Queensland
Law Reform Commission

A Review of Queensland's Guardianship Laws

Discussion Paper
Volume 2

WP No 68
October 2009

Queensland
Law Reform Commission

A Review of Queensland's Guardianship Laws

Discussion Paper

Volume 2

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 15

The Tribunal's functions and powers

INTRODUCTION

15.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including:

- the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation; and

- the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework.[1]

15.2 The Guardianship and Administration Tribunal ('GAAT') is a quasi-judicial body established by the *Guardianship and Administration Act 2000* (Qld). It has exclusive jurisdiction for the appointment of guardians and administrators for adults, subject to the exercise of the Tribunal's powers by the Supreme or District Courts, to make, change, or revoke the appointment of a guardian or administrator in particular civil proceedings. The Tribunal also has concurrent jurisdiction with the Supreme Court for matters relating to enduring documents and attorneys appointed under enduring documents.

15.3 Chapter 6 of the *Guardianship and Administration Act 2000* (Qld) provides for the establishment, functions and powers of the Guardianship and Administration Tribunal. It also contains administrative provisions about the appointment of Tribunal members, including the President and the Deputy Presidents.

15.4 When the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the 'QCAT Act') and the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) (the 'QCAT Amendment Act') commence, the Guardianship and Administration Tribunal will be abolished[2] and the jurisdiction presently exercised by the Tribunal will be conferred on the Queensland Civil and Administrative Tribunal ('QCAT').[3]

15.5 This chapter gives an overview of the current provisions of the *Guardianship and Administration Act 2000* (Qld) which deal with the Tribunal's functions and powers. It also examines how these provisions will be affected once QCAT commences operation and raises some issues for consideration.

BACKGROUND

15.6 Before the commencement of the *Guardianship and Administration Act 2000* (Qld), the legal mechanisms for substitute decision-making for an adult

---

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

2 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 247(1), sch 1 item 7.

3 See eg *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1439, which amends s 7(e) of the *Guardianship and Administration Act 2000* (Qld). Section 1439 has not yet commenced.

with impaired capacity were largely concentrated in the hands of a public officer.[4]

15.7 In its original 1996 report, the Commission identified a number of inherent difficulties with the existing legislation that governed substitute decision-making.[5] These included a lack of legislative principles binding on every person who exercises a power or performs a function under the legislation, different requirements in different legislative regimes, a limited choice of decision-maker, inflexible decision-making powers and inadequate procedures for making applications for an appointment. In order to overcome these difficulties, the Commission recommended the implementation of a comprehensive and coherent new guardianship system which encompassed not only assisting adults with impaired capacity in the least restrictive manner, but also allowed adults to make plans in the event that their decision-making capacity becomes impaired in the future.[6]

15.8 Central to the Commission's recommendations was the establishment of an independent tribunal to provide 'an accessible, affordable and simple, but sufficiently flexible way of establishing whether a person has decision-making capacity and of determining issues surrounding the appointment and powers of decision-makers where it is necessary for another person to have legal authority to make decisions for a person whose decision-making capacity is impaired'.[7] The establishment of a new specialist tribunal was also consistent with developments in other Australian jurisdictions.[8]

---

4 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).

5 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 23–7.

6 Ibid 23.

7 Ibid 27.

8 The majority of other Australian jurisdictions have tribunals which have a specialist guardianship jurisdiction. New South Wales, South Australia, and Tasmania have guardianship specific tribunals established under their guardianship legislation. In the ACT, Victoria and Western Australia guardianship proceedings are brought in those jurisdictions' civil and administrative tribunal. The Northern Territory does not have a permanent guardianship decision-making body. Instead, a Local Court or a specifically convened Guardianship Panel is able to make guardianship decisions.

For the establishment of the New South Wales Guardianship Tribunal see *Guardianship Act 1987* (NSW) pt 6. For the establishment of the South Australian Guardianship Board see *Guardianship and Administration Act 1993* (SA) pt 2 div 1. For the establishment of the Tasmanian Guardianship and Administration Board see *Guardianship and Administration Act 1995* (Tas) pt 2.

For guardianship proceedings in the ACT Civil and Administrative Tribunal, see references to 'ACAT' in the *Guardianship and Management of Property Act 1991* (ACT) and for the establishment of the Tribunal, see *ACT Civil and Administrative Tribunal Act 2008* (ACT). For guardianship proceedings in the Victorian Civil and Administrative Tribunal, see references to 'VCAT' in the *Guardianship and Administration Act 1986* (Vic) and for the establishment of the Tribunal, see *Victorian Civil and Administrative Tribunal Act 1998* (Vic). For guardianship proceedings in the Western Australian State Administrative Tribunal, see references to 'State Administrative Tribunal' in the *Guardianship and Administration Act 1990* (WA) and for the establishment of the Tribunal, see *State Administrative Tribunal Act 2004* (WA).

15.9 The establishment of the Tribunal has provided additional avenues for the appointment of substitute decision-makers for adults. For example, the Tribunal has power to appoint individuals as guardians and administrators. It also has a substantial supervisory jurisdiction in relation to the range of formal decision-makers who may be appointed under the Act.

15.10 The Tribunal has a very substantial workload, which has been increasing each year.[9] In the year 2007–08, 6930 applications were made to the Tribunal and 6510 applications were finalised. In all, the Tribunal received applications concerning 3878 adults.[10]

THE TRIBUNAL'S FUNCTIONS

15.11 The primary functions of the Tribunal are determining issues of legal capacity; considering, making and reviewing guardianship and administration orders; giving directions to appointed decision-makers; and, in some circumstances, consenting to some special health matters. In addition to these functions, the Tribunal has a supervisory role over enduring powers of attorney. These and other functions are reflected in specific powers given to the Tribunal under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).

15.12 The Tribunal's functions are outlined in section 82 of the *Guardianship and Administration Act 2000* (Qld):

> **82 Functions**
>
> (1) The tribunal has the functions given to it by this Act, including the following functions—
>
> (a) making declarations about the capacity of an adult, guardian, administrator or attorney for a matter;
>
> (b) considering applications for appointment of guardians and administrators;
>
> (c) appointing guardians and administrators if necessary and reviewing the appointments;
>
> (d) making declarations, orders or recommendations, or giving directions or advice, in relation to the following—
>
> (i) guardians and administrators;

---

9 Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 5. The Tribunal noted that these statistics represent an increase of 18 percent in applications received on the previous reporting year and an 8.9 percent increase in the number of adults concerned in those applications. The Tribunal also noted: 'These increases are substantial but also comparable with increases each reporting year from the Tribunal's establishment in 2000. For example, since 2003–04 there has been an increase of 30.9 percent in the number of adults assisted by the Tribunal'.

10 Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 5.

(ii) attorneys;

(iii) enduring documents;

(iv) related matters;

(e) ratifying an exercise of power, or approving a proposed exercise of power, for a matter by an informal decision maker for an adult with impaired capacity for the matter;

(f) consenting to the withholding or withdrawal of a life-sustaining measure for adults with impaired capacity for the health matter concerned;[11]

(g) subject to section 68, consenting to special health care for adults with impaired capacity for the special health matter concerned;

(h) consenting to the sterilisation of a child with an impairment;

Editor's note—

See chapter 5A (Consent to sterilisation of child with impairment).

(ha) giving approvals under chapter 5B for the use by a relevant service provider of a restrictive practice in relation to an adult to whom the chapter applies, and reviewing the approvals;

(i) registering an order made in another jurisdiction under a provision, Act or law prescribed under a regulation for section 167;

(j) reviewing a matter in which a decision has been made by the registrar.

(2) The tribunal also has the other functions given to it by another Act.

Note—

See for example the *Disability Services Act 2006*, sections 123ZK(8) and 123ZN(5).

(3) In this section—

attorney means an attorney under an enduring document or a statutory health attorney. (note added)

Issue for consideration

15.13 The functions of the Tribunal, which are generally broader than those of the equivalent Tribunals in the other Australian jurisdictions, are generally protective or supervisory in nature. The Commission is not aware of any

11 However, the Act does not appear to provide a corresponding power to give effect to this function. This issue is considered at [12.149]–[12.157] in vol 1 of this Discussion Paper.

additional functions that might be given to the Tribunal. However, the Commission welcomes submissions on the appropriateness of the Tribunal's functions.

15-1 Are the functions of the Tribunal, as provided for by section 82 of the *Guardianship and Administration Act 2000* (Qld), appropriate to enable the Tribunal to perform the roles of protecting the rights and interests of adults with impaired capacity?

THE TRIBUNAL'S POWERS

15.14 The Tribunal has the powers given under the *Guardianship and Administration Act 2000* (Qld) or under any other Act.[12] These include broad and specific powers to give effect to the Tribunal's general functions mentioned in section 82 of the Act.[13] The Tribunal also has power to do 'all things necessary or convenient to be done to perform the tribunal's functions'.[14]

15.15 The substantive powers that are conferred under the *Guardianship and Administration Act 2000* (Qld) will be largely unaffected by the conferral of jurisdiction in guardianship proceedings on QCAT. These substantive powers and, if relevant, any significant changes made to them under the QCAT Amendment Act, are discussed below.

15.16 The Tribunal also has various procedural powers, which enable it to make particular orders about the conduct of Tribunal proceedings. These procedural powers are discussed in Chapter 16 of this Discussion Paper.

The power to appoint a guardian or an administrator and to review the appointment[15]

The law in Queensland

15.17 As mentioned above, the Tribunal has exclusive jurisdiction for the appointment of guardians and administrators for adults,[16] subject to the exercise of the Tribunal's powers by the Supreme or District Court, to make,

---

12 *Guardianship and Administration Act 2000* (Qld) s 83. The Tribunal is also given power under s 109A of the *Powers of Attorney Act 1998* (Qld) and ss 123ZK(8), 123 ZN(5)(b) of the *Disability Services Act 2006* (Qld) .

13 *Guardianship and Administration Act 2000* (Qld) s 82 is set out at [15.12] above.

14 *Guardianship and Administration Act 2000* (Qld) s 83(2).

15 The appointment of guardians and administrators and the review of an appointment are discussed in Chapter 5 of this Discussion Paper.

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

change or revoke the appointment of a guardian or administrator in particular civil proceedings.[17]

15.18 Section 12 of the Act provides that the Tribunal may, by order, appoint a guardian for a personal matter or an administrator for a financial matter, on terms it considers appropriate, if:[18]

- the adult has impaired capacity for the matter;
- there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
- without an appointment:
  - the adult's needs will not be adequately met; or
  - the adult's interests will not be adequately protected.

15.19 The Tribunal also has power under section 31 of the Act to review the appointment of a guardian or an administrator.[19] The Tribunal must 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.[20] 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.[21] However, the Tribunal may remove an appointee only if the Tribunal considers that the appointee is no longer competent or that another person is more appropriate for appointment.[22]

---

17 *Guardianship and Administration Act 2000* (Qld) s 245 provides that the Supreme Court or the District Court may exercise the Tribunal's powers in relation to the appointment of a guardian or administrator for an adult if the Court sanctions a settlement between an adult and another person or orders payment to an adult by another person in a civil proceeding and the Court considers the adult has impaired capacity for a matter. See *Willett v Futcher* (2005) 221 CLR 627, [28]. Section 245 is considered in Chapter 23 of this Discussion Paper.

18 The appointment of guardians and administrators is discussed in Chapters 5 of this Discussion Paper. The Tribunal may make the order on its own initiative or on the application of the adult, the adult guardian or an interested person: *Guardianship and Administration Act 2000* (Qld) s 12(3).

19 The review of the appointment of a guardian or an administrator is discussed in Chapter 5 of this Discussion Paper.

20 *Guardianship and Administration Act 2000* (Qld) s 31(2). Section 12 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.

21 *Guardianship and Administration Act 2000* (Qld) s 31(3). The order may be changed, for example, by changing the terms of the appointment, making an additional appointment or replacing an existing appointee.

22 *Guardianship and Administration Act 2000* (Qld) s 31(4).

The law in other jurisdictions

15.20 The legislation in the other jurisdictions provides for the appointment of a guardian or an administrator.[23] Generally, these jurisdictions also provide for the review of an appointment.[24]

The power to make declarations about capacity

The law in Queensland

15.21 Section 146 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to make a declaration about the capacity of an adult, guardian, administrator, attorney under a power of attorney, attorney under an advance health directive or a statutory health attorney, for a matter.[25] This is an important power because decision-making capacity is a threshold issue under the guardianship legislation.[26] The Tribunal may appoint a guardian or an administrator for an adult only if the adult has impaired capacity for the matter; and an adult may execute an enduring power of attorney or advance heath directive only if he or she has capacity. Additionally, the loss of capacity by a formally appointed substitute decision-maker for an adult may affect his or her ability to continue in the role.

15.22 An application for such a declaration may be made on the Tribunal's own initiative or by the person who is the subject of the application or another interested person.[27]

15.23 When the Tribunal decides a matter in a hearing, it must ensure, as far as practicable, that it has all the relevant evidence.[28] In assessing the capacity

---

23 *Guardianship and Management of Property Act 1991* (ACT) ss 7, 8; *Guardianship Act 1987* (NSW) ss 14, 25E; *Adult Guardianship Act* (NT) ss 15, 16; *Guardianship and Administration Act 1993* (SA) ss 25, 29; *Guardianship and Administration Act 1995* (Tas) ss 20, 51; *Guardianship and Administration Act 1986* (Vic) ss 22, 46; *Guardianship and Administration Act 1990* (WA) ss 43, 64.

24 *Guardianship and Management of Property Act 1991* (ACT) s 19; *Guardianship Act 1987* (NSW) ss 25, 25N; *Adult Guardianship Act* (NT) s 23; *Guardianship and Administration Act 1993* (SA) s 57; *Guardianship and Administration Act 1995* (Tas) s 67; *Guardianship and Administration Act 1986* (Vic) s 61; *Guardianship and Administration Act 1990* (WA) ss 84–86.

25 In this section, a 'power of attorney' means a general power of attorney made under the *Powers of Attorney Act 1998*, an enduring power of attorney or a power of attorney made otherwise than under the *Powers of Attorney Act 1998*, whether before or after its commencement: *Guardianship and Administration Act 2000* (Qld) s 146(4).

26 '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.

27 *Guardianship and Administration Act 2000* (Qld) s 146(2). Note also that, in some proceedings, the Tribunal may be required to make a finding on the evidence about an adult's decision-making capacity even though a formal declaration has not been made.

of an adult, the Tribunal generally receives evidence from a health provider for the adult.[29] It may also receive evidence from other sources, such as the adult's carers or family. The Tribunal must weigh up all the relevant evidence and make its own determination about the adult's capacity.[30]

15.24 Section 147 of the *Guardianship and Administration Act 2000* (Qld) deals with the effect, in certain legal proceedings, of a declaration about whether a person had capacity to enter into a contract. It provides that such a declaration is, in a subsequent proceeding in which the validity of a contract is in issue, evidence about the person's capacity.

The law in other jurisdictions

15.25 The guardianship legislation in only two other jurisdictions confers a specific power on a Tribunal to make a declaration in relation to capacity.

15.26 In the ACT and Western Australia, the power to make a declaration is narrower than the power conferred on the Tribunal under section 146 of the *Guardianship and Administration Act 2000* (Qld).

15.27 In the ACT, the ACT Civil and Administrative Tribunal ('ACAT') may, on application, declare that the principal of an enduring power of attorney has impaired decision-making capacity. ACAT may stipulate whether such impaired capacity is general or relates only to a property matter, personal care matter or health care matter.[31]

15.28 The Western Australian legislation empowers the State Administrative Tribunal to declare, on application of the donee of a power of attorney, that the donor of the power does not have legal capacity.[32]

---

28 *Guardianship and Administration Act 2000* (Qld) s 130(1). Note that s 146(3) specifically requires the Tribunal, when deciding whether an individual is capable of communicating decisions in some way, to investigate the use of all reasonable ways of facilitating communication, including for example, symbol boards or signing.

29 *Guardianship and Administration Regulation 2000* (Qld) ss 3(2) 4(2), 6(2). The minimum standard documentation required by the Tribunal prior to listing certain types of applications for hearing includes 'a report by medical and related health professional/s other than the applicant, or other documentation describing diagnosis and capacity': Guardianship and Administration Tribunal, *Presidential Direction No 2 of 2002*, <http://www.gaat.qld.gov.au/files/2002_-_2_General.pdf> at 26 October 2009. These applications are: an application for the appointment a guardian or an administrator; an application for a declaration regarding an enduring power of attorney; an application for a declaration of capacity; and an application for consent to a special health matter.

30 See eg *XYZ v State Trustees Ltd* [2006] VSC 444.

31 *Guardianship and Management of Property Act 1991* (ACT) s 65.

32 *Guardianship and Administration Act 1990* (WA) s 106. Note also s 111 of the Act, which empowers the Tribunal to make declaration about an adult's capacity to vote.

The power to make a declaration, order or recommendation, or give directions or advice

The law in Queensland

15.29 Section 138 of the *Guardianship and Administration Act 2000* (Qld) provides that, once an application about a matter has been made to the Tribunal, the Tribunal may give advice or directions about the matter it considers appropriate, or make recommendations it considers appropriate about action an active party should take. It provides:

> **138 Advice, directions and recommendations**
>
> (1) Once an application about a matter has been made to the tribunal, the tribunal may—
>
> (a) give advice or directions about the matter it considers appropriate; or
>
> (b) make recommendations it considers appropriate about action an active party should take.
>
> *Note—*
>
> For disobeying a direction of the tribunal, see section 143(d).
>
> (2) If the tribunal gives advice or a direction or makes a recommendation, it may also—
>
> (a) continue with the application; or
>
> (b) adjourn the application.
>
> (3) The tribunal may also give leave for an active party to apply to the tribunal for directions about implementing the recommendation.
>
> (4) A guardian, administrator or attorney who acts under the tribunal's advice, directions or recommendations is taken to have complied with this Act or the *Powers of Attorney Act 1998* unless the person knowingly gave the tribunal false or misleading information relevant to the tribunal's advice, directions or recommendations.
>
> (5) In this section—
>
> ***attorney*** means—
>
> (a) an attorney under a power of attorney; or
>
> (b) an attorney under an advance health directive; or
>
> (c) a statutory health attorney.

> ***power of attorney*** means—
>
> (a) a general power of attorney made under the *Powers of Attorney Act 1998*; or
>
> (b) an enduring power of attorney; or
>
> (c) a power of attorney made otherwise than under the *Powers of Attorney Act 1998*, whether before or after its commencement.

15.30 Section 138(4) provides that a guardian, administrator or attorney who acts under the Tribunal's advice, directions or recommendations is taken to have complied with the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld), as the case may be, unless the person knowingly gave the Tribunal false information relevant to the advice, directions or recommendations.

15.31 Section 138AA of the *Guardianship and Administration Act 2000* (Qld) also empowers the Tribunal, at any hearing of a proceeding relating to an adult, to give limited directions to an adult's former attorney. The directions must be necessary because of the ending of the person's appointment as attorney for the matter and relate only to a matter for which the person was appointed as the attorney immediately before the appointment ended.[33]

15.32 The Act also provides that it is an offence for a person to disobey a lawful order or direction of the Tribunal.[34]

15.33 In *Re WFM*,[35] the Tribunal specifically considered the extent of its power to give directions to a guardian or an administrator. The Tribunal held that, at the time of the appointment of a guardian or an administrator, or on the review of an appointment,[36] as well as on a specific application for directions,[37] it may impose restrictions on, or give instructions to, a guardian or administrator which may extend to directing a substantive course of action for the decision-

---

33 Section 32B of the *Guardianship and Administration Act 2000* (Qld) also gives the Tribunal power to make similar directions to a former guardian or administrator.

34 *Guardianship and Administration Act 2000* (Qld) s 143(d). Section 143(d) will be omitted when the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) commences: *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1461. Section 213(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) will provide for a similar offence. That section has not yet commenced.

35 [2006] QGAAT 54.

36 Section 12(2) of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to make an appointment on 'terms considered appropriate by the tribunal'. Section 31(3)(b) of the Act also empowers the Tribunal, on a review of an appointment, to change the terms of an appointment or make a new appointment.

37 Section 115 of the *Guardianship and Administration Act 2000* (Qld) provides that an application may be made by the adult concerned or another interested person to GAAT for a declaration, order, direction, recommendation or advice in relation to an adult about something in, or related to, that Act or *the Powers of Attorney Act 1998* (Qld). See also s 41 of the Act which provides that, if the Adult Guardian has been unable to resolve a dispute between a guardian, administrator or attorney for an adult, the Adult Guardian, guardian, administrator or attorney may apply to the Tribunal for directions.

maker.[38] The Tribunal also held that its power to give directions extends to 'how a decision maker should exercise its powers, and to how a matter for which a decision maker has been appointed should be decided'.[39]

The law in other jurisdictions

15.34 In most jurisdictions, the Tribunal (or its equivalent) may, on application, give either advice or directions to a guardian as to the exercise of his or her functions and powers.[40] Advice or directions may also be given to an administrator in several jurisdictions.[41]

15.35 In Victoria, the legislation does not empower the Victorian Civil and Administrative Tribunal ('VCAT') to provide advice or directions generally to appointed guardians or administrators. However, VCAT may give directions or an advisory opinion to an enduring guardian in respect of any matter, either on application of an enduring guardian or on its own initiative.[42]

15.36 The Victorian legislation also makes provision for VCAT to give directions in relation to the medical treatment of a patient. On application of either the person responsible for the patient or a person who has a special interest in the patient (including a registered practitioner), the Tribunal may make any orders or give directions it considers necessary to resolve any conflict between persons relating to the best interests of a patient.[43]

The power to make an interim order

The law in Queensland

15.37 Section 129 of the *Guardianship and Administration Act 2000* (Qld) confers on the Tribunal a general power to make an interim order in a proceeding.[44] The wording of section 129 generally refers to an interim order

---

38 *Re WFM* [2006] QGAAT 54, [33].

39 Ibid.

40 *Guardianship and Management of Property Act 1991* (ACT) ss 16, 17; *Guardianship Act 1987* (NSW) s 28; *Adult Guardianship Act* (NT) s 11(2)(d); *Guardianship and Administration Act 1993* (SA) s 74; *Guardianship and Administration Act 1995* (Tas) s 31; *Guardianship and Administration Act 1990* (WA) s 47.

41 *Guardianship and Management of Property Act 1991* (ACT) s 18; *Guardianship and Administration Act 1993* (SA) s 74; *Guardianship and Administration Act 1995* (Tas) s 61; *Guardianship and Administration Act 1990* (WA) s 74.

42 *Guardianship and Administration Act 1986* (Vic) s 35E. An 'enduring guardian' means a person appointed as an enduring guardian under the Act: *Guardianship and Administration Act 1986* (Vic) s 3.

43 *Guardianship and Administration Act 1986* (Vic) s 42V.

44 Section 129 does not apply to applications made in relation to ch 5A (Consent to the sterilisation of child with impairment): *Guardianship and Administration Act 2000* (Qld) s 80E (1)–(2).

Section 80ZR of the Act empowers GAAT to make interim orders in relation to restrictive practices applications.

being made in 'the proceeding'. However, in practice, interim orders are made in relation to proceedings on applications for guardianship or administration.[45]

15.38 Section 129 provides:

> **129 Interim order**
>
> (1) This section applies if the tribunal is satisfied, on reasonable grounds, there is an immediate risk of harm to the health, welfare or property of the adult concerned in an application, including because of the risk of abuse, exploitation or neglect of, or self-neglect by, the adult.
>
> (2) The tribunal may make an interim order in the proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of this Act, including section 118.[46]
>
> (3) An interim order may not include consent to special health care.
>
> (4) An interim order has effect for the period specified in the order.
>
> (5) The maximum period that may be specified in an interim order is 3 months.
>
> (6) An interim order may be renewed, but only if the tribunal is satisfied there are exceptional circumstances justifying the renewal.
>
> (7) In this section—
>
> ***tribunal*** means the tribunal constituted by the president, a deputy president, a legal member or the registrar.[47] (notes added)

Section 243 of the Act also provides that if there are Supreme Court proceedings about an adult's enduring document or attorneys under an enduring document, GAAT may appoint a guardian or an administrator for the adult, on an interim basis, until the proceeding is resolved. Chapter 3 of the *Guardianship and Administration Act 2000* (Qld) applies to the appointment of a guardian or an administrator under s 243: *Guardianship and Administration Act 2000* (Qld) s 244. There are no restrictions or time limits on an interim order made under s 243.

45 A written request for an interim order must accompany or follow submission of a full application for guardianship or administration: Guardianship and Administration Tribunal, *Request for an Interim Order*, <http://www.gaat.qld.gov.au/files/Statutory_Declaration_for_Interim_Orders.doc> at 26 October 2009. The request must be made in the form of a Statutory Declaration. See also Guardianship and Administration Tribunal, *Presidential Direction No 3 of 2007* <http://www.gaat.qld.gov.au/files/2007_-_3_Interim_Orders.pdf> at 30 October 2009.

In 2007–08, the Tribunal made 69 interim guardianship orders. As at 30 June 2008, those orders were current for 9 adults with hearings pending. The Tribunal also made 91 interim administration orders. As at 30 June 2008, those orders were current for 16 adults with hearings pending: Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 42.

46 *Guardianship and Administration Act 2000* (Qld) s 118 generally requires the Tribunal to notify certain persons about the hearing of an application before the Tribunal.

47 Note that when the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) commences, s 1453 of that Act will omit s 129(7) of the *Guardianship and Administration Act 2000* (Qld) and insert a new s 129(7) which provides:

> (7) To exercise jurisdiction under subsection (6), the tribunal must be constituted by a legal member.

15.39 Section 129(1) of the Act provides that an interim order may be made in a Tribunal proceeding if the Tribunal is satisfied on reasonable grounds that there is an immediate risk of harm to the health, welfare or property of the adult concerned in the application including because of the risk of abuse, exploitation or neglect (including self-neglect) of the adult. This subsection was amended in 2007 to insert the wording of the current test for making an interim order.[48]

15.40 Section 129(2) provides that the Tribunal may make an interim order in a proceeding without hearing and deciding the proceeding and without complying with other requirements under the Act (including the general notification requirements).[49]

15.41 Section 129(3) provides that an interim order cannot be made for consent to special health care.

15.42 Section 129(4) specifies that an interim order has effect for the period specified in the order. Section 129(5) states that the maximum period for which an interim order may be made is three months. When the Act commenced in 2000, the maximum period that could be specified in an interim order was 28 days.[50] In 2003, the Act was amended to remove the 28 day cap on interim orders and to limit the combined period for which an interim order may be made to six months.[51] The Explanatory Notes to the amending Act explained that:[52]

> Under section 129 of the GAA, if the Tribunal is satisfied that urgent action is required, it may make an interim order without a hearing. Under this section, the maximum period for the interim order is 28 days. The GAA currently does not have a combined maximum period for interim orders so that interim orders can be renewed month after month. The Bill amends section 129 to limit the combined period of interim orders in a particular matter to six months. This means that the adult and other interested parties are assured that the Tribunal will commence hearing a matter within six months of an interim order/s being made.
>
> However, the Bill removes the requirement that each interim order be a maximum 28 days. A 28 day limit makes the current renewal process cumbersome and wastes the resources of the Tribunal and the interim

48 *Justice and Other Legislation Amendment Act 2007* (Qld) s 78. The Explanatory Notes to that Act explained that this amendment was consistent with the recommendation made by the Queensland Law Reform Commission in its original 1996 report, that the power to make interim orders should be conferred on the Tribunal when an adult with impaired capacity may be vulnerable to exploitation, neglect or abuse and, as a result there may be an immediate risk to the person's health or welfare: Explanatory Notes, Justice and Other Legislation Amendment Bill 2007 (Qld) 18–19. Section 129(1) had previously provided that, if the Tribunal is satisfied that urgent action is required, the Tribunal may make an interim order in a proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of the *Guardianship and Administration Act 2000* (Qld) (such as being given notice of the hearing under s 118).

49 Note also that s 131 of the *Guardianship and Administration Act 2000* (Qld) permits the Tribunal, in urgent or special circumstances, to proceed to decide a matter on the information before it without receiving further information.

50 See *Guardianship and Administration Act 2000* (Qld) s 129(4), as originally enacted.

51 *Guardianship and Administration Act and Other Acts Amendment Act 2003* (Qld) s 27(1).

52 Explanatory Notes, Guardianship and Administration and Other Acts Amendment Bill 2003 (Qld) 4.

> administrator as the matter has to be revisited on an interim basis every month. Orders have to be registered and fees paid to the Registrar of Titles every time an interim order is extended if it involves land.

15.43 The Act was amended in 2007 to shorten the maximum period for which an interim order may be made to three months and to provide a power to renew the order in exceptional circumstances.[53] The Explanatory Notes to the amending Act explained that:[54]

> The amendment to section 129 also provides that the maximum duration that may be specified in an interim order is 3 months, this being reduced from 6 months. However, the tribunal may renew the interim order but only if exceptional circumstances exist. The QLRC Report recommended that the maximum period stated on an interim order should be 10 days with an ability to renew an interim order. The time period for interim orders should be reduced so that the management of an adult's affairs is not left uncertain for any unreasonable period of time. A reduction in the period of time for interim orders would result in less disruption to the adult's life and to the lives of members of the adult's existing support network. Currently, interim orders are made ex-parte based on information provided by the applicant with limited inquiries made by the tribunal given the time restraints. There is a possibility that after a final hearing, the tribunal may determine that the adult has capacity and during that 6 month period the adult has been unable to make decisions for him or herself, unable to access his or her money to pay for legal representation or choose who he or she interacts with or where he or she may live. A reduction in the period of time for an interim order is consistent with the least restrictive principle of the Act.

15.44 Section 129(6) provides that an interim order may be renewed but only if there are exceptional circumstances justifying the renewal. As noted above, this power was conferred by the 2007 amendment of the Act.

15.45 Presidential Direction No 3 of 2007 deals with interim orders made under section 129.[55] It provides:

> 1. Introduction
>
> The Guardianship & Administration Tribunal is required to follow principles of natural justice and procedural fairness in exercising its powers when making an order in a proceeding. In limited circumstances, the Tribunal may displace these principles by issuing an interim order; however these orders are only issued in accordance with stringent guidelines and a strict set of criteria.
>
> 2. Interim Order: Protecting and Maintaining the Best Interests of the Adult
>
> Section 129 (1) of the *Guardianship and Administration Act 2000* (Act) provides if the Tribunal is satisfied on reasonable grounds there is an immediate risk of harm to the health, welfare or property of the adult

53 *Justice and Other Legislation Amendment Act 2007* (Qld) s 78(2).

54 Explanatory Notes, Justice and Other Legislation Amendment Bill 2007 (Qld) 19.

55 Guardianship and Administration Tribunal, *Presidential Direction No 3 of 2007* <http://www.qaat.qld.gov.au/files/2007_-_3_Interim_Orders.pdf> at 30 October 2009.

concerned (including because of the risk of abuse, exploitation or neglect of or self neglect by the adult), it may make an interim order. This section also allows the Tribunal to hear and decide the proceeding without otherwise complying with the requirements of the Act, including s.118 (advising persons concerned of hearing). This is a measure for the protection of adult, and the period for an interim order may initially be up to 3 months. The interim order may only be renewed if the Tribunal is satisfied that there are exceptional circumstances justifying the renewal. An interim order may not include consent to special health care.

3. Interim Order: Risk and Dispensing with the Need for Hearing in the Best Interests of the Adult

Only the President, Deputy President, legal member or the Registrar may make an interim order. Prior to making an interim order, the Tribunal has to be satisfied that on reasonable grounds, there is some evidence of incapacity and the adult appears to be at imminent risk. This notion of risk is grounded on the particular factual circumstances of a case. The risk needs to be immediate, and the Tribunal must be satisfied on the balance of probabilities that harm would result.

Examples of cases where action may be required include:

The adult has been physically injured or harmed or the likelihood of injury or harm is imminent or inevitable. Harm may include physical or emotional abuse; and/or mental harm;

- Allegations of abuse to the adult have been made;
- The adult is at risk from neglect or self neglect;
- The adult's property is at immediate risk;
- The provision of services for the adult is at immediate risk.

4. The Scope of an Interim Order

In cases where there is an immediate and acute need to protect the adult, the Tribunal will make only those orders which are necessary. These orders will remain in operation until the actual hearing.

5. Evidence Required in Support of an Application

- Evidence from health professionals about the adult's incapacity.
- Evidence by applicant setting out:
- Nature of the immediate risk;
- Whether other options/strategies have been tried;
- Parties who have been consulted; or
- Why parties have not been or should not be consulted.

Upon further inquiries a statutory declaration may be requested from the applicant.

The law in other jurisdictions

15.46 In the ACT, the Administrative and Civil Administrative Tribunal ('ACAT') has general power to make an interim order on the grounds of disadvantage or harm.[56] The Act provides that ACAT may make any order 'it considers appropriate to protect the position of the party that applied for the order'.

15.47 An interim order remains in force for 12 weeks or until the Tribunal orders otherwise or makes an order at a hearing to which the interim order relates.[57] An order may be extended for a further 14 days.[58]

15.48 In New South Wales, South Australia and Tasmania, the legislation provides for interim guardianship and administration orders.[59] In New South Wales, a temporary guardianship order can be made for up to three months, and may be renewed only once.[60] In New South Wales, an interim financial management order may be made for up to six months.[61]

15.49 The legislation in the Northern Territory empowers the Local Court, if it considers that the circumstances of the adult are such that a hearing should be held without unreasonable delay, to make a temporary guardianship order.[62] Such an order may continue in force for a maximum of 90 days.[63]

15.50 In South Australia, if the Guardianship Board is satisfied that urgent action is required, the Board, as a matter of urgency, may make a guardianship or administration order with effect for up to 21 days.[64]

15.51 In Tasmania, if the Guardianship and Administration Board considers it proper to do so, by reason of urgency, the Board may make any order considered appropriate in the circumstances.[65] If the adult is not the subject of a current guardianship or administration order, the Board may appoint the

---

56 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 53.

57 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 53(3).

58 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 53(4)(c).

59 *Guardianship Act 1987* (NSW) ss 14, 16(1)(b), 25H; *Guardianship and Administration Act 1993* (SA) s 14; *Guardianship and Administration Act 1995* (Tas) s 73.

60 *Guardianship Act 1987* (NSW) s 18(2)–(3).

61 *Guardianship Act 1987* (NSW) s 25H.

62 *Adult Guardianship Act* (NT) ss 15(2)(c), 19.

63 *Adult Guardianship Act* (NT) s 19(5).

64 *Guardianship and Administration Act 1993* (SA) s 14(7).

65 *Guardianship and Administration Act 1995* (Tas) s 65(1)–(2).

Public Guardian as guardian or the Public Trustee as administrator for the adult. Such an order may remain in effect for up to 28 days, and may be renewed once only.[66]

15.52 Additionally, where the Board adjourns the hearing of an application for guardianship or administration and it considers there may be grounds for making a guardianship or administration order for a person, it may make an interim order, effective for the period of the adjournment or subsequent adjournment, appointing the Public Guardian as the person's guardian or the Public Trustee as the person's administrator.[67]

15.53 The Victorian Civil and Administrative Tribunal ('VCAT') may make temporary orders appointing a plenary (or full) guardian or an administrator, on the application of any person.[68] An order may be made for a maximum period of 21 days and may be renewed once.[69]

15.54 In making a temporary guardianship order, VCAT must be satisfied the person in respect of whom the application has been made has a disability, is unable to make reasonable judgments relating to his or her personal circumstance and is in need of a guardian.[70] Similarly, in making a temporary administration order, VCAT must be satisfied the person has a disability, is unable to make reasonable judgments relating to his or her estate by reason of that disability, and is in need of an administrator.[71]

15.55 Persons eligible to be appointed guardians or administrators are eligible for appointment as temporary guardians or administrators.[72]

15.56 The Western Australian legislation provides for the exercise of powers by the Tribunal in situations of emergency.[73] If the State Administrative Tribunal considers that a person may be in need of an administrator and that it is necessary to make immediate provision for the protection of that person's estate, the Tribunal may exercise any of the powers conferred on it to ensure the estate's protection.

---

66 *Guardianship and Administration Act 1995* (Tas) s 65(1), (5).

67 *Guardianship and Administration Act 1995* (Tas) s 73A.

68 *Guardianship and Administration Act 1986* (Vic) ss 32, 33, 59, 60.

69 *Guardianship and Administration Act 1986* (Vic) ss 33(2), 60(2).

70 *Guardianship and Administration Act 1986* (Vic) s 33(1).

71 *Guardianship and Administration Act 1986* (Vic) s 60(1)(a)(i)–(ii). See also s 60(1)(b) for the Tribunal's power to appoint a temporary administrator for a person not resident in Victoria.

72 *Guardianship and Administration Act 1986* (Vic) ss 33(2), 60(2). However, note the limitation on the appointment as administrator of the State Trustee in relation to persons not resident in Victoria: *Guardianship and Administration Act 1986* (Vic) s 60(1)(b).

73 *Guardianship and Administration Act 1990* (WA) s 65.

The power to issue a warrant for the Adult Guardian to enter a place and remove an adult

The law in Queensland

15.57 If the Adult Guardian considers that there are reasonable grounds for suspecting that there is 'an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse,' to an adult with impaired capacity, the Adult Guardian may apply to the Tribunal for a warrant to enter a place and to remove the adult.[74] Such an application must be sworn and state the grounds on which the warrant is sought.[75] The Tribunal may refuse to consider the application until the Adult Guardian gives the Tribunal all the information the Tribunal requires about the application in the way the Tribunal requires.[76]

15.58 Section 149 of the *Guardianship and Administration Act 2000* (Qld) provides for the Tribunal, if it is satisfied there are reasonable grounds for suspecting there is an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse, to an adult, to issue a warrant to authorise the Adult Guardian, with necessary and reasonable help and force, to enter a place and remove an adult. It provides:

> **149 Issue of entry and removal warrant**
>
> (1) The tribunal may issue a warrant only if the tribunal is satisfied there are reasonable grounds for suspecting there is an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse, to an adult with impaired capacity for a matter.
>
> (2) The warrant must state—
>
> (a) that the adult guardian may, with necessary and reasonable help and force, enter the place, and any other place necessary for entry, and remove the adult; and
>
> (b) that the adult guardian may ask a police officer to help in the exercise of the adult guardian's powers under the warrant; and
>
> (c) the hours of the day or night when the place may be entered; and
>
> (d) the date, within 14 days after the warrant's issue, the warrant ends.

---

74 G*uardianship and Administration Act 2000* (Qld) s 197. The Adult Guardian's power to apply for an entry and removal warrant is discussed in Chapter 18 of this Discussion Paper.

75 G*uardianship and Administration Act 2000* (Qld) s 148(1).

76 G*uardianship and Administration Act 2000* (Qld) s 148(3). For example, the Tribunal may require that additional information supporting the application be given by statutory declaration.

15.59 The Tribunal may issue a warrant without notice of the application having been given to the adult or any other person.[77] This provision recognises the need to provide for urgent action to be taken where an adult may be at immediate risk of harm.

15.60 Section 151 of the *Guardianship and Administration Act 2000* (Qld) provides that, as soon as practicable after the adult has been removed under the warrant, the Adult Guardian must apply to the Tribunal for the orders the Adult Guardian considers appropriate about the adult's personal welfare, a power of attorney or advance health directive of the adult, or a guardian, administrator or attorney of the adult.

The law in other jurisdictions

15.61 The guardianship legislation in several jurisdictions provides a mechanism to allow for the removal of an adult from any premises.

15.62 In the ACT, the Public Advocate may apply to the ACT Civil and Administrative Tribunal ('ACAT') for a warrant for the emergency removal of a disabled person from a particular place.[78]

15.63 The President or a judicial officer of ACAT may issue a warrant if satisfied a guardian has been appointed for the person or grounds exist for the appointment of a guardian and the person is, as a result of a physical, mental, psychological or intellectual condition, likely to suffer serious damage to his or her physical, mental or emotional health if not removed from that place. ACAT may also issue a warrant if it is satisfied the person is being unlawfully detained at a particular place.[79]

15.64 Once issued, a warrant authorises the Public Advocate, with the assistance of police officers if required, to use 'necessary and reasonable force' to enter the place and remove the person.[80]

---

77 *Guardianship and Administration Act 2000* (Qld) ss 116 and 118 do not apply to an application for an entry and removal warrant: *Guardianship and Administration Act 2000* (Qld) s 148(2). Section 116 sets out the general requirements for making an application under the Act. These include that the application must be made in writing and filed with the Tribunal. It must also include information about the applicant, the adult, any family or primary carer of the adult and all current guardians, administrators and attorneys for the adult. Section 1448 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 116 of the *Guardianship and Administration Act 2000* (Qld). Instead, new application procedures are provided for under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld): *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 33, sch 2(4). Section 118 of the *Guardianship and Administration Act 2000* (Qld) generally requires the Tribunal to notify certain persons about the hearing of an application before the Tribunal.

78 *Guardianship and Management of Property Act 1991* (ACT) s 68.

79 *Guardianship and Management of Property Act 1991* (ACT) s 68(1).

80 *Guardianship and Management of Property Act 1991* (ACT) s 68(1)(b).

15.65 In New South Wales, the *Guardianship Act 1987* (NSW) provides two avenues for the removal of an adult from any premises.[81]

15.66 If an application for a guardianship order in respect of a person has been made, the Tribunal may, on its own initiative, make an order for the removal of the person from any premises if it considers it appropriate in the circumstances of the case.[82]

15.67 Under such an order, an 'authorised officer' or member of the police force may use 'all reasonable force' to enter and search the premises and to remove the person.[83]

15.68 Alternatively, the Act also allows an officer or a member of the police force to apply for the issue of a warrant for the entry, search and removal of a person from any premises.[84] An application may be made if the officer or member of the police force has reasonable grounds for believing that, in any premises, there is a person in need of a guardian who is either being unlawfully detained against his or her will, or is likely to suffer serious damage to his or her physical, emotional of mental well-being.[85]

15.69 A similar provision authorising police officers to enter, search and remove an adult from any premises exists in Tasmania, although there is no requirement for the issue of a warrant.[86] Section 30 of the *Guardianship and Administration Act 1995* (Tas) provides:

> **30 Removal of persons to place of safety**
>
> (1) If it appears to a police officer that there is reasonable cause to suspect that a person with a disability who appears to be in need of a guardian—
>
> (a) has been, or is being, ill-treated, neglected or unlawfully detained against his or her will; or
>
> (b) is likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken—

81 *Guardianship Act 1987* (NSW) ss 11–12.

82 *Guardianship Act 1987* (NSW) s 11(1)(a).

83 *Guardianship Act 1987* (NSW) s 11(1)(b), (2).

84 *Guardianship Act 1987* (NSW) s 12(1)–(2).

85 *Guardianship Act 1987* (NSW) s 12(1). Note that the application for the issue of a warrant is not made to the Tribunal. Application is made to an 'authorised officer' under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW): *Guardianship Act 1987* (NSW) s 12(1). An authorised officer includes a Magistrate, Children's Magistrate, a registrar of the Local Court, or an employee of the Attorney-General's Department, authorised by the Attorney General for the purpose: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3.

86 *Guardianship and Administration Act 1995* (Tas) s 30.

> the police officer may enter, if necessary by force, any premises in which that person is believed to be, and, if thought fit, remove that person from those premises.
>
> (2) A police officer, in removing a person under subsection (1), is to be accompanied by a person nominated by the Public Guardian.
>
> (3) A person nominated by the Public Guardian must, as soon as practicable—
>
> (a) convey the person to a place of safety; and
>
> (b) ensure that an application for guardianship or other appropriate arrangements are made; and
>
> (c) provide the Board with a written report giving details of the action that he or she has taken under this section.

15.70 In South Australia, in circumstances where the Guardianship Board requires a person to undergo a psychiatric or psychological examination as to his or her mental health and the person either refuses or is incapable of complying with the request, the Board may issue a warrant allowing for the removal of the person from any premises to undergo such examination.[87]

15.71 The warrant authorises either the Public Advocate, a member of the police force or a person authorised by the Minister for the purpose, to use only such force as is reasonably necessary to apprehend the person and take the person to a psychiatrist, psychologist or medical practitioner nominated by the Board for examination and assessment.[88]

15.72 The Western Australian legislation does not specifically provide for an adult's removal from any premises. However, the State Administrative Tribunal is empowered to issue a warrant authorising a guardian to enter a property for the purpose of ascertaining whether an adult is in those premises or the purpose of performing any function in relation to the adult.[89] The guardian may be assisted by such persons as he or she thinks fit, including police.

The power to ratify or approve an exercise of power by an informal decision-maker

The law in Queensland

15.73 Section 154(1) of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to ratify the exercise of power, or approve a proposed exercise of power, for a matter by an informal decision-maker for an adult with

87 *Guardianship and Administration Act 1993* (SA) s 15(1), (3)–(4).

88 *Guardianship and Administration Act 1993* (SA) s 15(2).

89 *Guardianship and Administration Act 1990* (WA) s 49.

impaired capacity for the matter.[90] In this context, an 'informal decision–maker' is a member of the adult's support network who is not an attorney under an enduring document, administrator or guardian for the matter.[91]

15.74 The Tribunal may ratify or approve the exercise of power for a matter only if:

- it considers the informal decision-maker proposes to act, or has acted, honestly and with reasonable diligence;[92] and
- the matter is not a special personal matter, a health matter or a special health matter.[93]

15.75 Accordingly, the Tribunal's power to ratify or approve an exercise of power is limited to personal matters (other than health matters) and financial matters.

15.76 If the Tribunal ratifies or approves the exercise of power for an adult for a matter, the exercise of power is as effective as if the power was exercised by the adult and the adult had capacity for the matter when the power was or is exercised. Additionally, the informal decision-maker does not incur any liability, either to the adult or anyone else, for the exercise of power.[94] In these respects, an informal decision-maker is placed on a similar footing to a formal substitute decision-maker.[95]

The law in other jurisdictions

15.77 No other jurisdictions provide for the ratification or approval of an exercise of power by an informal decision-maker.

---

90 The Tribunal may make the order on its own initiative or on the application of the adult or an informal decision-maker: *Guardianship and Administration Act 2000* (Qld) s 154(3).

91 *Guardianship and Administration Act 2000* (Qld) s 154(5).

92 The guardianship legislation imposes a similar standard on guardians, administrators and attorneys under enduring powers of attorney: *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66.

93 *Guardianship and Administration Act 2000* (Qld) s 154(2). Special personal matters, health matters and special health matters are discussed in Chapter 4 of this Discussion Paper.

94 *Guardianship and Administration Act 2000* (Qld) s 154(4).

95 See, in relation to the authority of guardians and administrators: *Guardianship and Administration Act 2000* (Qld) s 33. Note that s 77 of the *Powers of Attorney Act 1998* (Qld) provides that, to the extent that an enduring document does not state otherwise, an attorney is taken to have the maximum power that could be given to the attorney by the enduring document. An enduring document includes an enduring power of attorney. See, in relation to protection from liability for guardians and administrators: *Guardianship and Administration Act 2000* (Qld) ss 56, 248. See, in relation to protection from liability for attorneys under an enduring power of attorney: *Guardianship and Administration Act 2000* (Qld) s 248; *Powers of Attorney Act 1998* (Qld) ss 97–99, 105.

The power to consent to some types of special health care

The law in Queensland

15.78 The Tribunal has power to consent to some types of special health care for an adult with impaired capacity for the special health matter.[96]

15.79 'Special health care' is defined in the *Guardianship and Administration Act 2000* (Qld) as health care of the following types:[97]

- removal of tissue from the adult while alive for donation to someone else;
- sterilisation of the adult;
- termination of a pregnancy of the adult;
- participation by the adult in special medical research or experimental health care;
- electroconvulsive therapy or psychosurgery for the adult; and
- prescribed special health care of the adult.

15.80 If a special health matter for an adult is not dealt with by a direction given by the adult in an advance health directive,[98] the Tribunal has power to consent to special health care for an adult, other than electroconvulsive therapy or psychosurgery.[99]

15.81 The Tribunal's power to give consent is limited by specific requirements for each type of special health care. The Tribunal must be satisfied, for example, that the special health care involves minimal risk to the adult and is the only reasonably available option.[100] In deciding whether to give consent, the Tribunal must also apply the General Principles and the Health Care Principle contained in the legislation.[101]

15.82 In addition, the Tribunal cannot give its consent for certain types of special health care, namely the removal of tissue from an adult while alive for donation to another person or the participation by the adult in special medical

---

96 *Guardianship and Administration Act 2000* (Qld) ss 68–73. A special health matter for an adult is a matter relating to special health care of the adult: *Guardianship and Administration Act 2000* (Qld) sch 2 s 6; *Powers of Attorney Act 1998* (Qld) sch 2 s 6.

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

98 *Guardianship and Administration Act 2000* (Qld) ss 65(4), 68(1).

99 *Guardianship and Administration Act 2000* (Qld) ss 65, 68. Electroconvulsive therapy and psychosurgery fall within the jurisdiction of the Mental Health Review Tribunal: *Mental Health Act 2000* (Qld) ch 6 pt 6.

100 Eg, *Guardianship and Administration Act 2000* (Qld) ss 69(1)(a), (d) (Donation of tissue); 70(1)(a), (3) (Sterilisation); 72(1)(b), (d), (2)(b), (d) (Special medical research or experimental health care).

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

research or experimental medical treatment, if the adult objects to that special health care.[102]

The law in other jurisdictions

15.83 In each of the other jurisdictions, the Tribunal (or its equivalent) has power to consent to certain types of medical treatment for an adult. The procedures most commonly requiring the consent of a Tribunal include:

- sterilisation of the adult;[103]
- termination of a pregnancy of the adult;[104] and
- removal of tissue from the adult while alive for donation to someone else.[105]

15.84 In some jurisdictions, the legislation also provides that the Tribunal may not consent to certain types of treatments. For example, similarly to Queensland, the Tribunal in the ACT is unable to consent to treatment for electroconvulsive therapy or psychiatric surgery.[106]

The power to register a similar order made in another jurisdiction

The law in Queensland

15.85 The Tribunal may register an order made under a law in another Australian jurisdiction or in New Zealand that is similar to an order made under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney*

---

102 *Guardianship and Administration Act 2000* (Qld) ss 69(2), 72(3). The effect of an adult's objection to special health care is considered in Chapter 14 of this Discussion Paper.

103 *Guardianship and Management of Property Act 1991* (ACT) ss 2 (definition of 'prescribed medical procedure'), 70; *Guardianship Act 1987* (NSW) ss (33)(1)(a) (definition of 'special treatment'), 45; *Guardianship and Administration Act 1993* (SA) ss 3 (definition of 'prescribed treatment'), 61; *Guardianship and Administration Act 1995* (Tas) ss 3 (definition of 'special treatment'), 45; *Guardianship and Administration Act 1986* (Vic) ss 3 (definition of 'special procedure'), 42E; *Guardianship and Administration Act 1990* (WA) s 63. In the Northern Territory, the Court may consent to a medical procedure relating to contraception: *Adult Guardianship Act* (NT) s 21(4), (8).

104 *Guardianship and Management of Property Act 1991* (ACT) ss 2 (definition of 'prescribed medical procedure'), 70; *Guardianship Act 1987* (NSW) ss (33)(1)(c) (definition of 'special treatment'), 45 and *Guardianship Regulation 1995* (NSW) cl 8; *Adult Guardianship Act* (NT) s 21(4), (8); *Guardianship and Administration Act 1993* (SA) ss 3 (definition of 'prescribed treatment'), 61; *Guardianship and Administration Act 1995* (Tas) ss 3 (definition of 'special treatment'), 45; *Guardianship and Administration Act 1986* (Vic) ss 3 (definition of 'special procedure'), 42E.

105 *Guardianship and Management of Property Act 1991* (ACT) ss 2 (definition of 'prescribed medical procedure'), 70; *Guardianship and Administration Act 1995* (Tas) ss 3 (definition of 'special treatment'), 45; *Guardianship and Administration Act 1986* (Vic) ss 3 (definition of 'special procedure'), 42E.

106 *Guardianship and Management of Property Act 1991* (ACT) ss 2 (definition of 'prescribed medical procedure'), 70(4).

Act 1998 (Qld).[107] In this context, an order that has been made in another jurisdiction is called a 'registrable order'.[108]

15.86 Generally, applications for the registration of an order made in another jurisdiction may be dealt with by the Tribunal (constituted by a single member) on the papers without a formal hearing.[109]

15.87 As soon as reasonably practicable after registering or taking any subsequent action under the order, the Tribunal must advise the entity that made the order about the registration or the action taken.[110]

The law in other jurisdictions

15.88 In each of the other jurisdictions, there is provision for the registration of appointment orders made in another jurisdiction.[111]

15.89 Despite some differences in the mechanisms for seeking registration of orders in interstate jurisdictions, most provisions generally provide that:[112]

- an interstate order has the same force as if the order had been made under the local Act; or
- on registration of an interstate order appointing a person as an adult's guardian or administrator, the person is taken to be a guardian or an administrator of the adult, as if the person's appointment had been made under the local Act.

---

107 *Guardianship and Administration Act 2000* (Qld) ss 167, 169. The Tribunal may register the order only if the original order or a certified copy of the order has been filed in the Tribunal registry: *Guardianship and Administration Regulation 2000* (Qld) s 7 sch 1.

108 A 'registrable order' means an order made under a recognised provision: *Guardianship and Administration Act 2000* (Qld) s 166. A 'recognised provision' means a provision, Act or law prescribed under a regulation for s 167 of the Act: s 166. Schedule 1 of the *Guardianship and Administration Regulation 2000* (Qld) specifies that the following Acts are prescribed equivalent provisions for s 167 of the Act: *Guardianship and Management of Property Act 1991* (ACT); *Guardianship Act 1987* (NSW); *Adult Guardianship Act* (NT); *Aged and Infirm Persons' Property Act* (NT); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 1986* (Vic); *Guardianship and Administration Act 1990* (WA); *Protection of Personal and Property Rights Act 1988* (NZ).

109 Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2000*, <http://www.gaat.qld.gov.au/files/2000_-_1_Recognition_of_Order_made_under_another_law.pdf> at 26 October 2009. However, *Presidential Direction No 1 of 2000* also provides that a single member Tribunal may direct that a particular application or matter be set down for hearing by a full Tribunal if the member considers that it would be more appropriate for the application or matter to be dealt with by way of a hearing.

110 *Guardianship and Administration Act 2000* (Qld) s 171.

111 *Guardianship and Management of Property Act 1991* (ACT) s 12; *Guardianship Act 1987* (NSW) ss 48A, 48B; *Adult Guardianship Act* (NT) s 30; *Guardianship and Administration Act 1993* (SA) ss 34, 48; *Guardianship and Administration Act 1995* (Tas) s 81; *Guardianship and Administration Act 1986* (Vic) s 63E; *Guardianship and Administration Act 1990* (WA) ss 44A, 83D.

112 Note that in South Australia a different scheme exists in relation to the reciprocal powers of authorities (for example, the Public Trustee) invested with the custody or administration of the estates of persons who have a mental incapacity: see *Guardianship and Administration Act 1993* (SA) s 48.

The power to review a decision of the Registrar of the Tribunal

15.90 The Tribunal has power under section 161 of the *Guardianship and Administration Act 2000* (Qld) to review a matter in which a decision has been made by the Registrar of the Tribunal under section 85 of the Act in relation to a prescribed non-contentious matter.[113] These matters include the review of the appointment of a guardian or an administrator, the making of procedural orders, (including the adjournment of proceedings) and the ratification or approval of the exercise of power by an informal decision-maker. However, the Registrar cannot deal with a matter as a prescribed non-contentious matter if an active party in the proceeding advises the Registrar of an objection to the matter being dealt with by the Registrar.[114]

15.91 However, when QCAT commences operation, the provisions of the *Guardianship and Administration Act 2000* (Qld) which provide for the Registrar to decide prescribed non-contentious matters and for the Tribunal to review a decision of the Registrar will be repealed.[115] The QCAT Act instead provides that, if chosen to do so by the President of QCAT, an adjudicator may hear and decide various matters, including certain non-contentious matters.[116]

The power to suspend the operation of all or some of the powers of a guardian or administrator

15.92 Section 155 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to suspend the operation of all or some of the power of a guardian or administrator for an adult if the Tribunal suspects, on reasonable grounds, that the appointed person is not competent.[117] An appointee is not competent if, for example:[118]

---

113 *Guardianship and Administration Act 2000* (Qld) ss 160–162, 167. Section 85 of the Act provides that the Registrar may perform the functions and exercise the powers of the Tribunal in relation to a prescribed non-contentious matter. The schedule to the *Guardianship and Administration Tribunal Rule 2004* (Qld) specifies that the following matters are prescribed non-contentious matters: ss 28 (Periodic review of appointment); 29 (Other review of appointment); 30(1) (Guardian or administrator to update advice about appropriateness and competence); 31 (Appointment review process); 39(2) (Act together with joint guardians or administrators); 44(3) (Right of guardian or administrator to information); 76(5) (Health providers to give information); 108(6) (Procedural fairness and access) to the extent of displacing the right to access a document under s 108(3); 118 (Tribunal advises persons concerned of hearing); 122 (Withdrawal by leave); 124 (Representative may be used with Tribunal's leave); 133 (Tribunal may adjourn proceeding); 136 (Witness fees and expenses); 153 (Records and audit); 154 (Ratification or approval of exercise of power by informal decision maker); 169 (Registration).

114 *Guardianship and Administration Tribunal Rule 2004* (Qld) s 2(2).

115 Section 1445 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 85 of the *Guardianship and Administration Act 2000* (Qld). Section 1465 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals ss 160–162 of the *Guardianship and Administration Act 2000* (Qld).

116 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 195.

117 *Guardianship and Administration Act 2000* (Qld) s 155(1).

118 *Guardianship and Administration Act 2000* (Qld) s 155(2).

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

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

- the appointee has otherwise contravened the Act.

15.93 During the suspension of the operation of a guardian's power, the Adult Guardian is taken to be the guardian for the adult for the exercise of the suspended power.[119] Similarly, during the suspension of the operation of an administrator's power, the Public Trustee is taken to be the administrator for the adult for the exercise of the suspended power.[120]

15.94 The Tribunal may make a suspension order in a proceeding without hearing and deciding the proceeding or otherwise complying with the Act.[121] Such an order may be made for up to three months.[122]

The power to remove an attorney or to revoke an enduring power of attorney or advance health directive etc

15.95 The Tribunal has concurrent jurisdiction with the Supreme Court for matters relating to enduring documents and attorneys appointed under enduring documents.[123] Section 109A of the *Powers of Attorney Act 1998* (Qld) gives the Tribunal the same jurisdiction and powers for enduring documents as the Supreme Court. This includes giving the Tribunal power to decide the validity of an enduring power of attorney and an advance health directive,[124] to declare that the power under an enduring document has begun,[125] to remove or replace an attorney and change the terms of an enduring document[126] and to give directions or advice or make a recommendation, order or declaration about a matter.[127]

---

119 *Guardianship and Administration Act 2000* (Qld) s 155(5).

120 *Guardianship and Administration Act 2000* (Qld) s 155(6).

121 *Guardianship and Administration Act 2000* (Qld) s 155(3).

122 *Guardianship and Administration Act 2000* (Qld) s 155(4).

123 *Guardianship and Administration Act 2000* (Qld) s 84(2). An enduring document is an enduring power of attorney or an advance health directive.

124 *Powers of Attorney Act 1998* (Qld) ss 109A, 113(1).

125 *Powers of Attorney Act 1998* (Qld) s 115.

126 *Powers of Attorney Act 1998* (Qld) ss 116–117.

127 *Powers of Attorney Act 1998* (Qld) s 118.

The power to authorise conflict transactions and approve investments as authorised investments

15.96 Section 152 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to:

- authorise conflict transactions, a type of conflict transaction[128] or conflict transactions generally;[129] and
- approve an investment for an adult as an authorised investment.[130]

15.97 Section 152 applies in relation to administrators. The *Powers of Attorney Act 1998* (Qld) also provides for the Tribunal or the Supreme Court to authorise an attorney, either generally, or in a specific case, to undertake a transaction that the attorney is not, or may not, be otherwise authorised to undertake.[131] Such a transaction may include a conflict transaction.

15.98 The Supreme Court has held that the Tribunal's power to authorise conflict transactions includes the power to give retrospective authorisation:[132]

> The proper construction of s 37(1) of the GAA is that the word "only" applies to the requirement to obtain the authorisation of the Tribunal to a conflict transaction, but does not make it mandatory for that authorisation to be obtained prior to entry by the administrator into the conflict transaction. That does not mean that it will not be a relevant consideration to the Tribunal in considering whether or not to give the authorisation that the administrator failed to seek the authorisation prior to entering into the conflict transaction.

---

128 *Guardianship and Administration Act 2000* (Qld) s 37(2) defines a 'conflict transaction' as a transaction in which there may be conflict, or which results in conflict, between:

- the administrator's duty to the adult;
- and either:
  - the interests of the administrator or a person in a close personal or business relationship with the administrator; or
  - another duty of the administrator.

129 *Guardianship and Administration Act 2000* (Qld) s 37(1) provides that an administrator for an adult may enter into a conflict transaction only if the Tribunal authorises the transaction, conflict transactions of that type or conflict transactions generally. Section 37 is discussed at [6.19]–[16.20] in vol 1 of this Discussion Paper.

130 Generally, if an administrator has been given the power to invest, he or she may invest only in 'authorised investments': *Guardianship and Administration Act 2000* (Qld) s 51(1)–(2). An authorised investment is an investment which, if the investment were of trust funds by a trustee, would be an investment by the trustee exercising a power of investment under the *Trusts Act 1973* (Qld), pt 3, or an investment approved by the Tribunal: *Guardianship and Administration Act 2000* (Qld) sch 4. In relation to authorised investments by administrators, see [6.12]–[6.14] in vol 1 of this Discussion Paper.

131 Powers of Attorney Act 1998 (Qld) ss 109A, 118(2). In relation to conflict transactions by attorneys, see [9.134]–[9.174] in vol 1 of this Discussion Paper.

132 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] QSC 49, [78], [79], in relation to conflict transactions made by an administrator. 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 is potentially wide. It may, for example, have the effect of giving de facto validity to transactions for which approval has not been sought.

15.99 The guardianship legislation does not stipulate factors the Tribunal or the Court must consider in deciding whether to authorise a conflict transaction. However, in deciding whether to authorise a conflict transaction, the Tribunal has taken into account various factors such as the motivation of the administrator in making the transaction,[133] whether the transaction reflected the adult's known views and wishes[134] and whether the transaction would be detrimental to the adult or the adult's financial position, having regard to the extent of the adult's assets and resources.[135]

The power to order a summary of financial accounts to be filed and audited

15.100 On application of the adult or another interested person, or on its own initiative, the Tribunal may order an adult's administrator or adult's attorney under an enduring power of attorney for a financial matter to file in the Tribunal, and serve on the applicant, a summary of receipts and expenditure for the adult or more detailed accounts of dealings and transactions for the adult.[136] The Tribunal may also order that the summary or accounts filed be audited by an auditor appointed by the Tribunal and that a copy of the auditor's report be given to the Tribunal and the applicant.[137]

15.101 An administrator is generally required to submit accounts to the Tribunal or an examiner approved by the Tribunal at regular intervals.[138] There is no fee charged for the examination of the accounts by the Tribunal. However, an approved examiner is entitled to charge a fee for this service.[139]

---

133 Eg *Re CCR* [2006] QGAAT 45, [29]–[33].

134 Eg *Re CMB* [2004] QGAAT 20, [26]; *Re FAA* [2008] QGAAT 3, [107]–[114]; Cf *Re SD* [2005] QGAAT 71, [39].

135 Eg *Re CMB* [2004] QGAAT 20, [26]–[30]; *Re JK* [2005] QGAAT 58, [64]–[67]; *Re FAA* [2008] QGAAT 3, [107]–[114].

136 *Guardianship and Administration Act 2000* (Qld) s 153(1), (3)–(4).

137 *Guardianship and Administration Act 2000* (Qld) s 153(2)(a). The Tribunal may also make an order about the payment of the auditor's costs: *Guardianship and Administration Act 2000* (Qld) s 153(2)(b).

138 See eg Presidential Direction No 1 of 2003 in relation to the provision of accounts of administration for private administrators, which provides that accounts of administration are to be provided in an approved form to the Tribunal (where the value of the adult's estate excluding the adult's principal place of residence or a nursing home bond is under $50 000) or to one of the approved panel of examiners on an annual basis, (where the value of the adult's estate excluding the adult's principal place of residence or nursing home bond is over $50 000): Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2003*, <http://www.gaat.qld.gov.au/files/2003_-_1_Accounts_of_Administration_Private_Administrators.pdf> at 26 October 2009. See also Presidential Direction No 1 of 2007 in relation to the provision of accounts of administration for the Public Trustee and trustee companies under the *Trustee Companies Act 1968* (Qld), which requires these administrators to provide a tribunal briefing report to the Tribunal (where the value of the adult's estate excluding the adult's principal place of residence is under $300 000) or to the Tribunal's approved examiner (where the value of the adult's estate excluding the adult's principal place of residence is over $300 000): Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2007*, <http://www.gaat.qld.gov.au/files/2007_-_1_Accounts_of_Administration_The_Public_Trust_Office.pdf> at 26 October 2009.

139 Ibid.

The power to stay a Tribunal decision pending an appeal

15.102 Section 163 of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may, by order, stay a Tribunal decision until an appeal against the decision has been finally decided.[140] An order staying a decision may be given on such terms as the Tribunal considers appropriate.[141] The Tribunal may also amend or revoke its order staying a Tribunal decision.[142]

15.103 Section 242 of the *Guardianship and Administration Act 2000* (Qld) also provides that, if there are Supreme Court proceedings about an adult's enduring document or attorneys under an enduring document, the Tribunal must stay the Tribunal proceeding unless the Supreme Court transfers the proceeding to the Tribunal.

The power to make an order on the application of a substitute decision-maker regarding advice, notice or a requirement received from the Adult Guardian

15.104 Section 179(1) of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may:[143]

- give advice to an attorney, guardian or an administrator;
- by written notice, make an attorney, guardian or administrator subject to the Adult Guardian's supervision for a reasonable period if the Adult Guardian believes, on reasonable grounds, that it is necessary in the adult's interests including, for example, because the attorney, guardian or administrator has contravened the Act or his or her duties, but has not done so wilfully; and
- require an attorney appointed in relation to financial matters, or an administrator, to present a plan of management for approval.

15.105 Section 179(2) of the Act provides that an attorney, guardian or administrator may apply to the Tribunal about the Adult Guardian's advice, notice or requirement and the Tribunal may make such order as it considers appropriate.

---

140 *Guardianship and Administration Act 2000* (Qld) s 163(1). Section 163(1) provides that 'to secure the effectiveness of an appeal against a tribunal decision, the tribunal making the decision under ch 5A or pt 6 or 7 may, by order, stay the decision'. Section 1466 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) will repeal s 163 of the *Guardianship and Administration Act 2000* (Qld). Instead a similar provision is made under s 145(2) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). Section 1466 has not yet commenced.

141 *Guardianship and Administration Act 2000* (Qld) s 163(2)(a).

142 *Guardianship and Administration Act 2000* (Qld) s 163(4).

143 Under s 179, an 'attorney' means an attorney under an enduring document or a statutory health attorney.

The power to consent to the sterilisation of a child with an impairment[144]

15.106 Section 80C of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to consent to the sterilisation of a child with a cognitive, intellectual, neurological or psychiatric impairment. The Tribunal may consent to the sterilisation only if it is satisfied the sterilisation is in the best interests of the child. The effect of the Tribunal's consent is to make the sterilisation not unlawful.

The power to approve the use of a restrictive practice under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld)[145]

The law in Queensland

15.107 The Tribunal has power under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) to approve the use of certain restrictive practices, namely containment or seclusion, for some adults.[146] Chapter 5B applies only in relation to adults with an intellectual or cognitive disability who receive disability services from funded service providers within the meaning of the *Disability Services Act 2006* (Qld).[147]

15.108 The Tribunal also has power to review a containment or seclusion approval.[148] At the end of the review of an approval, the Tribunal must revoke the containment or seclusion approval unless it is satisfied it would give the containment or seclusion approval if a new application for the approval were made.[149]

15.109 If the Tribunal is satisfied that it would give the containment or seclusion approval if a new application for the approval were made, it may do one of the following:[150]

- continue its order giving the containment or seclusion approval;

---

144 The Commission is not reviewing the sterilisation of children with an impairment.

145 As explained earlier in Chapter 2 of this Discussion Paper, the Commission is not generally reviewing ch 5B of the *Guardianship and Administration Act 2000* (Qld). However, Chapter 7 considers a number of specific issues that have been raised in relation to the use of restrictive practices.

146 *Guardianship and Administration Act 2000* (Qld) s 80X. If the Tribunal has given a containment or seclusion approval which is in effect, or proposes to give a containment or seclusion approval, in relation to an adult, the Tribunal may also approve the use of a restrictive practice other than containment or seclusion in relation to the adult: s 80V. The total period for which a containment or seclusion approval has effect must be not more than 12 months: s 80Y. In some circumstances, the Adult Guardian may give a short term approval for containment or seclusion in relation to an adult: s 80ZH.

147 *Guardianship and Administration Act 2000* (Qld) ss 80R, 80S; *Disability Services Act 2006* (Qld) s 14. Generally, a funded service provider is a service provider that receives funds from the Department of Communities to provide disability services: *Disability Services Act 2006* (Qld) s 14.

148 *Guardianship and Administration Act 2000* (Qld) s 80ZB.

149 *Guardianship and Administration Act 2000* (Qld) s 80ZB(2).

150 *Guardianship and Administration Act 2000* (Qld) s 80ZB(3).

- change its order giving the containment or seclusion approval;
- make an order giving a new containment or seclusion approval.

15.110 The Tribunal also has power to make an interim order in a proceeding under Chapter 5B of the Act if it is satisfied, on reasonable grounds, that:[151]

- there is an immediate risk of harm to the adult concerned in the proceeding or others; and
- using a restrictive practice is the least restrictive way of ensuring the safety of the adult or others.

15.111 The maximum period for which such an interim order may be made is three months.[152]

The law in other jurisdictions

15.112 In South Australia, the Guardianship Board may exercise special powers, in limited circumstances, to make orders about where and with whom an adult is to live and to authorise his or her detention. Specifically, the Tribunal has power to:[153]

- give directions that an adult reside with a specified person in a specified place (or with such person and in such place as the adult guardian thinks fit);
- authorise the adult's detention in the place; and
- authorise persons caring for the adult to use reasonably necessary force for the purpose of ensuring the proper medical treatment, day-to-day care and well-being of the adult.

15.113 However, the Board cannot exercise such a power unless it is satisfied that, if such an order were not to be made and carried out, the adult's health or safety would be seriously at risk.[154]

151 *Guardianship and Administration Act 2000* (Qld) s 80ZR(1).

152 *Guardianship and Administration Act 2000* (Qld) s 80ZR(4).

153 *Guardianship and Administration Act 1993* (SA) s 32(1).

154 *Guardianship and Administration Act 1993* (SA) s 32(2).

ISSUES FOR CONSIDERATION

The scope of the Tribunal's powers

15.114 The Tribunal has the powers given under the *Guardianship and Administration Act 2000* (Qld) or under any other Act.[155] These powers include the following broad and specific powers to give effect to the Tribunal's general functions under section 82 of the Act:

- making declarations about the capacity of an adult, guardian, administrator or attorney for a matter;[156]
- appointing a guardian or an administrator, and reviewing the appointment;[157]
- making a declaration, order or recommendation, or giving directions or advice, in relation to the guardians, administrators, attorneys and enduring documents;[158]
- ratifying an exercise of power, or approving a proposed exercise of power, for a matter by an informal decision-maker for an adult with impaired capacity for the matter;[159]
- consenting to some types of special health care;[160]
- approving the use of a restrictive practice under Chapter 5B of the Act, and reviewing the approval;[161]
- registering an interstate order;[162] and
- reviewing a matter in which a decision has been made by the Registrar of the Tribunal.[163]

---

155 *Guardianship and Administration Act 2000* (Qld) s 83. The Tribunal is also given power under s 109A of the *Powers of Attorney Act 1998* (Qld) and ss 123ZK(8), 123ZN(5)(b) of the *Disability Services Act 2006* (Qld) .

156 *Guardianship and Administration Act 2000* (Qld) s 146.

157 *Guardianship and Administration Act 2000* (Qld) ss 12, 31.

158 *Guardianship and Administration Act 2000* (Qld) s 138. See also s 138AA, in relation to directions to a former attorney.

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

160 *Guardianship and Administration Act 2000* (Qld) ss 68–73.

161 *Guardianship and Administration Act 2000* (Qld) ss 80X, 80ZB.

162 *Guardianship and Administration Act 2000* (Qld) s 169.

163 *Guardianship and Administration Act 2000* (Qld) s 161.

15.115 The Tribunal also has power to do 'all things necessary or convenient to be done to perform the tribunal's functions'.[164]

15.116 The Tribunal is also given the following powers to make orders in specific proceedings:

- to issue a warrant for the adult guardian to enter a place and remove an adult;[165]
- to authorise conflict transactions and approve investments as authorised investments;[166]
- to order a summary of financial accounts to be filed and audited;[167]
- to suspend the operation of all or some of the powers of a guardian or administrator;[168]
- to stay a Tribunal decision pending an appeal;[169] and
- to make any order on the application of a substitute decision-maker regarding advice, notice or a requirement received from the Adult Guardian.[170]

15.117 The Commission notes that the powers of the Tribunal are generally more extensive than those that may be exercised by equivalent bodies in other jurisdictions. Although the Commission is not aware of any additional powers that might be needed to support the Tribunal's protective and supervisory functions, the Commission welcomes submissions on the appropriateness of the Tribunal's powers.

164 *Guardianship and Administration Act 2000* (Qld) s 83(2).

165 *Guardianship and Administration Act 2000* (Qld) s 149.

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

167 *Guardianship and Administration Act 2000* (Qld) s 153.

168 *Guardianship and Administration Act 2000* (Qld) s 155.

169 *Guardianship and Administration Act 2000* (Qld) s 163.

170 *Guardianship and Administration Act 2000* (Qld) s 179(2).

15-2 Are the substantive powers of the Tribunal, as conferred by the *Guardianship and Administration Act 2000* (Qld), appropriate to enable the Tribunal to fulfil its various functions?

15-3 If no to Question 15-2, what power or powers should be given to, or removed from, the Tribunal?

The power to make a declaration, order or recommendation, or give directions or advice

15.118 As part of its supervisory jurisdiction, the Tribunal has specific power under section 138 of the Act to give advice or directions about a matter.[171] It provides that, once an application about a matter has been made to the Tribunal, the Tribunal may 'give advice or directions about the matter it considers appropriate'.

15.119 In *Re WFM*,[172] the Tribunal specifically considered the extent of its power to give directions to a guardian or an administrator.

15.120 In that case, the Adult Guardian had been appointed as guardian for a 75 year old adult with Alzheimer's disease. For several years prior to, and in the period after, the Adult Guardian's appointment, the adult's daughter and partner had been in conflict over various issues, including the adult's care and contact arrangements. The adult's daughter applied to the Tribunal for orders to appoint her as the adult's guardian, or alternatively, for the Tribunal to give directions to the Adult Guardian about the manner in which it should make decisions about the adult's care, health matters and contact arrangements.

15.121 The applicant argued, on a number of grounds, that the overall scheme of the Act suggested that 'full effect' should be given to the Tribunal's powers to give directions in relation to guardians and administrators. Firstly, the broad and specific nature of the Tribunal's powers militates against reading down the power to give directions. Secondly, the Tribunal has an active role in 'ensuring appointees perform their roles in a way considered appropriate by the Tribunal'. Thirdly, the Tribunal, whether at the time of the original appointment or on review, has power to impose terms 'considered appropriate by the Tribunal', which suggests that the Tribunal may require a guardian or an administrator to exercise power in a certain way. Fourthly, the Act's objective of achieving balance between the right of an adult to decision-making autonomy and the adult's right to adequate and appropriate support for decision-making would not be achieved if the Tribunal was left with the limited option of removing a guardian (who may be otherwise competent and appropriate) rather than giving

171 *Guardianship and Administration Act 2000* (Qld) s 138 is set out at [15.29] above.

172 [2006] QGAAT 54.

the guardian directions about the exercise of a power (particularly if there was no other suitable appointee).[173]

15.122 The Adult Guardian argued that the Tribunal's functions are primarily supervisory and, as such, are separate and distinct from those of a guardian. She further submitted that, while the Tribunal has power under various provisions of the Act to set the terms of an appointment by determining its scope and limits, these provisions 'do not suggest that the Tribunal has authority to determine the way in which decisions are made'.[174]

15.123 The Tribunal considered that its power to give directions, recommendations or advice was similar to the Supreme Court's power to give advice and directions to trustees under section 96 of the *Trusts Act 1973* (Qld).[175] It noted that a narrow construction of this power would deny decision-makers, who may have some doubt about the correctness of a decision, or be seeking an indemnity from liability for making a decision, the benefit of the Tribunal's guidance. The Tribunal also considered that a narrow reading of the power to give a direction, recommendations or advice, as suggested by the Adult Guardian, would 'deny decision makers under the Act the right which is available to all trustees and the associated benefits which flow from such directions'.[176]

15.124 The Tribunal held that, at the time of the appointment of a guardian or an administrator, or on the review of an appointment, as well as on a specific application for directions, it may impose restrictions on, or give instructions to, a guardian or administrator which may extend to directing a substantive course of action for the decision-maker.[177] It also held that its power to give directions extends to 'how a decision-maker should exercise its powers, and to how a matter for which a decision-maker has been appointed should be decided'.[178] The Tribunal made directions in accordance with those findings.

---

173 Ibid [19].

174 Ibid [20]. In this regard, the Adult Guardian referred to ss 12(2), 33 and 36 of the *Guardianship and Administration Act 2000* (Qld). Section 12(2) provides for the Tribunal to make an appointment on terms it considers appropriate. Section 33 outlines the powers of an appointee, subject to the Tribunal ordering otherwise. Section 36 provides for the exercise of a power by an appointee as required by the terms of any Tribunal order.

175 *Trusts Act 1973* (Qld) s 96 provides:

> **96 Right of trustee to apply to court for directions**
>
> (1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
>
> (2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.

176 [2006] QGAAT 54, [25].

177 Ibid [33].

178 Ibid.

15.125 The Tribunal also noted that 'the right of these decision makers to apply for directions in cases of doubt is regarded by the Tribunal as critical to the ongoing efficacy of the legislative scheme'.[179]

15.126 The ACT legislation also enables the ACT Civil and Administrative Tribunal ('ACAT') to give a guardian or a manager a direction about the exercise of his or her functions and powers. Section 16 of the *Guardianship and Management of Property Act 1991* (ACT) relevantly provides:

> **16 Directions by ACAT**
>
> (1) The ACAT may, on application, give a direction to a guardian or manager about the exercise of his or her functions or powers.
>
> (2) A guardian or manager must not, without reasonable excuse, contravene a direction.
>
> Maximum penalty: 50 penalty units, imprisonment for 6 months or both.
>
> **17 Restrictions on ACAT's power to give directions**
>
> (1) This section applies to an order that affects a person—
>
> (a) who has a guardian; or
>
> (b) for whom a manager is appointed.
>
> (2) The ACAT must not give a direction that is inconsistent with the order.

15.127 In *Omari v Omari, Omari and Guardianship and Management of Property Tribunal*,[180] the ACT Supreme Court held that ACAT's power under section 16(1) of the *Guardianship and Management of Property Act 1991* (ACT) to give directions to guardians or managers includes the power to direct the guardians on *how* they should exercise their powers.[181] The Court also noted that:[182]

> There is no apparent limit on the subject matter of such directions, save that they are about the exercise of his or her [that is, the guardian's] functions or powers.
>
> This is obviously an appropriate brake on the wide powers of guardians and can be used to resolve disputes between the guardians and others who may have an interest in the affairs or well-being of the protected person.

179 Ibid [26].

180 [2009] ACTSC 28.

181 Ibid [66].

182 Ibid [65]–[66].

15.128 An issue to consider is whether the *Guardianship and Administration Act 2000* (Qld) should expressly provide that the Tribunal's power to give advice or directions includes the power to give a direction to a decision-maker about the way in which a decision is to be made.

15-4 Should the *Guardianship and Administration Act 2000* (Qld) include an express power for the Tribunal to give directions to a guardian, administrator or attorney about the exercise of his or her powers?

The power to make an interim order

15.129 An adult with impaired capacity may be vulnerable to abuse, exploitation or neglect. Interim guardianship or administration orders constitute an important safeguard under the *Guardianship and Administration Act 2000* (Qld) in protecting adults from abuse, exploitation or neglect. In recognition of the interim nature of such orders, the Tribunal's power to make such an order is subject to a number of limitations.

The grounds for making an interim order

15.130 The grounds for making an interim order are set out in section 129(1). In order to make an interim order, the Tribunal must be satisfied on reasonable grounds that there is an immediate risk of harm to the health, welfare or property of the adult concerned in an application, including because of the risk of abuse, exploitation or neglect of, or self-neglect by, the adult.

15.131 Section 129 does not refer to any requirement that the adult concerned in the application has impaired capacity. However, Presidential Direction No 3 of 2007 (which deals with interim orders made under section 129) provides, in paragraph (3), that the Tribunal must be satisfied, on reasonable grounds, that there is 'some evidence' of incapacity:[183]

> Prior to making an interim order, the Tribunal has to be satisfied that on reasonable grounds, there is some evidence of incapacity and the adult appears to be at imminent risk. This notion of risk is grounded on the particular factual circumstances of a case. The risk needs to be immediate, and the Tribunal must be satisfied on the balance of probabilities that harm would result. (emphasis added)

183 Presidential Direction No 3 of 2007 is set out at [15.45] above. See eg *Re RAB* [2008] QGAAT 75, [5], [14]; *Re CAF* [2008] QGAAT 95, [3], [20], in which the Tribunal has applied this approach.

Presidential Direction No 3 of 2007 is made under s 100(2)(d) of the *Guardianship and Administration Act 2000* (Qld), which empowers the President of GAAT to give directions about 'the tribunal's procedure'. However, to the extent that paragraph (3) of the Presidential Direction purports to limit the Tribunal's discretion to make an interim order under s 129, it is arguable that the Practice Direction goes beyond regulating the Tribunal's 'procedure'. See *Herald and Weekly Times Ltd v VCAT* [2005] VSC 44, where the Supreme Court of Victoria declared that certain rules of the *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) were *ultra vires* because they went beyond merely regulating 'practice and procedure'.

15.132 It is arguable that there is an implied requirement under section 129 that the Tribunal must be satisfied to the requisite degree that the adult lacks capacity. Section 84(2) of the Act provides that the Tribunal has exclusive jurisdiction for the appointment of guardians and administrators for adults with impaired capacity, (subject to the exercise of the Tribunal's powers for the appointment of guardians or administrators by the Supreme or District Courts in particular civil proceedings).[184] In order to make such an order, the Tribunal must be satisfied that the adult has impaired capacity for the matter.[185] However, section 129 also gives the Tribunal power to make an interim order without hearing and deciding the proceeding or otherwise complying with the requirements of the Act.

15.133 An issue for consideration is whether section 129(1) should be amended to include an additional ground that the Tribunal must be satisfied to the requisite degree that the adult concerned has impaired capacity.

15-5 Should the test for making an interim order under section 129(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to include an additional ground in relation to the adult's capacity?

15-6 If yes to Question 15-5, should the additional ground be that the Tribunal must be satisfied:

(a) that there is some evidence that the adult has impaired capacity;[186]

(b) that there is sufficient evidence that the adult has impaired capacity;

(c) that there is a prima facie case that the adult has impaired capacity; or

(d) some other test?

184 The Supreme or District Court also has jurisdiction under s 245 of the Act for the appointment of guardians or administrators for adults with impaired capacity for matters: 84(1).

185 One of the General Principles under the *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld) states that an adult is presumed to have capacity for a matter: *Guardianship and Administration Act 2000* (Qld) sch 1 s 1; *Powers of Attorney Act 1998* (Qld) sch 1 s 1. The Tribunal is required to apply the principles under the Act, including the presumption of capacity, when it exercises a power for a matter in relation to an adult: *Guardianship and Administration Act 2000* (Qld) s 11(1). See *Bucknall v Guardianship and Administration Tribunal* (No 1) [2009] QSC 128, [43].

186 Note that the test referred to in Presidential Direction No 3 of 2007 is that the Tribunal must be satisfied 'on reasonable grounds, there is some evidence of incapacity': see [15.130] above.

The maximum period of an interim order

15.134 The current maximum period that may be specified in an interim order made under section 129 is three months. There is also scope for the order to be renewed, but only if GAAT is satisfied that there are exceptional circumstances justifying the renewal.

15.135 The Guardianship and Administration Reform Drivers ('GARD') has suggested that the maximum period for which an interim order remains in effect should be reduced to 10 days.[187] GARD considered that it was appropriate that interim orders be made only for a short period given the potential disruption to the adult's life pending the final hearing of an application for guardianship or administration. GARD also noted that this approach was consistent with the recommendation made by the Queensland Law Reform Commission in its original 1996 report.[188]

15.136 There is a broad variation in the maximum periods for which interim orders may be made in other jurisdictions For example, in South Australia, the maximum period is 7 days; in Victoria, the maximum period is 21 days (with provision to renew the order for a further 21 days); and, in the Northern Territory, the maximum period is 90 days.[189]

15.137 An issue for consideration is whether the maximum period for which an interim order may ordinarily be made under section 129 (ie three months) is appropriate, or should be changed. The Commission notes that, in many cases, a shorter timeframe may be sufficient to safeguard an adult's interests, and, in these circumstances, the Tribunal may make an order for less than the maximum period. If the current maximum timeframe for which an interim order may ordinarily be made were extended, it may have serious consequences for the adult, particularly if the adult is subsequently found to have capacity. The Commission notes that section 129 also empowers the Tribunal to renew an interim order in exceptional circumstances. If the period for which an interim order may ordinarily be made were reduced, the adult's interests may not be sufficiently protected.

---

187 Submission C24. GARD is an informal alliance of community-based organisations and is comprised 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. Note that GARD's submission was made prior to the 2007 amendment to s 129, when the combined period for which an interim order could be made was six months.

188 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 270.

189 *Adult Guardianship Act* (NT) s 19(5); *Guardianship and Administration Act 1993* (SA) s 14; *Guardianship and Guardianship and Administration Act 1986* (Vic) ss 33(2), 60(2).

15-7 Is the maximum period for which an interim order may be made under section 129 (ie three months) appropriate? If not, what should the maximum period be?

Renewal of an interim order

15.138 An interim order may be renewed but only if there are exceptional circumstances justifying the renewal.[190] The making of an interim order affects the rights of the adult concerned by removing his or her decision-making autonomy. The usual maximum period for which an interim order may be made under section 129 is three months. This is arguably a reasonable period of time for the parties involved to make a subsequent application for a final appointment order, if necessary. On the other hand, it may be desirable to retain section 129(6) to ensure that, in exceptional circumstances, the interim order can be continued when it is in the interests of the adult to do so.

15-8 Should section 129(6) of the *Guardianship and Administration Act 2000* (Qld), which provides that an interim order may be renewed but only if there are exceptional circumstances justifying the renewal, be omitted?

The power to issue a warrant for the Adult Guardian to enter a place and remove an adult

The constitution of the Tribunal for hearing an application to issue an entry and removal warrant

15.139 As mentioned above, section 149 of the *Guardianship and Administration Act 2000* (Qld) empowers GAAT to issue a warrant for the Adult Guardian to enter a place and remove an adult.[191]

15.140 Section 101(5) of the Act provides that, when hearing an application for an entry and removal warrant, the Tribunal must be constituted by the President, a Deputy President or a legal member.[192] However, that section will

190 *Guardianship and Administration Act 2000* (Qld) s 129(6).

191 Applications for entry and removal warrants are made to the Tribunal relatively infrequently. Between 1 July 2003 and 30 June 2006, eight applications for warrants to enter and remove an adult were made to the Tribunal. No applications were made to the Tribunal between 1 July 2006 and 30 June 2008: Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 28.

192 *Guardianship and Administration Act 2000* (Qld) s 101(5).

be omitted and replaced when QCAT commences operation.[193] As amended, the *Guardianship and Administration Act 2000* (Qld) will provide that, when hearing a proceeding, QCAT is to be constituted generally by three members, and may, if the President considers it appropriate, be constituted by two members or a single member. This means that the Act will have no mandatory requirements for the constitution of QCAT when hearing an application for an entry and removal warrant. The Commission notes, however, that the QCAT Act provides that 'the constitution of the Tribunal for particular classes of matters' may be the subject of rules made under that Act.[194]

15.141 The removal of an adult from his or her surroundings is a serious matter, which affects the rights of the adult. It may also have a significant impact on other people who are involved in the adult's life. The evidence that is available at the hearing of an application to issue an entry and removal warrant is likely to be of a preliminary nature. This raises the issue of whether the Tribunal should be required to be constituted in a particular way when it exercises jurisdiction under section 149 of the Act. The Commission notes that, when QCAT commences operation, section 129 of the *Guardianship and Administration Act 2000* (Qld), which empowers the Tribunal to make interim orders, will require that the Tribunal be constituted by a legal member when it exercises jurisdiction under that section.[195] Consistent with this approach, it may be desirable to amend section 149 to require that, when the Tribunal exercises jurisdiction under that section, it must be constituted in a particular way, for example, by a legal member. Another option may be to require the Tribunal to be constituted by a three member panel (including a legal member).

15-9 Should section 149 of the *Guardianship and Administration Act 2000* (Qld) be amended to require that the Tribunal, when exercising jurisdiction under that section, be constituted in a particular way (for example, by a legal member or, alternatively, by a three member panel including a legal member)?

The current test for issuing a warrant under section 149

15.142 Section 149 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to issue a warrant for the Adult Guardian to enter a place and remove an adult. The current test for the issue of an entry and removal warrant under section 149 of the Act is that GAAT 'is satisfied there are

193 Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 101 of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 102 of the *Guardianship and Administration Act 2000* (Qld). The new s 102 provides that at a hearing the Tribunal must be constituted by three members unless the President considers it appropriate for the proceeding to be heard by the Tribunal constituted by two members or a single member.

194 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 224, sch 2 s 3(1).

195 *Guardianship and Administration Act 2000* (Qld) s 129(7), as amended by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1453.

reasonable grounds for suspecting that there is an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse, to an adult with impaired capacity for a matter'. The Commission notes that section 131 of the *Guardianship and Administration Act 2000* (Qld) permits the Tribunal, in urgent or special circumstances, to proceed to decide a matter on the information before it without receiving further information.

15.143 The wording of the current test differs slightly from the test proposed by the Queensland Law Reform Commission in its original 1996 report.[196] Clause 245(2) of the Draft Assisted and Substituted Decision-Making Bill 1996, which was included in that report, relevantly provides:

> **245 Entry and removal order**
>
> The tribunal may make an entry and removal order if the tribunal is satisfied there is enough evidence—
>
> (a) the adult has impaired decision-making capacity; and
>
> (b) there is an immediate danger to the adult because of neglect, exploitation or abuse.

15.144 GARD has expressed concern about whether the current test for the issue of a removal warrant under section 149 provides an adequate safeguard against the unwarranted removal of an adult from premises.[197] It has been suggested by GARD that, in some instances, adults have been removed from their families without adequate evidence of there being an immediate risk of harm.[198]

> In particular, all too often an adult will be removed from their family on the basis of unsound evidence. In these circumstances the adults involved can be isolated for extended periods until the time of their hearing before the Tribunal. The isolation of people is an issue of basic human rights.

15.145 GARD suggested that the requirement under the current test that the Tribunal must be satisfied that there are 'reasonable grounds for suspecting' the matters which constitute the grounds for seeking a warrant should be replaced by a requirement for 'compelling evidence' of those things.[199]

15.146 On the other hand, the current test is similar to the test that has been used in other Queensland legislation in relation to the issue of warrants for the protection of vulnerable people.[200] For example, section 513 of the *Mental*

---

196 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 270–1.

197 Submission C24.

198 Ibid.

199 Ibid.

200 See also *Disability Services Act 2006* (Qld) s 137.

Health Act 2000 (Qld) empowers a magistrate to issue a warrant to authorise a police officer to detain a patient and take him or her to an authorised mental health service. That section empowers a magistrate to issue a warrant only if he or she is satisfied there are *reasonable grounds for suspecting* the patient may be found at the place and that the warrant is necessary to enable the patient to be taken to an authorised mental health service for assessment, treatment or care.

15.147 An issue to consider is whether the current test for the issue of a removal warrant under section 149 is appropriate. On the one hand, if the test is too easily satisfied, an adult may be removed (in some cases, from his or her support network) without proper justification. On the other hand, if the test is too onerous, it may prevent the timely removal of the adult from an immediate risk of harm.

15-10 Is the current test under section 149 of the *Guardianship and Administration Act 2000* (Qld) for the issue of an entry and removal warrant appropriate?

Material in support of application for a warrant

15.148 As mentioned earlier, section 197 of the *Guardianship and Administration Act 2000* (Qld) provides that, if the Adult Guardian considers that there are reasonable grounds for suspecting that there is 'an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse, to an adult with impaired capacity for a matter', the Adult Guardian may apply to the Tribunal for a warrant to enter a place and to remove the adult.

15.149 In Victoria, if the Victorian Civil and Administrative Tribunal ('VCAT') has received information that a person with a disability in respect of whom a guardianship order has been sought:

- is being unlawfully detained against his or her will; or
- is likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken.

VCAT may by order empower the Public Advocate or someone else, in the company of a police officer, to visit the person with a disability for the purpose of preparing a report for VCAT.[201]

15.150 If after receiving the report, VCAT is satisfied that the person is being unlawfully detained against her or his will or that the person is likely to suffer serious damage to his or her physical, emotional or mental health or well-being

201 *Guardianship and Administration Act 1986* (Vic) s 27(1).

unless immediate action is taken, it may make an order enabling the person with a disability to be taken to a place specified in the order for assessment and placement until the application for guardianship is heard.[202]

15.151 The Tasmanian guardianship legislation includes a similar provision.[203]

15.152 GARD has suggested that the preparation of such a report 'may serve to limit the occasions on which adults are removed unnecessarily'.[204] Accordingly, it suggested that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that an application for an entry and removal warrant 'should be accompanied by a report to the Tribunal supporting the application and demonstrating that there is compelling evidence of harm to justify any action taken'.[205]

15.153 While the preparation of such a report may assist the Tribunal in its determination of an application for an entry and removal warrant, the requirement for such a report might also have the effect of defeating the purpose of making the application. For example, the preparation of the report is likely to extend the application process thereby delaying the adult's removal from actual or potential harm. It might also notify those who are suspected of causing harm to the adult of the pending application.

15.154 If the Act were amended to provide that an application for an entry and removal warrant must be supported by a report by the Adult Guardian about the adult's circumstances, a related issue is whether the Adult Guardian should be required to prepare the report on the order of the Tribunal or as part of the documentation required to be filed under an application. If there were a requirement that the Tribunal must order the preparation of a report, it would introduce an additional step in the application process.

15-11 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that an application for an entry and removal warrant must be supported by a report by the Adult Guardian about the adult's circumstances?

15-12 If yes to Question 15-11, should the *Guardianship and Administration Act 2000* (Qld) be amended to require the Adult Guardian to prepare the report on the order of the Tribunal as part of the documentation required to be filed under an application?

202 *Guardianship and Administration Act 1986* (Vic) s 27(2).

203 *Guardianship and Administration Act 1995* (Tas) s 29.

204 Submission C24.

205 Ibid.

The care of the adult following his or her removal

15.155 Section 151 of the *Guardianship and Administration Act 2000* (Qld) provides that, as soon as practicable after the adult has been removed under the warrant, the Adult Guardian must apply to the Tribunal for the orders the Adult Guardian considers appropriate about the adult's personal welfare, a power of attorney or advance health directive of the adult, or a guardian, administrator or attorney of the adult.[206] However, the Act does not expressly require the Adult Guardian, as soon as reasonably practicable after removing the adult, to take the adult to a safe place.

15.156 In New South Wales, the legislation provides that an adult, who has been removed from premises, is placed in the care of the Director-General of the relevant Department at a place approved by the Minister of that Department.[207]

15.157 The Tasmanian legislation empowers a police officer, who reasonably suspects that an adult is or has been abused or neglected or unlawfully detained or is at immediate risk of harm, to enter premises and remove the adult.[208] The police officer must be accompanied by a person nominated by the Public Guardian when the adult is removed. As soon as practicable, the Public Guardian's nominee must take the adult to a safe place and ensure that an application for guardianship or other appropriate arrangements are made.[209]

15.158 An issue for consideration is whether the *Guardianship and Administration Act 2000* (Qld) should be amended to require that the Adult Guardian must take the adult to a safe place as soon as reasonably practicable after removing the adult from a place under an entry and removal warrant.

15-13 Should the *Guardianship and Administration Act 2000* (Qld) be amended to require that the Adult Guardian must take the adult to a safe place as soon as reasonably practicable after removing the adult from a place under an entry and removal warrant.

---

206 Note also that the Tribunal has power to suspend the operation of all or some of the power of a guardian or administrator for an adult if the Tribunal suspects, on reasonable grounds, that the appointed person is not competent because, for example, he or she has failed to adequately protect the adult's interests or has neglected his or her duties or abused his or her powers *Guardianship and Administration Act 2000* (Qld) s 155. The Adult Guardian also has power to suspend the operation of all or some of the power of an attorney under an enduring power of attorney on similar grounds: s 195. During the suspension of the operation of the power of a guardian or an attorney for a personal matter, the Adult Guardian is taken to be the guardian for the adult for the exercise of the suspended power: ss 155(5), 196(2). Similarly, during the suspension of the operation of the power of an administrator or an attorney for a financial matter the Public Trustee is taken to be the administrator for the adult for the exercise of the suspended power: ss 155(6), 196(3). The Act also provides for the making of interim orders: s 129.

207 *Guardianship Act 1987* (NSW) s 13.

208 *Guardianship and Administration Act 1995* (Tas) s 30(1).

209 *Guardianship and Administration Act 1995* (Tas) s 30(2)–(3).

Chapter 16

Tribunal proceedings

INTRODUCTION

16.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework.[210]

16.2 This chapter gives an overview of Chapter 7 of the *Guardianship and Administration Act 2000* (Qld), which deals with Tribunal proceedings.

16.3 As mentioned in Chapter 2, on 1 December 2009, the Guardianship and Administration Tribunal ('GAAT') will be abolished and the jurisdiction presently exercised by the Tribunal will be conferred on the Queensland Civil and Administrative Tribunal ('QCAT').[211]

16.4 The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the 'QCAT Act') sets out QCAT's functions, powers and procedures, which will generally apply to Tribunal proceedings. The QCAT Act includes generic provisions for dealing with various matters including the commencement of applications, the conduct of Tribunal proceedings, dispute resolution and the giving of decisions and reasons. Consequently, the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) (the 'QCAT Amendment Act') omits or amends some of the provisions in Chapter 7 of the *Guardianship and Administration Act 2000* (Qld) that relate to the matters that are the subject of generic provisions in the QCAT Act.

---

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

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

16.5 This chapter examines how the provisions in Chapter 7 of the *Guardianship and Administration Act 2000* (Qld) will be affected once QCAT commences operation. It also raises some issues for consideration including a number of issues about Tribunal proceedings which the Commission indicated in its 2007 report on confidentiality would be considered in this stage of the review.

BRIEF OVERVIEW OF TRIBUNAL PROCEEDINGS

16.6 In its original 1996 report, the Commission recommended the establishment of an independent statutory tribunal. The Commission considered that a tribunal structure was appropriate 'to develop procedures which are easier than the court system for ordinary members of the community to understand and to use, and which involve minimum cost and delay, whilst at the same time ensuring that the rights and interests of people with a decision-making disability are protected'.[212]

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

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

The commencement of proceedings

16.9 An application may be made under the *Guardianship and Administration Act 2000* (Qld) for a declaration, order, direction, recommendation or advice in relation to an adult about something in or related to the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).[213] An application must contain particular information and certain applications must also be accompanied by a report by a health provider about the adult.[214]

---

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

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

214 *Guardianship and Administration Regulation 2000* (Qld) ss 3(2), 4(2), 6(2). The minimum standard documentation required by the Tribunal prior to listing certain types of applications for hearing includes 'a report by medical and related health professional/s other than the applicant, or other documentation describing diagnosis and capacity': Guardianship and Administration Tribunal, *Presidential Direction No 2 of 2002*, <http://www.gaat.qld.gov.au/files/2002_-_2_General.pdf> at 27 October 2009. These applications are: an application for the appointment a guardian or an administrator; an application for a declaration regarding an enduring power of attorney; an application for a declaration of capacity; and an application for consent to special health matter.

16.10 The Tribunal is required to notify certain persons of the hearing of an application.[215]

16.11 There is no filing fee for making an application.[216]

The parties to a proceeding

16.12 The parties to a Tribunal proceeding are called 'active parties'. They are the adult concerned in the application, the applicant (if not the adult), any current or proposed guardian, administrator or attorney for the adult, the Adult Guardian, the Public Trustee and any other person joined as party by the Tribunal.[217]

The constitution of the Tribunal

16.13 The *Guardianship and Administration Act 2000* (Qld) provides that GAAT is required to be constituted by three members for a hearing unless the President considers it appropriate that a matter is heard by one or two members.[218]

16.14 The QCAT Act applies a similar approach. It provides that, when exercising its guardianship jurisdiction, QCAT must be constituted by three members unless the President considers it appropriate for the proceeding to be heard by two members or a single member.[219]

Procedural fairness

16.15 The Tribunal must observe the rules of procedural fairness.[220] The requirements of procedural fairness are based on two rules.[221]

---

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

216 *Guardianship and Administration Act 2000* (Qld) s 114. Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 114 of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 114B(1) of the *Guardianship and Administration Act 2000* (Qld). Section 1446 also inserts a new s 114B(2) which provides that s 114B(1) does not apply in relation to an appeal to the Appeal Tribunal under the QCAT Act ch 2 pt 2. Section 1446 has not yet commenced.

217 *Guardianship and Administration Act 2000* (Qld) s 119.

218 *Guardianship and Administration Act 2000* (Qld) s 101(1). In the year 2007–08, 56 percent of finalised applications were heard by a single member, 36 percent were heard by three members, and 8 percent were heard by two members: Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 39. In that Report, the Tribunal indicated that a significant number of the single-member hearings are non-contentious reviews of existing appointments, for example, where there is no dispute about the issues of capacity and need or where an administrator has been managing the adult's finances for some time and all relevant contactable people (adult, family and caregivers) are happy with the appointment: at 38.

219 *Guardianship and Administration Act 2000* (Qld) s 102, as amended by s 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld).

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

16.16 The first rule is that the parties to a proceeding must be given an adequate opportunity to present their case (the hearing rule).[222] This rule involves three aspects: adequate prior notice, adequate disclosure of material and an opportunity to respond to that material.

16.17 The second rule is that the decision-maker must be impartial or free from bias (the bias rule).[223] This rule requires that the decision-maker approach the task with an open mind, free from prejudice and without any interest, pecuniary or otherwise, in the outcome.

16.18 The requirements of procedural fairness will depend on the circumstances of each case.

Access to documents

16.19 The active parties to a proceeding have a statutory right to access and inspect specified documents on the Tribunal file before, during and after the hearing.[224] A person who the Tribunal considers to have a sufficient interest in the proceeding may also access and inspect specified documents but only after the hearing has ended.[225] The right to access and inspect a document or other information may be displaced by a confidentiality order.[226] Such an order, which permits the Tribunal to withhold a document or information from an active party or another person, may be made only if the Tribunal is satisfied that it is necessary to avoid serious harm or injustice to a person.[227]

---

221 WB Lane and S Young, *Administrative Law in Australia* (2007) [2.235]. JS Forbes, *Justice in Tribunals* (2nd ed, 2002) [7.1], [7.4]. See, for a discussion of the principle of open justice and the requirements of procedural fairness in the guardianship system: Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [3.23]–[3.57].

222 JS Forbes, *Justice in Tribunals* (2nd ed, 2002) [7.1], [7.4]. See [16.54], [16.111] below.

223 JS Forbes, *Justice in Tribunals* (2nd ed, 2002) [7.3].

224 *Guardianship and Administration Act 2000* (Qld) s 108(2)–(3).

225 *Guardianship and Administration Act 2000* (Qld) s 108(3).

226 *Guardianship and Administration Act 2000* (Qld) s 108(6). Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 108 of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 100 of the *Guardianship and Administration Act 2000* (Qld). Section 1446 has not yet commenced.

227 *Guardianship and Administration Act 2000* (Qld) s 109E. Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 109E of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 109 of the *Guardianship and Administration Act 2000* (Qld). Section 1446 has not yet commenced.

Informality

16.20 Tribunal proceedings must be conducted as simply and quickly as the requirements of the *Guardianship and Administration Act 2000* (Qld) and a proper consideration of the matters before the Tribunal allow.[228]

Openness

16.21 Generally, Tribunal hearings must be held in public.[229] However, the presumption of openness in Tribunal proceedings may be displaced in limited circumstances.

16.22 The Tribunal may make an adult evidence order which permits the Tribunal to speak with the adult in the absence of others.[230] The Tribunal may also make a closure order which permits the Tribunal to close a hearing or part of a hearing to all or some members of the public, or to exclude a particular person (including an active party) from a hearing or part of a hearing.[231] These orders can be made only if the Tribunal is satisfied that it is necessary to avoid serious harm or injustice to a person. An adult evidence order can also be made if it is necessary to obtain relevant information the Tribunal would not otherwise receive.[232]

Evidence

16.23 The Tribunal is not bound by the rules of evidence but may inform itself on a matter in a way that it considers appropriate.[233] The Tribunal's decision must be based upon some evidence even though it may not be admissible in a court.[234] While the Tribunal is not bound by the rules of evidence,

---

228 *Guardianship and Administration Act 2000* (Qld) s 1097(1). Section 107(1) is repealed by s 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld). Section 28(3)(d) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) has a similar effect. Section 1446 has not yet commenced.

229 *Guardianship and Administration Act 2000* (Qld) s 109. Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 109 of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 105 of the *Guardianship and Administration Act 2000* (Qld). Section 1446 has not yet commenced.

230 *Guardianship and Administration Act 2000* (Qld) s 109B. Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 109B of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 106 of the *Guardianship and Administration Act 2000* (Qld). Section 1446 has not yet commenced.

231 *Guardianship and Administration Act 2000* (Qld) s 109C. Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 109C of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 107 of the *Guardianship and Administration Act 2000* (Qld). Section 1446 has not yet commenced.

232 *Guardianship and Administration Act 2000* (Qld) ss 109B(1), 109C(1).

233 *Guardianship and Administration Act 2000* (Qld) s 107(2). Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 107(2) of the *Guardianship and Administration Act 2000* (Qld). Section 28(3)(b) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) has a similar effect to s 107(2). Section 1446 has not yet commenced.

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

considerations of fairness and reliability on which the rules are based are relevant in the fact-finding process.[235] These considerations may affect the weight and significance given to the evidence.[236]

16.24 The Tribunal has specific powers to inform itself in particular circumstances, for example, to inquire as to the appropriateness and competence of a particular person to be appointed as a guardian or administrator.[237] In addition to these powers to undertake inquiries, the legislation also imposes a duty on the Tribunal to inquire. The Tribunal must 'ensure, as far as it considers it practicable, it has all the relevant information and material'.[238] It may, for example, request or order a person to provide it with information or material.[239] However, if the Tribunal considers urgent or special circumstances justify it doing so, it may proceed to decide a matter on the information before it without receiving further information.[240] Other powers that permit the Tribunal to receive its own evidence include specific powers to call its own witnesses and to seek particular documents.[241]

16.25 The Tribunal is required when making a decision to be 'satisfied' as to its decision and there is no burden of proof placed on a party by the

---

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

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

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

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

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

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

241 *Guardianship and Administration Act 2000* (Qld) ss 110, 135. In addition to the general power, the Act also refers to powers to seek particular documents or documents in a specific situation: *Guardianship and Administration Act 2000* (Qld) ss 18 (Inquiries about appropriateness and competence), 49 (Keep records), 153 (Records and audit).

Guardianship and Administration Act 2000 (Qld).[242] In the absence of the parties' responsibility to prove a particular case, the Tribunal may need to make further inquiries before it can be 'satisfied' of the particular matters necessary for a decision.[243]

Other matters about Tribunal proceedings

Mediation

16.26 At any stage of the proceedings, the Tribunal may, with the President's approval, refer the parties in a proceeding to mediation.[244] The purpose of a referral is to identify and reduce the issues in dispute between the active parties to a proceeding and to promote the settlement of the issues in dispute.[245]

16.27 The mediation provisions of the *Guardianship and Administration Act 2000* (Qld) will be repealed once QCAT commences operation.[246] The QCAT

---

242 The following provisions of the *Guardianship and Administration Act 2000* (Qld) provide that the Tribunal must be 'satisfied' as to a relevant matter: ss 12(1) (appointing a guardian or an administrator), 13(1) (appointing a guardian or an administrator six months in advance of the adult turning 18), 31(2)–(3) (reviewing the appointment of a guardian or an administrator), 69–73 (making a range of decisions about special health matters such as sterilisations and terminations), 80C(2) (whether sterilisation of a child is in his or her best interests), 80J(3) (reducing time for notice of a hearing in relation to the sterilisation of a child), 109B (making an adult evidence order), 109C (making a closure order), 109D (making a non-publication order), 109E (making a confidentiality order), 112(6) (permitting publication of information about a proceeding), 129(1) (making an interim order), 138A(1)(b) (dismissing an application as frivolous, trivial or vexatious), 149(1) (issuing a warrant for removal of adult), sch 2 s 13(3) (approving clinical research).

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

The *Guardianship and Administration Act 2000* (Qld) does not expressly state the standard of proof to be applied in Tribunal hearings. However, the Tribunal has applied the civil or balance of probabilities standard: *Re HEM* [2005] QGAAT 27. See also *McDonald v Director-General of Social Security* (1984) 1 FCR 354; N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 32.

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

244 *Guardianship and Administration Act 2000* (Qld) ch 7 pt 4A. The National Alternative Dispute Resolution Advisory Council defines 'mediation' as a process in which the participants to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted: National Alternative Dispute Resolution Advisory Council, Dispute Resolution Terms <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADRGlossary_of_ADR_Terms#MM> at 27 October 2009.

245 *Guardianship and Administration Act 2000* (Qld) s 145B. An Australian research study about the effectiveness of mediation in guardianship proceedings has indicated that, in some cases, mediation may be helpful 'to determine if some or all of the differences between the parties can be resolved in a way that best meets the needs of the adult': R Carroll, 'Appointing decision-makers for incapable persons – what scope for mediation?' (2007) 17 *Journal of Judicial Administration* 75, 92. See, for example, *Re WFM* [2006] QGAAT 54; *Re WAE* [2007] QGAAT 72.

246 Section 1462 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals ch 7 pt 4A of the *Guardianship and Administration Act 2000* (Qld). Section 1462 has not yet commenced.

Act contains general mediation provisions which will apply to active parties in guardianship proceedings.[247]

Dismissal of an application

16.28 The Tribunal has power to dismiss an application at any stage of a proceeding if the Tribunal considers the application is frivolous, trivial or vexatious or is satisfied the application is misconceived or lacks substance.[248]

Costs

16.29 Generally, each party in a proceeding is to bear its own costs of the proceeding.[249] However, in exceptional circumstances, including, for example, if the Tribunal considers the application is frivolous or vexatious, the Tribunal may order an applicant to pay both an active party's costs and the Tribunal's costs.[250]

16.30 When QCAT commences operation, a number of additional costs provisions under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) will apply in guardianship proceedings.[251]

Offences and contempt

16.31 The *Guardianship and Administration Act 2000* (Qld) provides for various offences in relation to Tribunal proceedings. For example, the Act makes it an offence for a person, without reasonable excuse, from doing anything that would, if the Tribunal were a court of record, be a contempt of court.[252] It is also an offence, for example, to give a false or misleading document to the Tribunal or to make a false or misleading statement (for

---

247 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 6 div 2 (compulsory conferences), div 3 (mediation). While both sets of provisions are generally similar, there are also some key differences between them. For example, the provisions under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provide that the Tribunal or the Principal Registrar may make a referral to mediation without the need for the President's approval and that, in addition to a Tribunal member, the mediation may be conducted by an Adjudicator, the Principal Registrar, a member of the Tribunal Registry or a mediator under the *Dispute Resolution Centres Act 1990* (Qld): *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 75, 79.

248 *Guardianship and Administration Act 2000* (Qld) s 138A.

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

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

251 Section 1452 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) will insert a new s 127(3) in the *Guardianship and Administration Act 2000* (Qld). Section 127(3) provides that ss 101, 103–109 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) will apply in proceedings under the *Guardianship and Administration Act 2000* (Qld). Those provisions, amongst other things, will empower QCAT, in limited circumstances, to order costs against a party's representative in the interests of justice: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 103.

252 *Guardianship and Administration Act 2000* (Qld) s 143. A maximum penalty of 100 penalty units ($10 000) applies: *Guardianship and Administration Act 2000* (Qld) s 143; *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

example, in documentation supporting an application for a guardianship or an administration order).[253]

Publication of proceedings

16.32 Consistent with the legislative presumption of openness, the *Guardianship and Administration Act 2000* (Qld) permits the publication of information about Tribunal proceedings, provided that the publication does not lead to identification of the adult.[254] However, in limited circumstances, the Tribunal may make a non-publication order which permits the Tribunal to prohibit the publication of information about Tribunal proceedings to the public, or a section of the public.[255] A non-publication order may be made only if the Tribunal is satisfied that it is necessary to avoid serious harm or injustice to a person.

SELECTED ISSUES FOR CONSIDERATION

Making an application

16.33 Section 115(1) of 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 Act or the *Powers of Attorney Act 1998* (Qld).

Procedural requirements for making an application

16.34 An application must be in writing, signed by the applicant and filed with the Tribunal.[256] It must also include the reasons for the application.[257] In order to enable the Tribunal to give notice of the hearing, the application must also include, to the best of the applicant's knowledge, the name and address or contact details for the following people:[258]

- the applicant;

253 *Guardianship and Administration Act 2000* (Qld) ss 140–141. A maximum penalty of 100 penalty units ($10 000) applies: *Guardianship and Administration Act 2000* (Qld) ss 140(1), 141(1); *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

254 *Guardianship and Administration Act 2000* (Qld) s 112(1)–(2).

255 *Guardianship and Administration Act 2000* (Qld) s 109D. Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 109D of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 108 of the *Guardianship and Administration Act 2000* (Qld). Section 1446 has not yet commenced.

256 *Guardianship and Administration Act 2000* (Qld) s 116(1).

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

258 *Guardianship and Administration Act 2000* (Qld) s 116(2)(b)–(c). Note that s 140 of the *Guardianship and Administration Act 2000* (Qld) provides that a person must not state anything to the Tribunal, Registrar or another Tribunal staff member the person knows is false or misleading in a material manner. The maximum penalty is 100 penalty units ($10 000): *Guardianship and Administration Act 2000* (Qld) s 140(1); *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

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

16.35 An application for the appointment of a guardian or an administrator must also include the proposed appointee's written consent.[259]

16.36 Some types of application also require the inclusion of additional information. For example, an application for appointment as guardian or administrator must include the following information:[260]

- details of the matter;
- a detailed description of the adult's alleged impaired capacity for the matter;
- why the appointment is necessary;
- details of any enduring document made by the adult;
- for an application for appointment of a guardian — a summary of the adult's financial position;
- for an application for appointment of an administrator:
  - details of the adult's income, living expenses, assets and liabilities; and
  - details of the current arrangements for management of the adult's financial matters;
- the name, address and telephone number of the proposed guardian or administrator;
- whether the adult has been informed of the application;
- a description of how the person communicates and information about the type of assistance, if any, the adult might need at the hearing; and
- if urgent action is required — an explanation of the urgency.

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

260 *Guardianship and Administration Regulation 2000* (Qld) s 3(1).

16.37 Various types of application must also include information about the adult relevant to the application that is provided by a health provider.[261]

16.38 When the QCAT commences operation, the generic provisions and procedures for making an application under the QCAT Act will apply for the purposes of making an application in a guardianship proceeding.[262]

16.39 The QCAT Act also enables the Principal Registrar of QCAT to accept an application, with or without conditions, or to reject an application.[263] This is similar to the position in the Victorian Civil and Administrative Tribunal.[264]

Who may make an application

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

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

- the adult concerned; or
- unless the Act or the *Powers of Attorney Act 1998* (Qld) states otherwise[265] — another interested person.[266]

---

261 *Guardianship and Administration Regulation 2000* (Qld) ss 3(2) 4(2), 6(2). The minimum standard documentation required by the Tribunal prior to listing certain types of applications for hearing includes 'a report by medical and related health professional/s other than the applicant, or other documentation describing diagnosis and capacity': Guardianship and Administration Tribunal, *Presidential Direction No 2 of 2002*, <http://www.gaat.qld.gov.au/files/2002_-_2_General.pdf> at 27 October 2009. These applications are: an application for the appointment a guardian or an administrator; an application for a declaration regarding an enduring power of attorney; an application for a declaration of capacity; and an application for consent to special health matter.

262 Section 1448 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals ss 116–117 of the *Guardianship and Administration Act 2000* (Qld). Section 1448 has not yet commenced.

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

264 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 71.

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

Interested persons

16.42 An 'interested person' is defined under the *Guardianship and Administration Act 2000* (Qld) as follows:[267]

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

16.43 The definition of 'interested person' under the *Powers of Attorney Act 1998* (Qld) is in virtually the same terms.[268]

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

16.45 The Tribunal has power to decide whether a person is an 'interested person' for another person under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).[269]

16.46 In *Re MAD*,[270] the Tribunal considered whether the applicant had standing as an 'interested person' to bring an application for a declaration of capacity about the adult concerned in the proceeding. The applicant was a solicitor who was acting (under the instructions of a medical defence fund) for two doctors who were the defendants in a personal injuries action in the Supreme Court commenced by the adult. The applicant sought a declaration about the adult's capacity to conduct litigation on his own behalf. The Tribunal held that the applicant did not have a sufficient and continuing interest in the adult because he did not have an 'ongoing concern for the welfare of the adult'.[271]

---

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

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

268 *Powers of Attorney Act 1998* (Qld) sch 3. The Act provides that an '***interested person***, for another person, means a person who has a sufficient and continuing interest in the other person'.

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

270 [2007] QGAAT 56.

271 Ibid.

16.47 Similarly, in *Re EEP*,[272] the Tribunal held that the applicant, who sought the appointment of the Public Trustee as administrator for the adult for the purpose of litigation between the applicant and the adult, was not an 'interested person'. The Tribunal considered that the applicant's interest was limited to the resolution of litigation between the applicant and the adult, and was not 'an interest necessarily connected with the adult's proper care and protection and is not a continuing interest'.

16.48 These decisions would appear to indicate that a critical factor in the test for standing as an 'interested person' under the Act is the person's interest in the *welfare* of the adult.

16.49 The legislation in several other jurisdictions provides for a similar concept to an 'interested person'.[273] For example, in New South Wales, the legislation provides that 'any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person' has standing to make an application.[274] In *Bovaird v Guardianship Tribunal*,[275] the New South Wales Supreme Court identified the following three requirements which must be satisfied in order to prove that a person has a 'genuine concern' for the welfare of the adult concerned in the proceeding:[276]

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

16.50 The Supreme Court also noted that, in relation to the third of these requirements, the applicant must be primarily motivated by the adult's welfare:[277]

---

272 [2005] QGAAT 45, [15]. In that case, the Presiding Member also noted at [15], in respect to the applicant's interest in the adult, that:

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

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

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

275 [2009] NSWSC 452.

276 Ibid [21].

277 Ibid.

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

16.51 A wide range of applications under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) may be made by an interested person.[278] One type of application that is often made by an interested person is an application for an order for the appointment of a guardian or an administrator.[279] In some circumstances, it may be that an application for an appointment order for an adult is made by the adult's service provider; for example, the manager of a residential care facility at which the adult resides.[280] Although the issue of whether a person has standing as an interested person will depend on the circumstances of the particular case, a service provider who provides regular or ongoing services for the adult's welfare would arguably have a sufficient and continuing interest in the adult.

16.52 Although the Commission has not previously sought submissions about the standing of an interested person to make an application under the *Guardianship and Administration Act 2000* (Qld), a number of submissions have addressed this issue.[281] In particular, several submissions have raised concern that, in particular instances, some service providers have acted in their own interests rather than, or in addition to, the adult's interests in making an application for guardianship or administration for an adult.[282] For example, Legal Aid Queensland submitted that the application process has been used by some service providers in order to enforce debts against the adult.[283]

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

---

278 See n 266 above.

279 *Guardianship and Administration Act 2000* (Qld) s 12(3).

280 Note, however, that a paid carer for an adult is ineligible for appointment as a guardian or an administrator for the adult: *Guardianship and Administration Act 2000* (Qld) s 14(1)(a), sch 4 (definition of 'paid carer').

281 Submissions C3, C20, C24, C25, C27A, C51, C65, C114, C132, C141, C148, C150, 41, 45, 63, 71, 93, 94.

282 Submissions C24, C65, C114, 41, 63.

283 Submission 63.

16.53 An issue for consideration is whether the definition of 'interested person' under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) is appropriate or should be changed in some way. It is arguable that the current definition is sufficiently clear on its face. An advantage of retaining the current definition might also be that it is flexible enough to cater for the broad range of circumstances in which it may be appropriate for a person to make an application. On the other hand, it may be desirable to clarify that the definition is focussed on the *welfare* of the adult. Additionally, or alternatively, it might be helpful if the definition contained some additional guidance as to what constitutes a sufficient and continuing interest in the adult. This might include, for example, a requirement that the primary motivation of the person in making the application is the person's interest in the adult's welfare. This approach would be consistent with the focus of the guardianship system on promoting and safeguarding the adult's rights and interests.

16-1 Is the definition of 'interested person' under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) appropriate?

16-2 If no to Question 16-1, should the definition of 'interested person' be amended:

(a) to provide that the person must have a sufficient and continuing interest in the *welfare* of the adult; or

(b) in some other way?

16-3 Additionally, or alternatively, should the definition of 'interested person' under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) provide the following additional guidance as to what constitutes a sufficient and continuing interest in the adult:

(a) a requirement that the primary motivation of the person in making the application must be the person's interest in the adult's welfare; or

(b) some other requirement?

Notification requirements

16.54 One of the requirements of procedural fairness is that a person must be given adequate prior notice of the date, time and location at which the matter

will be heard and also of the nature of the issues that are to be decided.[284] Notice must be sufficiently detailed and given sufficiently early to allow the person 'to make inquiries, to consider his position, and to prepare his response'.[285]

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

16.56 At least seven days before the hearing of an application about a matter, the Tribunal must give notice of the hearing to the adult concerned in the matter and, as far as practicable, to the following people:[286]

- if the adult concerned is not the applicant — the applicant;
- the adult's family members;
- the adult's primary carers;
- all current guardians, administrators and attorneys for the adult;
- the Adult Guardian;
- the Public Trustee;
- for a proceeding under Chapter 5B of the Act:[287]
  - the Chief Executive of the Department in which the *Disability Services Act 2006* (Qld) is administered;
  - a relevant service provider providing disability services to the adult; and
  - if the Tribunal is aware the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000* (Qld) — the Director of Mental Health; and
- anyone else the Tribunal considers should be notified.

16.57 However, the Tribunal is not required to give notice to the adult if:[288]

---

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

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

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

287 Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) deals with the use of restrictive practices for certain adults. See Chapter 7 of this Discussion Paper.

288 *Guardianship and Administration Act 2000* (Qld) s 118(2).

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

16.58 The notice to the adult is to be given in the way the Tribunal considers is the most appropriate having regard to the adult's needs.[289]

16.59 The Tribunal may, by direction, dispense with the requirement to give notice to all or any of the persons, except for the adult, who would otherwise be required to be given notice. It may also reduce the standard notification period.[290]

16.60 The failure to comply with the requirement to give notice to the adult has the effect of invalidating the hearing and the Tribunal's decision about the application.[291]

16.61 When QCAT commences, section 118 will continue to apply in relation to the notification of the hearing of an application made under the *Guardianship and Administration Act 2000* (Qld).[292]

Who should be notified of a hearing

16.62 Although the Commission has not previously sought submissions about the notification requirements for hearings, a number of submissions have raised concerns about the sufficiency of the notification procedures in terms of their efficacy and efficiency.[293] Section 118(1) sets out a comprehensive list of the

---

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

290 *Guardianship and Administration Act 2000* (Qld) s 118(5).

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

292 Section 1449 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) inserts a new s 118(8) in the *Guardianship and Administration Act 2000* (Qld), which provides that s 37 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (which deals with notice of an application) does not apply for the purposes of s 118. Section 1449 has not yet commenced. It would appear that the reference in s 1449 to s 37 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) is a drafting error, and should be a reference to s 92 of that Act (which deals with notice of a hearing).

293 Submissions C10A, C24, C124, C132B, C141, C142, C148, 74, 83, CF13, CF16.

persons who must be notified of the hearing of an application. This list would generally appear to cover people who have, or may have, a genuine interest in the adult, for example family members, carers, formal appointees for the adult and others with a proper interest in the hearing of the application. The Tribunal also has a duty to notify anyone else it considers should be notified of the hearing. An issue for consideration is whether the list of persons in section 118(1) who are required to be notified of an application about an adult is appropriate or should be changed in some way.

16.63 The failure to notify a person other than the adult as required (for example, because the applicant did not include the person's name in the application or because of an administrative or other oversight by the Tribunal) would not affect the validity of the hearing or the Tribunal's decision. In these circumstances, it may be open to the person to apply for a review of the appointment or to seek leave to appeal the decision.[294] It is also an offence under the Act for a person to provide false, misleading or incomplete documents (for example, by deliberately withholding information from the Tribunal about the names of people who may have an interest in the application).[295]

16-4 Is the list of persons in section 118(1) of the *Guardianship and Administration Act 2000* (Qld) about the persons who are required to be notified of an application about an adult under that Act or the *Powers of Attorney Act 1998* (Qld) appropriate or should it be changed in some way?

Notification period

16.64 As noted above, procedural fairness requires that the parties in a proceeding be given adequate prior notice of the date, time and location at which the matter will be heard and also of the nature of the issues that are to be decided.[296]

16.65 Section 118(1) of the *Guardianship and Administration Act 2000* (Qld) currently provides that the Tribunal must give notice of the hearing of an

294 The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) also enables a party to a proceeding, in limited circumstances, to apply for a reopening of the proceeding. These circumstances include that the party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing. The Act contains specific provisions about who may apply to reopen a proceeding, review an appointment or to appeal a Tribunal decision. The mechanisms for the reopening of Tribunal proceedings and the review and appeal of Tribunal decisions are discussed in Chapter 17 of this Discussion Paper.

295 See n 258 above. The application form requires the applicant to make a declaration as to the truth of the information provided in the form and that no information relevant to the application has been omitted. This includes that the applicant has not withheld information from the Tribunal about the names of people who may have an interest in the application. The application form also states that it is an offence to provide false, misleading or incomplete documents to the Tribunal.

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

application to certain people at least seven days before the hearing of the application.[297]

16.66 In the other jurisdictions, the timeframe for giving notice varies. Only three jurisdictions have specific timeframes: the period is at least seven days in the ACT, at least 10 days in Tasmania, and at least 14 days in Western Australia.[298] In New South Wales notice must be given 'as soon as practicable'[299] and, in South Australia, 'reasonable notice' must be given.[300] There is no notification period specified in the Northern Territory or in Victoria.[301]

16.67 Although the Commission has not previously sought submissions about the notification of hearings, several submissions have raised concerns about the sufficiency of the period of notice given prior to the hearing of an application.[302]

16.68 An issue for consideration is whether the current timeframe for notification of the hearing of an application, which generally requires the Tribunal to give notice to specified persons at least seven days before the hearing, is appropriate or should be changed in some way. A relevant matter to consider in this context is that section 108(2) of the Act entitles the active parties in a proceeding to access relevant documents on the Tribunal file before the hearing.[303] That section is supplemented by an administrative arrangement which provides for active parties to access those documents after the receipt of the Notice of Hearing.[304] In relation to the timeframe for the notification of a hearing, it is noted that there may be matters where there are limited issues for consideration and only a small amount of documentation. However, other matters may be more complex. It is important to ensure that the standard notification period for the hearing of an application is adequate to enable active parties to exercise their rights to access and inspect documents on the Tribunal file and to adequately prepare for the hearing.

---

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

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

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

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

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

302 Submissions C10A, C114, C137, 74.

303 Section 108 is set out at [16.113] below.

304 See Presidential Direction No 1 of 2009, which is set out at [16.120] below.

16-5 Is the current timeframe for the notification of the hearing of an application, which requires the Tribunal to give notice to specified persons at least seven days before the hearing, appropriate or should it be changed in some way?

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

16.69 Another issue for consideration is whether the current exception under section 118(2)(a) to the general requirement that notice of the hearing of an application must be given to the adult concerned in a proceeding is appropriate.

16.70 Section 118(2)(a) provides that the Tribunal is not required to give notice of the hearing of an application to the adult concerned if 'the tribunal considers that notice to the adult might be prejudicial to the physical or mental health or wellbeing of the adult'. Given the gravity of the consequences for the adult if he or she is not notified of the hearing, it might be considered that the current test in section 118(2)(a) is too broad. If so, it may be appropriate to substantially narrow the current test in section 118(2)(a), for example, by changing the test to 'the tribunal considers on reasonable grounds that giving notice to the adult would cause serious harm to the adult'. This test would be consistent with the test to be applied under section 157 of the Act by the Tribunal in determining whether to postpone notifying and giving a copy of its decision in a proceeding to a person. If that test is considered too restrictive, another option may be to change the test to 'the tribunal considers on reasonable grounds that giving notice to the adult may cause serious harm to the adult'.

16-6 Is the current test in section 118(2)(a) of the Act, which provides that the Tribunal is not required to give notice of an application to the adult concerned if the Tribunal considers that notice to the adult might be prejudicial to the physical or mental health or wellbeing of the adult, appropriate?

16-7 If no to Question 16-6, should the test be that the Tribunal is not required to give notice of an application to the adult concerned if:

(a) the Tribunal considers on reasonable grounds that giving notice to the adult would cause serious harm to the adult;

(b) the Tribunal considers on reasonable grounds that giving notice to the adult may cause serious harm to the adult; or

(c) some other test?

Parties to proceedings

Active parties

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

- the right to appear in person, or to be represented by a lawyer or an agent (if given leave by the Tribunal to do so), in the proceeding;[305]
- the right to be given a reasonable opportunity to present his or her case and to access documents that are directly relevant to an issue in the proceeding;[306]
- the right to be notified, and given a copy, of a decision in the proceeding;[307]
- the right to request reasons for a decision;[308] and
- the right to apply to the Tribunal for directions about how the active party should implement the Tribunal's recommendation about an action the active party should take in relation to a matter.[309]

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

> **119 Who is an active party**
>
> Each of the following persons is an ***active party*** for a proceeding in relation to an adult—
>
> (a) the adult;
>
> (b) if the adult is not the applicant—the applicant;
>
> (c) if the proceeding is for the appointment or reappointment of a guardian, administrator or attorney for the adult—the person proposed for appointment or reappointment;
>
> (d) any current guardian, administrator or attorney for the adult;

---

305 *Guardianship and Administration Act 2000* (Qld) ss 123, 124.

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

307 *Guardianship and Administration Act 2000* (Qld) s 156.

308 *Guardianship and Administration Act 2000* (Qld) s 156. The Tribunal must give written reasons for its decision to an active party in a limitation order proceeding: s 109I.

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

(e) the adult guardian;

(f) the public trustee;

(g) a person joined as a party to the proceeding by the tribunal.

16.73 Although the list also includes a person who is joined as a party to the proceeding by the Tribunal, there is no specific guidance in the *Guardianship and Administration Act 2000* (Qld) or in its subordinate legislation about the circumstances in which it is appropriate to join a party to a proceeding under the Act. In its 2007 report on confidentiality, the Commission noted that concerns had been raised in some submissions about whether a person, regardless of his or her interest or involvement with an adult, should be able to be joined as an active party to a proceeding before the Tribunal.[310]

16.74 In contrast, section 42 of the QCAT Act provides that QCAT may join a person as a party to a proceeding if the Tribunal considers that:

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

16.75 It would generally appear that, in order to be joined as a party to a proceeding under section 42, a person must have a sufficient interest in the proceeding or its outcome.

16.76 Once QCAT commences operation, section 42 will apply to proceedings in applications made under the *Guardianship and Administration Act 2000* (Qld).

16.77 An issue for consideration is whether the list of persons who are classified as an active party for a proceeding in relation to an adult is appropriate or should be changed in some way.

16-8 Is the list of persons who are classified as an active party for a proceeding in relation to an adult appropriate or should the list be changed in some way?

310 Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [5.238].

The right to appear

16.78 Section 123 of the *Guardianship and Administration Act 2000* (Qld) gives an active party in a proceeding the right to appear in the proceeding. It provides:

> **123 Right of active party to appear**
>
> (1) An active party in a proceeding before the tribunal may appear in person.
>
> (2) If the active party is a corporation, the corporation may appear through an officer of the corporation.[311] (note added)

Legal and other representation

16.79 The *Guardianship and Administration Act 2000* (Qld) provides for the legal or other representation of active parties in Tribunal proceedings. The Act does not provide an automatic right of representation for the parties involved in a proceeding. Instead, the Tribunal has a discretionary power to allow any of the parties to a hearing to be represented by a lawyer or another person. This approach is intended to encourage the parties to appear and speak for themselves in Tribunal proceedings, and to avoid overly legalistic procedures which may cause delay, additional expense and an adversarial atmosphere in proceedings.[312] As an additional safeguard to protect the adult's rights and interests, the Tribunal also has power to appoint a separate representative for the adult.

16.80 Section 124 of the Act enables an active party (including the adult concerned) to be represented by a lawyer or agent, if given leave by the Tribunal.[313] That section provides:

> **124 Representative may be used with tribunal's leave**
>
> (1) An active party may, with the tribunal's leave, be represented by a lawyer or agent.
>
> (2) A person given notice to attend at a hearing to give evidence or produce things may, with the tribunal's leave, be represented by a lawyer or agent.

---

311 Section 1451 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 123(2) of the *Guardianship and Administration Act 2000* (Qld). Section 1451 has not yet commenced.

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

313 The persons who are specified as active parties under the *Guardianship and Administration Act 2000* (Qld) are set out in [16.72] above.

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

> **125 Representative may be appointed**
>
> (1) If, in a proceeding before the tribunal—
>
> (a) the adult concerned in the proceeding is not represented in the proceeding; or
>
> (b) the adult is represented in the proceeding by an agent the president or presiding member considers to be inappropriate to represent the adult's interests;
>
> the president or the presiding member may appoint a representative to represent the adult's views, wishes and interests.
>
> (2) A proceeding may be adjourned to allow the appointment to be made.

16.82 The QCAT Act also contains specific provisions about the representation of parties in Tribunal proceedings.[314] The intent of the QCAT provisions is 'to have parties represent themselves unless the interests of justice require otherwise'.[315]

16.83 The general features of the QCAT provisions are that:[316]

- a party may appear without representation;
- a party may appear with representation if:
  - the party is an adult with impaired capacity; or
  - the party has been given leave by QCAT to be represented;
- in deciding whether to give a party leave to be represented in a proceeding, the Tribunal may consider the following circumstances supporting the giving of leave:
  - the party is a State agency;

---

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

315 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(1).

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

  - the proceeding is likely to involve complex questions of fact or law;
  - another party in a proceeding is represented in a proceeding;
  - all of the parties have agreed to the party being represented in the proceeding;
- a party cannot be represented by a person who:
  - is not an Australian lawyer or a government legal officer, unless the Tribunal is satisfied that the person is an appropriate person to represent the party; or
  - has been disqualified from being a representative; and
- the Tribunal may appoint a person to represent an unrepresented party.

16.84 There are two key differences between the provisions under the QCAT Act and the *Guardianship and Administration Act 2000* (Qld).

16.85 The first difference is that the QCAT Act provides that a person with impaired capacity is entitled to have legal or other representation as of right, while the *Guardianship and Administration Act 2000* (Qld) requires the adult concerned in the proceeding to obtain the leave of the Tribunal to be represented (unless a separate representative is appointed).

16.86 The second difference is that the QCAT Act concerns 'a person with impaired capacity', whereas the Guardianship and Administration Act 2000 (Qld) relates to 'the adult concerned in a proceeding'. The significance of this difference is that the issue of whether the adult has impaired capacity is a threshold issue under the Guardianship and Administration Act 2000 (Qld). When hearing an application, the Tribunal must apply the General Principles, which provide that an adult is presumed to have capacity.[317] The issue of whether an adult has impaired capacity is often the key issue that is in dispute in Tribunal proceedings under the Act.

16.87 The QCAT provisions, like the Guardianship and Administration Act 2000 (Qld), enable a lay person, including an advocate, to represent an active party. The QCAT Act requires that the person must satisfy the Tribunal that he or she is an appropriate person to represent the party and has not been disqualified from being a representative.

317 One of the General Principles under the *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld) states that an adult is presumed to have capacity for a matter: *Guardianship and Administration Act 2000* (Qld) sch 1 s 1; *Powers of Attorney Act 1998* (Qld) sch 1 s 1. The Tribunal is required to apply the principles under the Act, including the presumption of capacity, when it exercises a power for a matter in relation to an adult: *Guardianship and Administration Act 2000* (Qld) s 11(1). See *Bucknall v Guardianship and Administration Tribunal* (No 1) [2009] QSC 128, [43].

16.88 When the QCAT Act commences, sections 124 and 125 of the *Guardianship and Administration Act 2000* (Qld) will be substantially retained. To the extent that there is any inconsistency between the provisions under the *Guardianship and Administration Act 2000* (Qld) and the QCAT Act, the provisions under the *Guardianship and Administration Act 2000* (Qld) will prevail.[318] Arguably this would mean that the adult concerned in a guardianship proceeding would continue to require the leave of the Tribunal to be represented.

The adult's right to representation

16.89 Although the Commission has not previously sought submissions about the representation of the adult concerned in a Tribunal proceeding in relation to an application made under the *Guardianship and Administration Act 2000* (Qld), a number of submissions have raised concerns about the adult's right to legal or other representation in the proceeding.[319]

16.90 An issue for consideration is whether the adult concerned in a Tribunal proceeding in relation to an application made under the *Guardianship and Administration Act 2000* (Qld) should have an entitlement to be represented in the proceeding without the need to be given leave by the Tribunal. The conferral of such a right would be consistent with the application of General Principle 7 of the Act, which requires that 'an adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, … must be recognised and taken into account' and that 'the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life'.[320] It would also be consistent with article 12.3 of the United Nations *Convention* on *the Rights of Persons with Disabilities*, which provides that 'States parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising that capacity'.[321]

16.91 This entitlement would also be consistent the general right of representation given to adults with impaired capacity in other QCAT proceedings.

16.92 The Commission notes that the issue of representation in Tribunal proceedings raises a number of practical considerations in relation to the accessibility of legal representation. These include the affordability of private legal representation and the unavailability of publicly funded legal representation.[322] In this regard, it is relevant to note that it will continue to be

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

319 Submissions C36A, C37A, C38B, C24, 36, 63.

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

321 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006.

322 Legal Aid Queensland, *Grants Handbook*, Civil Law>Guardianship and Administration Tribunal, <http://www.legalaid.qld.gov.au/applications/grantshandbook/> at 29 October 2009.

the case that a person other than a lawyer (for example, an advocate) may represent an adult in Tribunal proceedings.

16-9 Should the adult concerned in a Tribunal proceeding in relation to an application made under the *Guardianship and Administration Act 2000* (Qld) have an entitlement to be represented in the proceeding without the need to be given leave by the Tribunal?

The right of other active parties to representation

16.93 As mentioned above, under the *Guardianship and Administration Act 2000* (Qld), active parties other than the adult concerned in the proceeding are entitled to be represented by a lawyer or agent, if given leave by the Tribunal. As explained above, this reflects the approach that, generally, Tribunal proceedings should be as informal and accessible as possible. There will be no significant change to this approach under the QCAT Act, although that Act gives some guidance to the Tribunal in deciding whether to grant leave to an active party.

16.94 Although the Commission has not previously sought submissions about the representation of active parties other than the adult in a Tribunal proceeding in relation to an application made under the *Guardianship and Administration Act 2000* (Qld), a number of submissions have raised concerns about legal or other representation for these parties in proceedings.[323]

16.95 One concern relates to a perception that some lay persons who are not familiar with, or who are intimidated by, Tribunal proceedings may be at a disadvantage in Tribunal hearings, particularly given that many agencies and service providers have become increasingly familiar with Tribunal processes and hearings.[324] The Guardianship and Administration Reform Drivers ('GARD') has submitted that the Tribunal should ensure that parties are placed on an equal footing in relation to representation so that each party is given an adequate opportunity to articulate his or her interests.[325] A related concern was that the informality of Tribunal proceedings may be compromised if there is a disparity in the representation of the parties.[326] In relation to these particular issues, it is relevant to note that, under the new QCAT provisions, when deciding whether to give a party leave to be represented in a proceeding, the Tribunal may consider, as a factor supporting the giving of leave, the circumstance that another party to the proceeding is represented.

323 Submissions C24, C36A, C37A, C38B, 11B, 20, 63, CF9.

324 Submission C24.

325 Submission C24. GARD is an informal alliance of community-based organisations and is comprised 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.

326 Submission C24, 20, 63.

16.96 An issue to consider is whether the current position that an active party other than the adult concerned in the proceeding may be represented in a Tribunal proceeding, if given leave by the Tribunal, is appropriate.

16-10 Is the current position under section 125 of the *Guardianship and Administration Act 2000* (Qld) that an active party, other than the adult concerned in the proceeding, may be represented in a Tribunal proceeding if given leave by the Tribunal, appropriate?

The appointment of a separate representative

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

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

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

16.99 The New South Wales Guardianship Tribunal may appoint a separate representative for certain persons.[327] It does not set out the separate representative's role in guardianship proceedings. However, Practice Note No 1 of 2009, provides some guidance about the role:[328]

> **Legal Practitioners and Guardianship Tribunal proceedings**
>
> …
>
> **18 Role of a separate representative**
>
> 18.1 The role of a separate representative is different from that of a solicitor acting on instructions. A separate representative's role is to make

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

328 New South Wales Guardianship Tribunal, *Practice Note No 1 of 2009*, Legal Practitioners and Guardianship Tribunal proceedings, <http://www.gt.nsw.gov.au/information/doc_181_gt_practice_note_no_1_2009_final.pdf> at 29 October 2009.

> submissions to the Tribunal about the best interests of a person with a disability as they arise in the matter before the Tribunal.
>
> 18.2 A separate representative should seek out the views and opinions of the person with a disability wherever possible and present these to the Tribunal but they are not limited to conveying only those views. The role of a separate representative is not only to seek and inform the Tribunal of the wishes of the subject person but ultimately to represent the best interests of the person rather than act on instructions.

16.100 18.3 A separate representative may also canvass the views of all others involved in the proceedings and make a submission to the Tribunal, based on all the available information, about what is the best outcome for the person with a disability.

The New South Wales Guardianship Tribunal has published an Information Sheet, which provides additional information about the specific duties associated with the role of the separate representative. In that Information Sheet, the Tribunal notes that:[329]

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

16.101 Although the Commission has not previously sought submissions about the role of the separate representative under the *Guardianship and Administration Act 2000* (Qld), several submissions have suggested that the separate representative for an adult should act as an independent advocate for the adult, similar to the role of an independent children's lawyer in a family law proceeding.[330]

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

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

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

---

329 New South Wales Guardianship Tribunal, 'Information for separate representative', *Information Sheet* (2009), <http://www.gt.nsw.gov.au/information/doc_200_separate_representative_july09.pdf> at 29 October 2009.

330 Submissions C24, 36.

16.104 It has been suggested that the role of the independent children's lawyer is based on a 'beneficence model', which focuses on the care and protection of the child.[331] However, the practical application of the role would appear to involve some element of autonomy. For example, recently developed National Legal Aid guidelines about the role and duties of an independent children's lawyer suggest that the best interests of the child will ordinarily be served by the independent children's lawyer enabling the child to be involved in decision-making about the proceedings.[332]

16.105 Another approach used in the separate representation of children is the 'direct instructions' model, which focuses on the expressed wishes of the child.[333] Under this model, depending on the child's age and level of maturity, children who are able to give instructions generally are represented on the basis of those instructions.[334]

16.106 In the New South Wales Children's Court, the child's legal representative is required to act as either an 'independent legal representative' (reflecting a beneficence approach) or a 'direct legal representative' (reflecting an autonomous approach), depending on the child's age or level of disability.[335]

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

16.108 This raises the question of whether the role of the separate representative in section 125 of the *Guardianship and Administration Act 2000* (Qld) needs to be clarified in any way. Section 125 requires that an adult's separate representative be appointed to represent the adult's views and wishes as well as the adult's interests. However, at times, what is in the adult's interests may conflict with the adult's expressed views and wishes. Section 125 does not give any guidance about how such a conflict should be resolved; nor

---

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

332 National Legal Aid, *Guidelines for Independent Children's Lawyers* (2007), <http://www.nla.aust.net.au/res/File/PDFs/ICL%20guidelines-6-12-07.pdf> at 29 October 2009.

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

334 Ibid.

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

does it indicate the steps the separate representative should take if he or she considers that the adult is capable of giving instructions.

16.109 It might be desirable to clarify the role and duties of the separate representative for an adult either in the *Guardianship and Administration Act 2000* (Qld) or the QCAT Act (as the case may be), or by way of subordinate legislation. An alternative or additional approach might be for the Tribunal to develop comprehensive administrative guidelines to assist separate representatives in their role.

16.110 It is noted that a practical consideration in relation to the appointment of a separate representative for an adult, who is the subject of a guardianship proceeding, is the lack of public funding available in relation to the appointment.[336] Although the Tribunal has power to appoint a separate representative for an adult concerned in such a proceeding, there is no legal aid funding available in relation to appointment of a separate representative for the adult, as there is with children with an intellectual impairment in relation to applications under Chapter 5A of the *Guardianship and Administration Act 2000* (Qld) or in the family law or child protection jurisdictions.[337]

16-11 Does the role of a separate representative appointed under section 125 of the *Guardianship and Administration Act 2000* (Qld) need to be clarified in any way?

16-12 If yes to Question 16-11, what should the role of the separate representative entail?

The right to obtain copies of documents under section 108(2)

16.111 One of the requirements of procedural fairness is that the parties to a proceeding must be given an adequate opportunity to present their case. The parties must be given adequate disclosure of the evidence upon which the decision-maker proposes to base its decision.[338] That is, the person should be given an opportunity to 'deal with adverse information that is credible, relevant

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

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

337 Legal Aid Queensland, *Grants Handbook*, Civil Law, Guardianship and Administration Tribunal, <http://www.legalaid.qld.gov.au/applications/grantshandbook/> at 29 October 2009.

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

and significant to the decision to be made.'[339] This means that, for example, the person should be apprised of the substance of any documentary evidence[340] and of any oral evidence that is received,[341] and given an opportunity to respond to it.

16.112 Section 108 of the *Guardianship and Administration Act 2000* (Qld) requires GAAT 'to observe the rules of procedural fairness'.[342] It also creates a statutory right for various people to access and inspect documents filed in the Tribunal in relation to a proceeding.[343]

16.113 Section 108 of the *Guardianship and Administration Act 2000* (Qld) provides:

> **108 Procedural fairness and access**
>
> (1) The tribunal must observe the rules of procedural fairness.[344]
>
> (2) Each active party in a proceeding must be given a reasonable opportunity to present the active party's case and, in particular—
>
> (a) to access, before the start of a hearing, a document before the tribunal that the tribunal considers is relevant to an issue in the proceeding; and

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

340 This includes documentary evidence held by other parties to the proceedings, not just documents held by the decision-maker. However, procedural fairness may not necessarily require that the person be given a copy of the document itself as it may be sufficient that the substance of the information is brought to the person's attention. See J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122, 123, 128-9, citing *R v Gaming Board for Great Britain; Ex parte Benaim and Khaida* [1970] 2 QB 417, 413; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 197, 205, 223; *Gilson v Minister for Immigration and Multicultural Affairs* (Unreported, Federal Court of Australia, Lehane J, 21 July 1997) 8-9; *Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 103 FCR 539, 557; and *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 741, 748-749 (which was subsequently appealed to the High Court: *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88). See also JRS Forbes, *Justice in Tribunals* (2nd ed, 2002) [12.31]. Compare, however, in the guardianship context, *Moore v Guardianship and Administration Board* [1990] VR 902, 912 (Gobbo J), where it was held that the nature of the document required that it actually be produced, preferably before the hearing.

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

342 See, for a discussion of principles determining the operation of the hearing rule in the guardianship jurisdiction, *GM v Guardianship Tribunal* [2003] NSWADTAP 59.

343 In addition to active parties' general right of inspection, section 134(2) of the *Guardianship and Administration Act 2000* (Qld) provides a right to see reports prepared by Tribunal staff that are received in evidence in a proceeding. It specifies that the adult and each other active party in the proceeding must be advised of the contents of the report and, upon request, be given a copy of it. Section 134(3) provides, however, that the Tribunal may, in a confidentiality order, displace the right to receive a copy of the report.

344 Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 108(1) of the *Guardianship and Administration Act 2000* (Qld). However, s 28(3)(a) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides that, in conducting a proceeding, the Tribunal must observe the rules of natural justice. Section 1446 has not yet commenced.

> (b) to access, during a hearing, a document or other information before the tribunal that the tribunal considers is credible, relevant and significant to an issue in the proceeding; and
>
> (c) to make submissions about a document or other information accessed under this subsection.
>
> (3) Each active party in a proceeding, or person the tribunal considers has a sufficient interest in the proceeding, must be given a reasonable opportunity to access, within a reasonable time after a hearing, a document before the tribunal that the tribunal considered credible, relevant and significant to an issue in the proceeding.
>
> (4) For subsections (2) and (3), something is relevant only if it is directly relevant.
>
> (5) On request, the tribunal must give access to a document or other information in accordance with this section.
>
> (6) The tribunal may displace the right to access a document or other information only by a confidentiality order.
>
> (7) To remove any doubt, it is declared that the right to access a document or other information is not affected by an adult evidence order, a closure order or a non-publication order. (note added)

16.114 Section 108(2) generally provides that the Tribunal must give each active party[345] in a proceeding a reasonable opportunity to present his or her case. In particular, an active party is entitled:

- prior to the hearing — to access and inspect a document in the Tribunal files that the Tribunal considers is relevant to an issue in the proceeding;
- during the hearing — to access and inspect any document or other information before the Tribunal that the Tribunal considers is credible, relevant and significant to an issue in the proceeding; and
- to make submissions about a document or other information to which he or she has been given access.

16.115 Section 108(3) provides that, within a reasonable time after a hearing, the Tribunal must also give each active party, or person who the Tribunal considers has a sufficient interest in the proceeding, a reasonable opportunity to access any document before the Tribunal that the Tribunal considered credible, relevant and significant to an issue in the proceeding.

16.116 The statutory right to access and inspect documents under section 108 is subject to a limitation. Section 108(6) provides that the Tribunal may displace the right to access and inspect a document or other information by a

345 *Guardianship and Administration Act 2000* (Qld) s 119 sets out who is an active party for a proceeding. See [16.72] above.

confidentiality order.[346] Such an order, which permits the Tribunal to withhold a document or information from an active party or another person, may be made only if the Tribunal is satisfied that it is necessary to avoid serious harm or injustice to a person.[347]

16.117 Section 108 was amended in 2008[348] in accordance with the Commission's recommendations, made in its 2007 report on confidentiality, in relation to the right of active parties to access and inspect documents in Tribunal files.[349] Because the Commission's recommendations in that report dealt only with the confidentiality provisions under the guardianship legislation, the Commission made no specific recommendation in the report about whether the *Guardianship and Administration Act 2000* (Qld) should provide a statutory right of post-hearing access but indicated that it would revisit the issue in this stage of the review.[350] The Commission also recommended that the Tribunal should develop an administrative access policy to provide an administrative mechanism for post-hearing access to documents by active parties. It also indicated that it would consider the issue of whether the right to inspect documents conferred on the active parties before or during a proceeding should include a right to copy the documents.

16.118 Section 108(3), which deals with post-hearing access to documents, was inserted in the *Guardianship and Administration Act 2000* (Qld) when section 108 was amended in 2008. In light of the enactment of this new subsection, the Commission does not propose to examine the issue of whether the Act should provide a statutory right of post-hearing access.

16.119 Presidential Direction No 1 of 2009, which was published in January 2009, implements an administrative access policy for documents in Tribunal proceedings. The Presidential Direction summarises the position under section 108 for access by active parties and persons with a sufficient interest in the Tribunal proceeding to documents filed in the Tribunal. It also outlines the practical arrangements for access to documents before, during and after hearings.

16.120 Presidential Direction No 1 of 2009 provides:

---

346 *Guardianship and Administration Act 2000* (Qld) s 108(6). Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 108 of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 103 of the *Guardianship and Administration Act 2000* (Qld). Section 1446 has not yet commenced.

347 *Guardianship and Administration Act 2000* (Qld) s 109E. Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 109E of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 109 of the *Guardianship and Administration Act 2000* (Qld). Section 1446 has not yet commenced.

348 *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld) s 10.

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

350 Ibid [8.506]–[8.511], [8.514]–[8.519].

1. Introduction

The provisions about access to information in the *Guardianship and Administration Act 2000* (the Act) seek to achieve an appropriate balance between the principles of protecting the privacy of persons affected by the guardianship system and the promotion of accountability and transparency in decision-making within the guardianship system. The Act contains a legislative presumption of openness permitting publication of information about Tribunal proceedings, provided the publication does not lead to identification of the adult.

The aim of this Direction is to provide information to parties and other persons with a sufficient interest in the proceedings as to the general procedures the Tribunal has adopted in satisfying the competing principles of protection for individuals and of openness and accountability for parties and the public.

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

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

Active parties in a proceeding have the right to access documents and information in the Tribunal files before, during and after a hearing — section 108(2) and (3) of the Act.

In addition a person who the Tribunal considers has a sufficient interest in the proceeding can access the Tribunal files after a hearing — section 108(3) of the Act

3. Preservation of Privacy by section 112 and General Principle 11

Generally, information about a guardianship proceeding may be published. However, it is an offence under subsection 112(2) of the Act for anyone to publish information about a guardianship proceeding if the information is likely to lead to the identification of the relevant adult by a member of the public, or by a member of the section of the public to whom the information is published.

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

4. Procedural Fairness required by section 108

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

5. Confidentiality Order made under section 109E

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

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

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

The principles in section 108 of the Act contain the guidelines for the inspection of documents which have been lodged with the Tribunal Registry.

7. Prior to Hearing — *Active Parties Only*

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

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

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

8. Practical Arrangements Relating to Inspection and Access

<u>Pre-hearing</u> — Active parties only

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

(b) *Place of Inspection*: File inspections will generally occur in two locations:

(i) at the registry for Brisbane hearings; or
(ii) at the venue of the hearing for regional matters.

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

> **At the Hearing — Active parties only**
>
> An active party has the right to inspect at the hearing a document or other information before the Tribunal that the Tribunal considers is credible, directly relevant and significant to an issue in the proceeding unless a confidentiality order prohibiting or restricting access to the document or information has been made.
>
> In cases where a confidentiality order has been made prior to the hearing, the confidentiality order is automatically vacated at the start of the hearing. If the prohibition or restriction about access is sought to be continued after the hearing commences, the party or entity who had requested the confidentiality order will be required to re-apply at the hearing and all active parties and any entity affected by the proposed order will be heard on the application.
>
> **After the Hearing**
>
> Section 108(3) of the Act provides that each active party in a proceeding, or a person the Tribunal considers has a sufficient interest in the proceeding, must be given a reasonable opportunity to access within a reasonable time after the hearing, a document that the Tribunal considers credible, relevant and significant to an issue in the proceeding.
>
> Written requests for access to documents, after a hearing, should be made to the Registrar.

16.121 Paragraph 7 of the Presidential Direction sets out the circumstances in which, prior to a Tribunal hearing, the Registrar or a Tribunal member may permit an active party, or the active party's representative, to obtain a copy of a document on the Tribunal file.

16.122 When QCAT commences operation, the current Presidential Direction will no longer be in force.[351] However, the QCAT Act permits the Governor in Council to make rules for the practices and procedures of the Tribunal, including the disclosure and inspection of documents.[352] Those rules have not yet been made.

16.123 An issue for consideration is whether the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the right of active parties to access and inspect a document under section 108(2) includes a right to obtain a copy of the document. An alternative approach might be for the right to obtain a copy of a document to be conferred under the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld). Either of these options,

---

351 Section 226(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides that the President of QCAT may make Practice Directions for the Tribunal about the practices and procedures of the Tribunal not provided for, or not sufficiently provided for, in that Act, an enabling Act or the Rules. Section 226(2) expressly provides that a Practice Direction is not subordinate legislation.

352 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 224, sch 2. The subject matter for the rules includes the disclosure and inspection of documents: sch 2, s 12.

which reflect the approach currently taken in Presidential Direction No 1 of 2009, would create a statutory right to obtain a copy of a document.[353]

16.124 If the Act or the Rules specified that the right of an active party to access and inspect a document under section 108(2) includes a right to obtain a copy of the document, a related issue is whether the right to obtain a copy of the document should be subject to the Tribunal's discretion. Paragraph 7 of Presidential Direction No 1 of 2009 provides that the Registrar or a member of the Tribunal may permit an active party or their representative, after they have inspected the file, to obtain copies of documents available for inspection 'where this is necessary for an active party to adequately prepare for the hearing'. The Commission understands that the Tribunal's current practice is to give a person who is an active party, or the representative of an active party, at the person's request, a copy of any document that satisfies the criteria for inspection, unless the document is subject to a confidentiality order.[354]

16-13 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the right of an active party to access and inspect a document under section 108(2) includes a right to obtain a copy of the document?

16-14 Alternatively, should the right of an active party to obtain copies of documents under section 108(2) be provided for in the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld)?

16-15 If the Act or Rules were to provide that the right of an active party to access and inspect a document under section 108(2) of the *Guardianship and Administration Act 2000* (Qld) includes a right to obtain a copy of the document, should the right to obtain a copy of the document be subject to the Tribunal's discretion?

Special witness provisions

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

353 When the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) are made, they will fall within the definition of 'statutory rule' under the *Statutory Instruments Act 1992* (Qld): *Statutory Instruments Act 1992* (Qld) s 9 (Meaning of *subordinate legislation*).

354 Information provided to the Commission by the A/Registrar, Guardianship and Administration Tribunal 8 October 2009.

99 Dealing with special witnesses

(1) This section applies in relation to a special witness giving evidence at a hearing of a proceeding.

(2) The tribunal may make any of the following orders—

(a) that only particular persons may be present when the special witness gives evidence;

(b) that only particular persons may ask questions of the special witness;

(c) that the questioning of the special witness must be restricted to a stated time limit;

(d) that a particular person must be obscured from the view of the special witness while the special witness is giving evidence;

(e) that a particular person must be excluded from the place where the hearing is held while the special witness is giving evidence;

(f) that the special witness must give evidence in a place other than where the hearing is held and in the presence of only stated persons or with stated persons being excluded from the room;

(g) that a person, including, for example, a support person under section 91, must be present while the special witness is giving evidence to give emotional support to the special witness;

(h) that an audiovisual record of the evidence given by the special witness be made and that the record be viewed and heard at the hearing instead of the special witness giving direct testimony at the hearing.

(3) The tribunal may make an order under subsection (2) on the application of a party to the proceeding or on its own initiative.

(4) In this section—

relevant matter, for a person, means—

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

(b) the person's relationship to a party to the proceeding; or

(c) the nature of the subject matter of the evidence; or

(d) another matter the tribunal considers relevant.

special witness means a witness who is—

(a) a child; or

> (b) another person who the tribunal considers would be likely, if the person were required to give evidence according to the tribunal's usual practices and procedures, to—
>
> (i) be disadvantaged as a witness because of the person's mental, intellectual or physical impairment or a relevant matter; or
>
> (ii) suffer severe emotional trauma; or
>
> (iii) be so intimidated as to be disadvantaged as a witness.

16.126 Section 99 of the QCAT Act confers on QCAT discretionary powers to make various orders to facilitate the giving of evidence by vulnerable witnesses, including closing the court, allowing the presence of an approved support person when the witness gives evidence or directing that the evidence be given by way of video recording. These provisions are similar to the special witness provisions in section 21A of the *Evidence Act 1977* (Qld).

16.127 Section 99 of the QCAT Act is expressed not to apply to 'proceedings under Chapter 7 of the *Guardianship and Administration Act 2000* (Qld)'.[355] This is intended to clarify that, when QCAT is exercising its jurisdiction in such proceedings, the Tribunal may exercise its power to close a hearing or to exclude particular people from a hearing only under the relevant provisions of the *Guardianship and Administration Act 2000* (Qld).[356] In this regard, the *Guardianship and Administration Act 2000* (Qld) provides that, in certain circumstances, the Tribunal may make an adult evidence order (which permits the Tribunal to speak with the adult in the absence of others) or a closure order (which permits the Tribunal to close a hearing or part of a hearing to all or some members of the public, or to exclude a particular person, including an active party, from a hearing or part of a hearing).[357]

16.128 However, another consequence of providing that section 99 of the QCAT Act does not apply in proceedings under Chapter 7 of the *Guardianship and Administration Act 2000* (Qld) is that the Tribunal would have no power under that section to make other types of orders that may assist a vulnerable witness during a hearing, for example, to have a support person present.

16.129 In its 2007 report on confidentiality, the Commission noted strong support from submissions for the Tribunal to use mechanisms, such as those

---

355 *Guardianship and Administration Act 2000* (Qld) s 101(c), as amended by s 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld). Section 1446 has not yet commenced.

356 Explanatory Notes, Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Bill 2009 (Qld) 281.

357 Section 109B of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to make an adult evidence order. Section 109C of the Act empowers the Tribunal to make a closure order. These types of orders may be made only if the Tribunal is satisfied that it is necessary to avoid serious harm or injustice to a person: ss 109B(1), 109C(1). An adult evidence order can also be made if it is necessary to obtain relevant information the Tribunal would not otherwise receive: s 109B(1).

provided for special witnesses in the courts, to enhance 'the comfort of adults during proceedings and at the same time ensure parties are accorded procedural fairness'.[358] In light of those submissions, the Commission encouraged the Tribunal to 'utilise such mechanisms, where available, to assist an adult or another vulnerable witnesses during a hearing'. It also encouraged the Tribunal to adopt an approach that facilitates an active party's ability to participate in hearings as much as possible and, where feasible, to use the least restrictive method for managing issues that arise during a hearing.[359] By way of example, the Commission suggested that, before making a closure order to exclude an active party, the Tribunal should consider whether, given the reasons for making the closure order, it is possible and appropriate for that party to view what occurs in his or her absence via video link.[360]

16.130 An issue to consider is whether the special witness provisions under section 99 of the QCAT Act, to the extent they do not conflict with QCAT's power to make a closure order or an adult evidence order under the *Guardianship and Administration Act 2000* (Qld), should expressly apply to proceedings under Chapter 7 of the *Guardianship and Administration Act 2000* (Qld).

16-16 Should the special witness provisions under section 99 of the QCAT Act, to the extent they do not conflict with QCAT's power to make a closure order or an adult evidence order under the *Guardianship and Administration Act 2000* (Qld), expressly apply to proceedings under Chapter 7 of the *Guardianship and Administration Act 2000* (Qld)?

Decisions and reasons

16.131 The provision of reasons for a decision is an integral part of ensuring transparent and accountable decision-making by the Tribunal. The obligation to give reasons has been described as a normal incident of the judicial process[361]

358 Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [4.206].

359 Ibid [4.207]–[4.208].

360 Ibid [4.208].

361 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ); Justice MD Kirby, 'Ex Tempore Judgments' (1995) 25 *Western Australian Law Review* 213, 220.

and as being 'of the essence of the administration of justice'.[362] It is well recognised that there are many benefits in requiring reasons for decisions.[363] These include:

- contributing to the quality of Tribunal decisions by demanding that the Tribunal focus on all the relevant issues which must be considered before a determination can be made;
- providing guidelines for Tribunal members in the determination of future applications, thereby contributing to the consistency of Tribunal decisions;
- promoting the accountability of the Tribunal and enhancing its public acceptance;
- helping decision-makers understand their role; and
- assisting in the review process by explaining why an order was made and the expectations of the Tribunal at the time of the making of the order.

16.132 Sections 156, 158 and 158A of the *Guardianship and Administration Act 2000* (Qld) create a statutory right, in specified circumstances, for particular people involved in a proceeding to receive a copy of the Tribunal's decision and reasons.[364]

16.133 Section 156 generally provides that, as soon as practicable after making its decision, the Tribunal must notify and give a copy of its decision to the adult concerned, any other active party in the proceeding, any other person given notice of the hearing of the application and any other person who

---

362 Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [19.3], citing H Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 494. There is not, however, an absolute rule that a judge must give reasons for decisions. The statement of Gibbs CJ quoted above included the qualification that the provision of reasons is a normal 'but not a universal' incident of the judicial process: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667. The limited exceptions include situations such as the making of procedural decisions where the reasons are clear because of the context or the foregoing exchanges between the parties: Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [19.3], citing Justice MD Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 694. See also *Perkins v County Court of Victoria* (2000) 2 VR 246, 272 (Buchanan JA); *Brittingham v Williams* [1932] VLR 237, 239.

363 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 264–5; Queensland Law Reform Commission, *A New Approach to Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP No 60 (2006) vol 1, [6.41]–[6.49] See also Administrative Review Council, *Commentary on the practical guidelines for preparing statements of reasons*, (2000) 2; Hon RG Atkinson, Judgment Writing (Paper delivered at the Magistrates Conference, Gold Coast, 21 March 2002).

364 This statutory right was conferred in s 156 to implement the Commission's recommendation, made in its 2007 report on confidentiality, that the Tribunal's power to withhold from active parties to a proceeding a decision and the reasons for it be removed: Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [6.86], [6.89].

requests a copy.[365] Unless the Tribunal gives a person a copy of each of its reasons and decision at the same time, when the Tribunal gives a person a copy of a decision, it must also give the person a notice that, if the person is aggrieved by the decision, he or she may obtain written reasons for the decision by making a written request to the Tribunal within 28 days after the person is given the notice.[366]

16.134 Section 158 imposes a duty on the Tribunal to provide written reasons in two circumstances. Firstly, if directed by the President of the Tribunal to give written reasons for a decision, the Tribunal must give the reasons within 28 days of the day the decision was made or the direction was given. Secondly, if a person aggrieved by a decision gives the Tribunal written notice under section 156, the Tribunal must give written reasons for the decision within 28 days of receiving the request.

16.135 Section 158A applies if the Tribunal gives written reasons for a decision. That section requires the Tribunal to give a copy of the reasons to each adult concerned, any other active party in the proceeding and any other person who requests a copy of the reasons.

16.136 In limited circumstances, the Tribunal may postpone notifying and giving a copy of its decision to a person for up to 14 days.[367] This may be done only if it is necessary to avoid serious harm or the effect of the decision being defeated.[368]

16.137 Special provisions about making and notifying decisions and giving written reasons apply to limitation orders.[369] The Tribunal must give its decision as soon as practicable after the hearing to the adult, each other active party, every entity heard in the proceeding, the Public Advocate and anyone else who

---

365 *Guardianship and Administration Act 2000* (Qld) s 156(3), (8). Section 156 does not apply to in relation to the making of a limitation order: *Guardianship and Administration Act 2000* (Qld) s 156(1). For the purposes of giving a copy of its decision to a person (other than the adult, another active party or a person notified of the hearing of the application) who requests the copy, it is sufficient if the Tribunal gives the copy in a form that does not contravene s 112 of the *Guardianship and Administration Act 2000* (Qld): 156(5). Section 112 provides that, subject to certain exceptions, a person, without reasonable excuse, must not publish information about a guardianship proceeding to the public or a section of the public if the publication is likely to lead to the identification of the relevant adult by a member of the public. Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 112 of the *Guardianship and Administration Act 2000* (Qld) and replaces it with a new s 114 of the *Guardianship and Administration Act 2000* (Qld). Section 1446 has not yet commenced.

366 *Guardianship and Administration Act 2000* (Qld) s 156(6)–(7).

367 *Guardianship and Administration Act 2000* (Qld) s 157(1)–(4). A postponement order may be renewed but only if the Tribunal is satisfied that there are exceptional circumstances justifying the renewal: s 157(5). Section 157 implements the Commission's recommendation, made in its 2007 report on confidentiality, that that the Tribunal may delay notification of a decision for a period up to 14 days to avoid serious harm to a person or the effect of the Tribunal's decision being defeated: Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [6.123]–[6.125].

368 *Guardianship and Administration Act 2000* (Qld) s 157(2).

369 *Guardianship and Administration Act 2000* (Qld) ss 109H, 109I. Sections 109H and109I will be repealed and replaced by new sections 112 and 113 respectively: *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1446. Section 1446 has not yet commenced.

requests a copy.[370] The Public Advocate must be given all the information considered by the Tribunal in making the limitation order.[371] The Tribunal must also give written reasons for its decision to make a limitation order (other than an adult evidence order), and may give reasons for its decision to make an adult evidence order.[372] The same people to whom a copy of the decision is to be given must also be given a copy of the reasons for the decision within 28 days of the decision being made.[373]

16.138 Once QCAT commences, section 156 of the *Guardianship and Administration Act 2000* (Qld) will continue to require the Tribunal to notify and give a copy of the decision to particular persons. However, section 156 will be amended to provide that requests for written reasons will be dealt with under the QCAT Act.[374]

16.139 The QCAT Act includes the following general provisions about giving decision and reasons in QCAT proceedings:

- QCAT must give its decision in a proceeding, including its final decision, within a reasonable time;[375]
- final decisions (that is, the decision that finally decides the matters the subject of the proceeding) must be given in writing to stated persons, and the reasons for final decisions must be given either orally or in writing;[376]
- if the Tribunal makes a final or preliminary decision but does not give written reasons for the decision, written reasons may be requested;[377]

---

370 *Guardianship and Administration Act 2000* (Qld) s 109H(1)–(3).

371 *Guardianship and Administration Act 2000* (Qld) ss 109H(5).

372 *Guardianship and Administration Act 2000* (Qld) ss 109I(1)–(4).

373 *Guardianship and Administration Act 2000* (Qld) s 109I. Section 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 109I of the *Guardianship and Administration Act 2000* (Qld), and replaces it with a new s 113. Section 1446 has not yet commenced. Section 113(3) provides that the Tribunal must provide a copy of its written reasons for decision within 45 days after making the decision.

374 See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122. Sections 119–123 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) set out the general requirements for giving decisions and written reasons in QCAT proceedings, including in relation to an application made under the *Guardianship and Administration Act 2000* (Qld).

375 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 119, 121(1). Section 1464 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) repeals s 156(2) of the *Guardianship and Administration Act 2000* (Qld), which provides that the Tribunal must make its decision on a matter involved in a proceeding within a reasonable time after the matter is heard. Section 1464 has not yet commenced. Section 119 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) has a similar effect to s 156(2) of the *Guardianship and Administration Act 2000* (Qld).

376 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 121(1), (4). However, s 121 does not apply to limitation orders: *Guardianship and Administration Act 2000* (Qld) s 113(6), as amended by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1446. Section 1446 has not yet commenced.

377 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122(1)–(2).

- a request for written reasons must be made within 14 days after the decision takes effect, and the Tribunal must comply with the request within 45 days after the request is made or, if the President extends the period, the extended period;[378] and

- for a decision or reasons required to be given in writing, it is enough for the Tribunal to give the person a written transcript or an audio recording of the part of the proceeding in which the decision is, or the reasons are, given orally.[379]

16.140 Neither section 156 of the *Guardianship and Administration Act 2000* (Qld), as amended, nor the QCAT provisions dealing with requests for written reasons apply to limitation orders made in guardianship proceedings.[380]

Availability of written reasons for decision

16.141 In its 2007 report on confidentiality, the Commission indicated that it would examine, in this stage of the review, whether the Act should require the Tribunal to produce written reasons for all of its decisions rather than parties to a hearing having to make a request for written reasons, as is currently the case under section 156 of the *Guardianship and Administration Act 2000* (Qld).[381]

16.142 However, the Commission considers that this issue will be largely addressed by the new mechanism under the QCAT regime that enables parties to a hearing to receive the transcript or audio recording of the reasons for decision and the requirement that the reasons for final decisions must be given either orally or in writing. Therefore, the Commission does not propose in this stage of the review to examine the issue of whether written reasons should be produced for all decisions in guardianship proceedings.

16.143 An important and related issue for consideration is how to ensure that the reasons provided to parties — whether in the form of formal written reasons, or in the form of a transcript or audio recording — are sufficient to satisfy what is necessary to produce adequate reasons.

What the reasons for decision should contain

16.144 As noted above, the QCAT Act provides that, if QCAT makes a decision in a proceeding but does not give written reasons for the decision, a party to the proceeding may request written reasons. The Act also provides that, in satisfying such a request, it is enough for the Tribunal to give the person

---

378 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122(2)–(3).

379 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 123.

380 *Guardianship and Administration Act 2000* (Qld) s 113(6), as amended by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1446. Section 1446 has not yet commenced.

381 Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [6.129].

a transcript, or audio recording, of part of the proceeding in which the decision is, or reasons are, given orally.[382]

16.145 One advantage of this approach, particularly in a busy jurisdiction such as the guardianship jurisdiction, is that it is a convenient and efficient way of providing to the parties an official record of the reasons for decision articulated by the Tribunal at the hearing.

16.146 On the other hand, given that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) are reasonably complex pieces of legislation, which often involve the application of various related provisions (including an extensive number of legal definitions), it is arguable that particular care needs to be taken to ensure that the transcripts or audio recordings are in each case sufficient to satisfy the requirements of adequate reasons. It has been suggested that the production of adequate reasons requires that 'the parties should be able to see what matters the decision-making body has taken into account and what view it has reached on the points of fact and law which arise'.[383]

16.147 The content of a general statutory duty to provide reasons is governed by section 27B of the *Acts Interpretation Act 1954* (Qld). Where legislation simply states that the decision-maker is required to give reasons for a decision, as is the case under the current *Guardianship and Administration Act 2000* (Qld) and the QCAT Act, section 27B extends that obligation and requires that the reasons refer to the evidence, set out the material findings of fact and state the reasons for the decision. It provides:

> **27B Content of statement of reasons for decision**
>
> If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision, the instrument giving the reasons must also—
>
> (a) set out the findings on material questions of fact; and
>
> (b) refer to the evidence or other material on which those findings were based.

16.148 The ACT has a similar legislative provision.[384] In addition, section 60 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) generally requires the Tribunal to include certain other information in its written reasons for decision, namely any principles of law relied on by the Tribunal and the way in which the Tribunal applied the principles of law to the facts. That section provides:

---

382 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 123.

383 JS Forbes, *Justice in Tribunals* (2nd ed, 2002) [13.21], citing *Iveagh (Earl of) v Minister for Housing and Local Government* [1964] 1 QB 395, 410.

384 *Legislation Act 2001* (ACT) s 179. That section is in similar terms to s 27B of the *Acts Interpretation Act 1954* (Qld).

60 Statement of reasons

(1) This section applies if—

(a) the tribunal makes an order on an application; and

(b) within 14 days after the day the order is made, a party asks for a statement of reasons for the making of the order.

(2) The tribunal must give the party a written statement of reasons for the making of the order.

(3) The statement of reasons must set out—

(a) any principles of law relied on by the tribunal; and

(b) the way in which the tribunal applied the principles of law to the facts.

Note The *Legislation Act*, s 179 deals with what other information must be included in a statement of reasons.

(4) This section does not apply to an order under section 53 (Interim orders).

Note The rules may prescribe a longer period for asking for a statement of reasons (see s 25 (1) (e) and (2)).

16.149 An issue to consider is whether the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the written reasons for a decision made in a proceeding in relation to an application made under the Act, must set out any principles of law provided by the Tribunal and the way in which the Tribunal applied the principles of law to the facts. An alternative option may be for these matters to be included in the QCAT Rules or provided for in a Practice Direction.

16-17 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the written reasons for a decision, made in a proceeding in relation to an application made under the *Guardianship and Administration Act 2000* (Qld), must set out any principles of law provided by the Tribunal and the way in which the Tribunal applied the principles of law to the facts?

16-18 Alternatively, should these matters be included in the QCAT Rules or provided for in a Practice Direction?

The timeframe for requesting written reasons

16.150 In its 2007 report on confidentiality, the Commission also indicated that it would examine in this stage of the review whether the timeframe of 28 days for requesting written reasons for a decision of the Tribunal (as is currently the

case under section 156 of the *Guardianship and Administration Act 2000* (Qld)) is sufficient.[385]

16.151 As noted above, under the new QCAT procedures, if the Tribunal makes a final or preliminary decision but does not give written reasons for the decision, written reasons may be requested.[386] The request must be made within 14 days after the decision takes effect, and the Tribunal must comply with the request within 45 days after the request is made or, if the President extends the period, the extended period.[387] These provisions apply generally to QCAT proceedings, including proceedings on applications made under the *Guardianship and Administration Act 2000* (Qld).

16.152 The new QCAT procedures will therefore reduce the period of time for requesting written reasons in guardianship proceedings from 28 days to 14 days. This is a significant reduction in the current timeframe. Depending on the circumstances, a shorter timeframe may be a disadvantage for some parties in a proceeding.

16.153 The new QCAT procedures will also extend the timeframe within which the Tribunal is required to provide its written reasons from the current period of 28 days to 45 days. However, the new QCAT procedures would arguably enable the Tribunal to readily comply with requests for written reasons in many instances.

16.154 An issue for consideration is what should be the timeframe for requesting written reasons for a decision in relation to an application made under the *Guardianship and Administration Act 2000* (Qld).

16-19 What should be the timeframe for requesting written reasons for a decision in relation to an application made under the *Guardianship and Administration Act 2000* (Qld):

(a) 28 days;

(b) 14 days; or

(c) some other period?

385 Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [6.130].

386 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122(1).

387 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122(2).

Chapter 17

Appeals and reviews

INTRODUCTION

17.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including 'the processes for review of decisions'.[388] In undertaking the review, the Commission is to have regard to a number of specified matters, including 'the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts'.[389]

17.2 When the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the 'QCAT Act') and the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) commence, the Guardianship and Administration Tribunal will be abolished[390] and the jurisdiction presently exercised by the Tribunal will be conferred on the Queensland Civil and Administrative Tribunal ('QCAT').[391] This chapter examines the mechanisms that are currently available under the *Guardianship and Administration Act 2000* (Qld) for an appeal against a decision of the Guardianship and Administration Tribunal and for the review of an appointment

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

389 Ibid.

390 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 247(1), sch 1 item 7.

391 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).

made by that Tribunal. It also examines how the appeal and review mechanisms will be affected when QCAT commences operation, as well as examining the new procedure that will be available, in limited circumstances, for the reopening of a proceeding by QCAT.

17.3 Although the Guardianship and Administration Tribunal is generally referred to in this Discussion Paper as 'the Tribunal', to avoid confusion with QCAT, the existing Tribunal will be referred to throughout this chapter as 'GAAT'.

APPEALS

The law in Queensland: Appeal from a GAAT decision

17.4 The *Guardianship and Administration Act 2000* (Qld) currently provides that an eligible person may, by notice, appeal to the Supreme Court against a decision made by GAAT in a proceeding.[392] The leave of the Supreme Court is required except for an appeal on a question of law only.[393]

17.5 The Act provides that each of the following persons is an 'eligible person' for the purpose of appealing against a GAAT decision:[394]

- the person whose capacity for a matter was under consideration in the proceeding;
- the applicant in the proceeding;
- a person proposed for appointment by the proceeding;
- a person whose power as guardian, administrator or attorney was changed or removed by the tribunal decision;
- the Adult Guardian;
- the Public Trustee;
- the Attorney-General;
- a person given leave to appeal by the Supreme Court; and

---

392 *Guardianship and Administration Act 2000* (Qld) s 164(1), sch 4 (definition of 'court'). Section 164(1) refers to an appeal against a 'tribunal decision'. 'Tribunal decision' is defined in s 164(3)(b) to include 'a declaration, order or direction of the tribunal'.

393 *Guardianship and Administration Act 2000* (Qld) s 164(2). See also s 80O(2) in relation to an appeal to the Supreme Court against a GAAT decision under ch 5A pt 3 (Consent to sterilisation of child with impairment) of the Act.

394 *Guardianship and Administration Act 2000* (Qld) s 164(3) (definition of 'eligible person').

- for an appeal to the Supreme Court against a GAAT decision to make a limitation order — a party or entity entitled to appeal under section 109G(2).

17.6 Unless the Supreme Court orders otherwise, a notice of appeal must be filed in the court registry within 28 days after the GAAT decision appealed from, or the date of the written reasons for GAAT's decision, whichever is the later, and must be served as soon as practicable on all active parties to the proceeding.[395]

17.7 However, if GAAT makes one or more orders under section 157 postponing the notification, and the giving of a copy, of its decision for a specified period, the notice of appeal may be filed within 28 days after the later of the following days:[396]

- the last day of the specified period or periods;
- the date of the written reasons for GAAT's decision.

17.8 Because an appeal from a GAAT decision lies to the Supreme Court, the fee for filing an appeal is governed by the *Uniform Civil Procedure (Fees) Regulation 1999* (Qld). The current filing fee where there is only one party initiating the appeal and the party is an individual, or if there is more than one party initiating the appeal and they are all individuals, is $495.[397]

17.9 Generally, each party to an appeal is to bear his or her own costs of the appeal.[398] However, the Supreme Court may order a party to an appeal to pay costs to another party if the court considers that:[399]

- the appeal was frivolous or vexatious; or
- the party has incurred costs because the appellant defaulted in the procedural requirements.

Appeals under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

Appeal to the QCAT Appeal Tribunal

17.10 The most significant change that will be made by the QCAT Act in relation to appeals, is that, unless a judicial member of QCAT constituted the

395 *Guardianship and Administration Act 2000* (Qld) s 164A(1).

396 *Guardianship and Administration Act 2000* (Qld) s 164A(2).

397 *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 4(1), sch 1 item 1(3)(a). In any other case, the filing fee is $995: sch 1 item 1(3)(b).

398 *Guardianship and Administration Act 2000* (Qld) s 165(1).

399 *Guardianship and Administration Act 2000* (Qld) s 165(2).

Tribunal in the original proceeding, an appeal from a QCAT decision will lie to the Appeal Tribunal of QCAT.[400] When QCAT is constituted as the Appeal Tribunal for an appeal, or for an application for leave to appeal, it is to be constituted by one, two or three judicial members of QCAT.[401]

17.11 The persons who will be eligible to appeal against a QCAT decision will be almost the same as those who may currently appeal against a GAAT decision.[402] However, instead of referring to 'a person given leave to appeal by the court',[403] the *Guardianship and Administration Act 2000* (Qld) will be amended to refer to 'a person given leave to appeal by the appeal tribunal, or the Court of Appeal, under the QCAT Act'.[404]

17.12 If an appeal is on a question of fact, or a question of mixed law and fact, the Appeal Tribunal's leave to appeal must be obtained.[405] This is similar to the current requirement for leave under the *Guardianship and Administration Act 2000* (Qld).[406]

17.13 The application or the appeal must:[407]

- be in a form substantially complying with the rules;
- state the reasons for the application or appeal; and

---

400 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 142(1). However, a party to a proceeding cannot appeal to the Appeal Tribunal against a QCAT decision under s 35 of the Act (being a decision of the Tribunal to accept or reject an application or referral) or a cost-amount decision: s 142(2).

401 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 166(1). 'Judicial member' is defined in sch 3 of the Act to mean:

- the president, the deputy president or a supplementary member who is a Supreme Court judge or District Court judge; and
- for the exercise of a power of the Tribunal to make an order or give a direction — includes a senior member or ordinary member who is a former judge and is nominated by the president to exercise the power.

402 See [17.5] above.

403 *Guardianship and Administration Act 2000* (Qld) s 164(3)(a)(viii).

404 *Guardianship and Administration Act 2000* (Qld) s 163(3)(a)(viii), as inserted by s 1466 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld). The reference to the Court of Appeal is not included in s 1466, but is proposed by cl 106 of the State Penalties Enforcement and Other Legislation Amendment Bill 2009 (Qld).

405 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 142(3)(b). The Appeal Tribunal's leave must also be obtained if the appeal is against a decision in relation to a costs order: s 142(3)(a)(iii). Note that s 142(3)(a)(ii) does not apply to a proceeding under ch 7 of the *Guardianship and Administration Act 2000* (Qld) (where QCAT is exercising its original jurisdiction): *Guardianship and Administration Act 2000* (Qld) s 101(f), as inserted by s 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld).

406 See [17.4] above.

407 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 143(2).

- be accompanied by the prescribed fee (if any).[408]

17.14 If leave to appeal is required, an application for the Appeal Tribunal's leave must be filed within 28 days after the relevant day,[409] and an appeal must be filed within 21 days after the leave is given.[410] If leave to appeal is not required, an appeal must be filed within 28 days of the 'relevant day'.[411]

17.15 If the President of QCAT considers that an appeal made to the Appeal Tribunal could be more effectively or conveniently dealt with by the Court of Appeal, the President may transfer the appeal to the Court of Appeal with the court's leave.[412]

17.16 In deciding an appeal against a decision on a question of law only, the Appeal Tribunal may:[413]

- confirm or amend the decision;
- set aside the decision and substitute its own decision;
- set aside the decision and return the matter for reconsideration with or without the hearing of additional evidence as directed by the Appeal Tribunal and with the other directions that the Appeal Tribunal considers appropriate; or
- make any other order it considers appropriate.

17.17 If an appeal is made to the Appeal Tribunal against a decision on a question of fact only, or on a question of mixed law and fact, the appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the Appeal Tribunal.[414] In deciding the appeal, the Appeal Tribunal may:[415]

---

408 At this stage it is not known whether a fee will be payable in relation to an appeal against a QCAT decision in a guardianship proceeding.

409 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 143(3). Section 143(5) defines '***relevant day***, for an application or appeal' to mean:

> (a) the day the person is given written reasons for the decision being appealed against; or
>
> (b) if a person makes an application under part 7, division 5, 6 or 7 about the decision being appealed against within 28 days after the person is given written reasons for the decision—the day that application is finally dealt with under that division.

410 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 143(4)(a).

411 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 143(4)(b).

412 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 144(1)–(2).

413 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 146.

414 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 147(1)–(2).

415 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 147(3).

- confirm or amend the decision; or
- set aside the decision and substitute its own decision.

17.18 Generally, each party to an appeal to the Appeal Tribunal must bear his or her own costs of the appeal.[416] However, the Appeal Tribunal may make an order requiring a party to an appeal to pay all or a stated part of the costs of another party to the appeal if it considers that the interests of justice require it to make the order.[417]

Appeal to the Court of Appeal

Appeal against a QCAT decision

17.19 A different appeal mechanism will apply for appealing a decision of QCAT if a judicial member of QCAT constituted the Tribunal in the original proceeding. In that situation, a party to the proceeding may appeal to the Court of Appeal against the QCAT decision.[418]

17.20 However, an appeal to the Court of Appeal on a question of fact, or on a question of mixed law and fact, may be made only if the party has obtained the court's leave to appeal.[419]

Appeal against a QCAT Appeal Tribunal decision

17.21 The QCAT Act also provides that an appeal lies to the Court of Appeal against certain decisions of the QCAT Appeal Tribunal.

17.22 Section 150(1) provides that a person may appeal to the Court of Appeal against a decision of the QCAT Appeal Tribunal to refuse an application for leave to appeal to the Appeal Tribunal.

17.23 Further, section 150(2) provides that a party to an appeal to the QCAT Appeal Tribunal may appeal to the Court of Appeal against the following

---

416 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100. Note that s 100 does not apply to a proceeding under ch 7 of the *Guardianship and Administration Act 2000* (Qld) (where QCAT is exercising its original jurisdiction): see *Guardianship and Administration Act 2000* (Qld) s 101(d), as inserted by s 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld).

417 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102(1). In deciding whether to award costs under s 102(1), the Appeal Tribunal may have regard to the matters specified in s 102(3). Section 102 does not apply to a proceeding under ch 7 of the *Guardianship and Administration Act 2000* (Qld), except to the extent that it applies for s 103 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld): see *Guardianship and Administration Act 2000* (Qld) s 101(e), as inserted by s 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld).

418 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 149(2). A party to a proceeding may also appeal to the Court of Appeal against a 'cost-amount' decision of QCAT, whether or not a judicial member of QCAT constituted the Tribunal in the proceeding: s 149(1).

419 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 149(3)(b). An appeal to the Court of Appeal against a cost-amount decision of QCAT may be made only on a question of law and only if the party has obtained the court's leave to appeal: s 149(3)(a).

decisions of the Appeal Tribunal:[420]

- a cost-amount decision; and
- the final decision.

17.24 However, an appeal under section 150(1) or (2) may be made only on a question of law and only if the party has obtained the Court of Appeal's leave.[421]

General matters for appeals to the Court of Appeal

17.25 An application for the Court of Appeal's leave, or an appeal to the Court of Appeal, must be made under the *Uniform Civil Procedure Rules 1999* (Qld) and within 28 days after the 'relevant day' unless the Court of Appeal orders otherwise.[422]

The law in other jurisdictions

Australian Capital Territory

17.26 In the ACT, where guardianship proceedings are heard by the ACT Civil and Administrative Tribunal ('ACAT'), a party to an original application may appeal a decision of ACAT to the ACAT Appeal Tribunal.[423] A notice of appeal must be filed within 28 days after the day the decision is made, or such further time as ACAT allows.[424] The Appeal Tribunal may deal with an appeal as a new application or as a review of all or part of the original decision.[425]

17.27 In addition, a party to an application for an appeal may, with the leave of the Supreme Court, appeal to the Supreme Court on a question of law or fact from:[426]

- a decision of the Appeal Tribunal; or

---

420 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 150(2).

421 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 150(3).

422 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 151(1)–(2). Section 153(3) defines '***relevant day***, for an application or appeal by a person,' to mean—

> (a) the day the person is given written reasons for the decision being appealed against; or
>
> (b) if a person makes an application under part 7, division 5, 6 or 7 about the decision being appealed against within 28 days after the person is given written reasons for the decision—the day that application is finally dealt with under that division.

423 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 79.

424 *ACT Civil and Administrative Tribunal Procedure Rules 2009* (ACT) r 12(1).

425 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 82.

426 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 86.

- if the Appeal President dismissed the appeal under section 80 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT)[427] — the original decision of ACAT.

17.28 The applicant for leave to appeal must file the application for leave to appeal, the accompanying affidavit, and the draft notice of appeal, in the Supreme Court not later than 28 days after the day the order appealed from is made, or not later than any further time allowed by the court.[428]

New South Wales

17.29 In New South Wales, section 67 of the *Guardianship Act 1987* (NSW) provides that a party to a proceeding before the Guardianship Tribunal may appeal to the Supreme Court against a decision of the Tribunal. An appeal may be instituted as of right on a question of law and with the Supreme Court's leave on any other question.[429] Depending on the nature of the decision that is appealed against, the appeal is to be instituted within 28 days after the decision was made or within 28 days after the decision was furnished to the party instituting the appeal.[430]

17.30 Section 67A of the *Guardianship Act 1987* (NSW) also provides that an appeal against specified decisions of the Guardianship Tribunal may be made by a party to the proceeding to the Administrative Decisions Tribunal ('ADT'). An appeal to the ADT may be made as of right, on any question of law, or by leave of the ADT Appeal Panel hearing the appeal, on any other grounds.[431] An appeal must be made within 28 days after the decision-maker provides, in accordance with the Act under which the external appeal is made, the party with written reasons for the decision, or within such further time as the Appeal Panel may allow.[432]

17.31 A person who has appealed to the ADT under section 67A of the Act may not appeal to the Supreme Court under section 67 in respect of the same decision unless the appeal under section 67A has been withdrawn with the approval of the ADT for the purpose of enabling the Supreme Court to deal with the matter.[433] Similarly, a person who has appealed to the Supreme Court

---

427 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 80(1) provides that the Appeal President may give an applicant for an appeal written notice that the subject matter of the appeal is substantively similar to other appeals rejected by ACAT, that the Appeal President proposes to dismiss the appeal, and that the applicant may make representation within 21 days after the day the notice is given. The Appeal President may dismiss the application if, among other things, he or she is satisfied that it is in the public interest for ACAT not to consider the appeal and the Appeal President has sufficient information to make an informed decision to dismiss the application.

428 *Court Procedures Rules 2006* (ACT) r 5072.

429 *Guardianship Act 1987* (NSW) s 67(1).

430 *Guardianship Act 1987* (NSW) s 67(2).

431 *Administrative Decisions Tribunal Act 1997* (NSW) s 118B(1).

432 *Administrative Decisions Tribunal Act 1997* (NSW) s 118B(2).

433 *Guardianship Act 1987* (NSW) s 67(1A).

under section 67 of the Act may not appeal to the ADT under section 67A in respect of the same decision unless the appeal under section 67 has been withdrawn with the approval of the Supreme Court for the purpose of enabling the ADT to deal with the matter.[434]

Northern Territory

17.32 In the Northern Territory, where guardianship proceedings are heard by the Local Court,[435] a party to a proceeding before the court who is aggrieved by a decision or determination of the court may appeal against the decision or determination to the Supreme Court.[436] An appeal is to be made in the time and in the manner prescribed by the *Supreme Court Rules* (NT).[437] An appeal against a decision of the Local Court is to be instituted within 28 days after the date on which the decision was given.[438]

South Australia

17.33 In South Australia, an appeal against a decision, direction or order of the Guardianship Board may be made to the Administrative and Disciplinary Division of the District Court ('ADD').[439] Generally, it is necessary to obtain the permission of the Board or the ADD.[440] However, that restriction does not apply if the appeal is against a decision or order for, or affirming, the detention of a person or relating to the giving of consent to a sterilisation or a termination of pregnancy.[441] An appeal against an order of the Board for, or affirming, the detention of a person or relating to the giving of consent to a sterilisation must be made within 28 days of the making of the order or within 28 days of being furnished, pursuant to a request made within seven days of the making of the order, with the reasons for the order.[442] However, an appeal against a decision or order of the Board made on an application for the Board's consent to a termination of pregnancy must be instituted within two working days of the decision or order being made.[443]

---

434 *Guardianship Act 1987* (NSW) s 67A(3).

435 *Adult Guardianship Act* (NT) s 11.

436 *Adult Guardianship Act* (NT) s 24(1).

437 *Adult Guardianship Act* (NT) s 24(1).

438 *Supreme Court Rules* (NT) rr 83.01 (definitions of 'Acts', 'material date', 'tribunal below'), 83.04(a).

439 However, a right of appeal does not lie against a decision of the Board not to authorise a publication of a report of proceedings before the Board or a decision or order made by the registrar in exercising the jurisdiction of the Board: *Guardianship and Administration Act 1993* (SA) s 67(2).

440 *Guardianship and Administration Act 1993* (SA) s 67(1)(g). An application for permission to appeal must be made within 28 days of the making of the decision, direction or order or within 28 days of being furnished, pursuant to a request made within seven days of the making of the decision, direction or order, with the reasons for the decision, direction or order: s 67(3).

441 *Guardianship and Administration Act 1993* (SA) s 67(1)(f).

442 *Guardianship and Administration Act 1993* (SA) s 67(4).

443 *Guardianship and Administration Act 1993* (SA) s 67(5).

17.34 In addition, a party to a proceeding before the ADD who is dissatisfied with a decision, direction or order of the ADD in the proceeding may, with the permission of the ADD or the Supreme Court, appeal to the Supreme Court against the decision, direction or order.[444] However, there is no appeal to the Supreme Court in relation to the following decisions or orders:[445]

- a decision to refuse permission to appeal to the ADD;
- a decision or order made in relation to an application for consent to a termination of pregnancy;
- a decision not to authorise publication of a report of a proceeding before the ADD; or
- a decision or order made on an appeal against a decision of the Board in the exercise of its appellate jurisdiction under the *Mental Health Act 1993* (SA).

Tasmania

17.35 In Tasmania, specified persons may appeal to the Supreme Court against a determination of the Guardianship and Administration Board.[446] An appeal may be brought as of right on a question of law.[447] However, an appeal on any other question may be brought only with the leave of the Supreme Court.[448]

17.36 Generally, an appeal is to be instituted within 28 days after the day on which the determination was made.[449] However, if the appeal is against a determination made in respect of an application for consent to the carrying out of a termination of pregnancy, the appeal must be instituted within two days after the making of the determination.[450]

Victoria

17.37 In Victoria, guardianship proceedings are heard by the Victorian Civil and Administrative Tribunal ('VCAT').[451]

---

444 *Guardianship and Administration Act 1993* (SA) s 70(1).

445 *Guardianship and Administration Act 1993* (SA) s 70(2).

446 *Guardianship and Administration Act 1995* (Tas) ss 3(1) (definitions of 'Board', 'Court'), 76(1). The persons who may appeal are specified in s 76(1).

447 *Guardianship and Administration Act 1995* (Tas) s 76(2)(a).

448 *Guardianship and Administration Act 1995* (Tas) s 76(2)(b).

449 *Guardianship and Administration Act 1995* (Tas) s 76(3)(a).

450 *Guardianship and Administration Act 1995* (Tas) s 76(3)(b).

451 See *Guardianship and Administration Act 1986* (Vic) s 3(1) (definition of 'Tribunal').

17.38 If VCAT makes an order in respect of an application under the *Guardianship and Administration Act 1986* (Vic), other than an interim order or a temporary order, a party or person entitled to notice of the application may apply to the Tribunal for a rehearing of the application.[452] Further, if VCAT makes an order on a reassessment under section 61 of the Act on its own initiative,[453] a party or person entitled to notice of the reassessment may apply to VCAT for a rehearing of the reassessment if VCAT gives leave.[454] An application for a rehearing, or for leave to apply for a rehearing, must be made within 28 days after the day of the order.[455]

17.39 In addition, a party to a proceeding may appeal, on a question of law, from an order of VCAT. If VCAT was constituted for the purpose of making the order by the President or a Vice President, whether with or without other members, an appeal lies to the Court of Appeal if the Court of Appeal gives leave to appeal. In any other case, an appeal lies to the trial division of the Supreme Court if the Court gives leave to appeal.[456]

17.40 An application for leave to appeal must be made within 28 days after the day of VCAT's order[457] and, if leave is granted, the appeal must be instituted within 14 days after the day on which leave is granted.[458]

Western Australia

17.41 In Western Australia, where guardianship proceedings are heard by the State Administrative Tribunal,[459] the avenues for the review of, or appeal against, a determination of the Tribunal depend on how the Tribunal was constituted for the proceeding.

17.42 If the Tribunal was constituted by a single member, a party who is aggrieved by the determination may request the President to arrange for a Full Tribunal to review the determination, and the President must comply with the request.[460] A request for a review by the Full Tribunal must be made within 28

---

452 *Guardianship and Administration Act 1986* (Vic) s 60A(1). However, s 60A(6) provides that a person cannot apply for a rehearing of certain applications, including an application where VCAT was constituted for the hearing by the President, whether with or without other members.

453 An assessment under s 61 of the *Guardianship and Administration Act 1986* (Vic) is similar to the review of an appointment under s 29 of the *Guardianship and Administration Act 2000* (Qld).

454 *Guardianship and Administration Act 1986* (Vic) s 60A(3A).

455 *Guardianship and Administration Act 1986* (Vic) s 60A(4).

456 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(1).

457 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(2)(a).

458 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(3)(a).

459 *Guardianship and Administration Act 1990* (WA) s 13.

460 *Guardianship and Administration Act 1990* (WA) s 17A(1).

days of the date of the determination or within such further time as the Full Tribunal allows.[461]

17.43 If the Tribunal was constituted for the proceeding by three members not including the President, an appeal lies to a single judge of the Supreme Court.[462] If the Tribunal was constituted by three members including the President, an appeal lies to the Court of Appeal.[463] In both cases, leave to appeal is required.[464] An application for leave to appeal may be made on the ground or grounds that the Tribunal made an error of law or fact, or of both law and fact, or acted without or in excess of jurisdiction, or that there is some other reason that is sufficient to justify a review of the determination.[465] An application for leave to appeal must be made within 28 days of the determination appealed from unless a judge extends the period for making the application.[466]

Issues for consideration

The appropriate forum for an appeal

17.44 As explained above, when the QCAT Act commences, it will significantly expand the current appeal rights available under the *Guardianship and Administration Act 2000* (Qld).[467]

17.45 Although the Commission has not previously sought submissions on this issue, it has received several submissions that have commented on the current provisions under the *Guardianship and Administration Act 2000* (Qld) in relation to appeals. These submissions were received before the QCAT Act was enacted.

17.46 In a submission to the Attorney-General and Minister for Justice, the Guardianship and Administration Reform Drivers ('GARD')[468] commented that the expense and formality of appealing from a GAAT decision to the Supreme Court was prohibitive in most cases.[469] GARD therefore suggested that there should be provision under the *Guardianship and Administration Act 2000* (Qld)

461 *Guardianship and Administration Act 1990* (WA) s 17A(2).

462 *Guardianship and Administration Act 1990* (WA) s 19(a).

463 *Guardianship and Administration Act 1990* (WA) s 19(b).

464 *Guardianship and Administration Act 1990* (WA) s 19.

465 *Guardianship and Administration Act 1990* (WA) s 21.

466 *Guardianship and Administration Act 1990* (WA) s 20(4).

467 See [17.10]–[17.25] above. See also Explanatory Notes, Queensland Civil and Administrative Tribunal Bill 2009 (Qld) 16.

468 GARD is an informal alliance of community-based organisations and is comprised 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.

469 Submission C24.

to apply to GAAT for a rehearing by three members of the Tribunal where the President was not sitting at the original hearing.[470] Other respondents have also expressed the view that an appeal to the Supreme Court is an obstacle and that an affordable and accessible review mechanism is required.[471]

17.47 When the QCAT Act commences, it will be possible to appeal from a QCAT decision to the Appeal Tribunal of QCAT, and it will generally be necessary to appeal to the Court of Appeal only if a judicial member of QCAT constituted the Tribunal in the original proceeding.[472] In addition, it will be possible in limited circumstances to appeal from a QCAT Appeal Tribunal decision to the Court of Appeal.[473]

17-1 Does the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provide an appropriate appeal mechanism for guardianship matters? If not, what would be an appropriate appeal mechanism?

The requirement for leave to appeal

17.48 In its submission, GARD also noted that, under the current legislation, the leave of the Supreme Court is required unless the appeal is on a question of law only. It considered that the requirement for leave was a further barrier to appealing a GAAT decision, and suggested that provision should be made 'for interested parties, as a matter of right, to be able to apply to the Magistrates Court for a *de novo* hearing, after a hearing before the Tribunal'.[474]

17.49 However, as explained above, the leave of the relevant appellate body, especially for an appeal made other than on a question of law, is a common requirement in the other Australian jurisdictions.[475]

17-2 Is it appropriate that, for an appeal on a question of fact or on a question of mixed law and fact, the leave of the Appeal Tribunal of QCAT is required?

470 Ibid.

471 Submissions C13, C41, C142.

472 See [17.10]–[17.19] above.

473 See [17.21]–[17.23] above.

474 Submission C24.

475 See [17.27], [17.29], [17.33]–[17.34], [17.35], [17.39], [17.43] above.

REOPENING OF PROCEEDINGS

Reopening a proceeding under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

17.50 When the QCAT Act commences, it will also be possible for a party to a proceeding, in limited circumstances, to apply for a reopening of the proceeding.

The application for reopening

17.51 The QCAT Act provides that a party to a proceeding[476] heard and decided by QCAT may apply to QCAT for the proceeding to be reopened if the party considers that a 'reopening ground' exists for the party.[477] An application for reopening must:[478]

- state the reopening ground on which it is made;
- be made within the period and in the way stated in the rules; and
- be accompanied by the prescribed fee (if any).[479]

The grounds for reopening

17.52 The Act provides for two grounds of reopening:[480]

(1) The first ground is that the party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing.

(2) The second ground is that the party would suffer a substantial injustice if the proceeding was not reopened because significant new evidence has arisen and that evidence was not reasonably available when the proceeding was first heard and decided.

The decision whether to reopen a proceeding

17.53 Under the QCAT Act, if a party applies for the reopening of a QCAT decision, QCAT must consider any written submissions made by a party to the proceeding.[481] The Act further provides that QCAT 'may decide whether or not

---

476 The provisions in relation to reopening do not apply to an appeal that has been heard and decided by the QCAT Appeal Tribunal under pt 8, div 1 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld): s 136.

477 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 138(1).

478 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 138(2).

479 At this stage it is not known whether a fee will be payable in relation to an application to reopen a guardianship proceeding.

480 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 137.

481 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 139(3)(a).

to reopen the proceeding entirely on the basis of documents, without a hearing or meeting of any kind'.[482]

17.54 The Explanatory Notes for the Queensland Civil and Administrative Tribunal Bill 2009 (Qld) outline the purpose of reopening provisions:[483]

> The purpose of this provision is to ensure fairness to a party absent from the hearing through no fault of their own and, in relation to the second ground, to avoid unnecessary costs to the parties and the tribunal involved in an appeal where the ground could be more effectively or conveniently dealt with by a re-opening of the matter. In most cases, it would not be necessary to have a hearing on these issues. The evidence should be able to be sufficiently identified in the submissions which the tribunal is required to consider.

17.55 QCAT may grant the application only if it considers that:[484]

- a reopening ground exists for the applicant party; and
- the ground could be effectively or conveniently dealt with by reopening the proceeding under chapter 2, part 7, division 7 of the QCAT Act, whether or not an appeal under chapter 2, part 8 of the Act relating to the ground may also be started.

17.56 QCAT's decision whether or not to reopen a proceeding is final and cannot be challenged, appealed against, reviewed, set aside, or called into question in another way, whether under the *Judicial Review Act 1991* (Qld) or otherwise.[485] The Explanatory Notes for the Queensland Civil and Administrative Tribunal Bill 2009 (Qld) acknowledge that this provision potentially breaches the fundamental legislative principle under section 4(3)(a) of the *Legislative Standards Act 1992* (Qld) that 'legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is subject to appropriate review'.[486] The Explanatory Notes state, however, that the breach of this principle is considered justified because:[487]

- the re-opening provision provides an option for a party that is in addition to the party's right to appeal the original decision of the tribunal
- the parties' usual appeal rights from the original decision of the tribunal are not affected

---

482 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 139(3)(b).

483 Explanatory Notes, Queensland Civil and Administrative Tribunal Bill 2009 (Qld) 9.

484 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 139(4).

485 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 139(5).

486 Explanatory Notes, Queensland Civil and Administrative Tribunal Bill 2009 (Qld) 7, 14.

487 Ibid 15.

- allowing an appeal or a review of the tribunal's decision on whether or not a matter should be re-opened will unnecessarily lengthen proceedings, duplicate the normal appeal process and result in additional costs to the party and to the tribunal contrary to the objects of the Bill.

Effect of decision to reopen

17.57 If QCAT decides that a proceeding should be reopened, 'the tribunal must decide the issues in the proceeding that must be heard and decided again'.[488] The issues must be heard and decided by way of a fresh hearing on the merits.[489]

17.58 Once QCAT has heard and decided the issues, it may:[490]

- confirm or amend its previous final decision in the proceeding; or
- set aside its previous final decision in the proceeding and substitute a new decision.

17.59 If a proceeding has been reopened and QCAT has heard and decided the issues again, the decision of QCAT as confirmed, amended or substituted is QCAT's final decision in the proceeding,[491] and the proceeding cannot be reopened again under the reopening provisions of the Act.[492]

17.60 If a party to a proceeding has made an application for the reopening of QCAT's final decision in a proceeding, the party is not precluded from appealing the decision. However, an appeal, or an application for leave to appeal, against a final decision of QCAT cannot be made until the application for reopening has been finally dealt with.[493]

The law in other jurisdictions

17.61 In Victoria, the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides for the reopening of a proceeding on slightly more limited grounds than are available under the QCAT Act.

17.62 Section 120(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides that a person in respect of whom an order is made may apply to VCAT for a review of the order if the person did not appear and was not represented at the hearing at which the order was made. Section 120(4) provides that VCAT may hear and determine the application if it is satisfied that

488 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(1).

489 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(2).

490 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(4).

491 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(5).

492 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(6).

493 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 141.

the applicant had a reasonable excuse for not attending or being represented at the hearing and, if it thinks fit, may order that the order be revoked or varied.

17.63 No other Australian jurisdiction has an equivalent provision.

Issue for consideration

17.64 As explained above, there are two grounds for reopening under the QCAT Act:

- that the party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing; or
- that the party would suffer substantial injustice if the proceeding was not reopened because new evidence has arisen and that evidence was not reasonably available when the proceeding was first heard and decided.

17.65 The first ground will be as relevant to a guardianship proceeding as it is to any other type of proceeding that is heard by QCAT. However, the second ground is likely to be more relevant to a proceeding before QCAT that is a contest between the parties' respective rights — for example, a proceeding brought in QCAT's minor civil disputes jurisdiction. In the case of a guardianship proceeding, where the adult's interests are the primary focus, the party seeking the reopening might not be able to establish that he or she would suffer substantial injustice, but might be able to establish that the adult concerned would suffer substantial injustice.

17.66 The stated rationale for the reopening procedure is 'to avoid unnecessary costs to the parties and the tribunal involved in an appeal where the ground could be more effectively or conveniently dealt with by a reopening of the matter'.[494] If it is generally considered desirable to have a procedure that can avoid the costs of an appeal in an appropriate case, then arguably the QCAT Act should be amended to include a further ground for reopening that is relevant to the specific nature of the guardianship jurisdiction conferred on QCAT — for example, that the adult concerned would suffer a substantial injustice.

17-3 Should section 137 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) be amended to include a further ground for reopening that is appropriate to the specific nature of the guardianship jurisdiction conferred on QCAT? If so, how should that reopening ground be framed?

494 See [17.54] above.

REVIEWS OF APPOINTMENTS

The law in Queensland

Periodic review of appointments

17.67 Section 28(1) of the *Guardianship and Administration Act 2000* (Qld) provides for the regular review of the appointment of guardians and private administrators.[495] If GAAT makes an appointment because an adult has impaired capacity, but it does not consider that the adult's impaired capacity is permanent, it must state in its order when it considers it appropriate for the appointment to be reviewed.[496] If GAAT makes such an order, it must review the appointment in accordance with the review period stated in its order, but at least every five years.[497] In any other case, GAAT must review the appointment at least every five years.[498]

17.68 The requirement for periodic review does not apply if the administrator is the Public Trustee or a trustee company under the *Trustee Companies Act 1968* (Qld).[499] Consequently, the appointment of the Public Trustee or a trustee company may be made for an indefinite period.[500] However, GAAT has a policy of randomly reviewing 3 to 5 per cent of these appointments each year.[501]

Other review of appointments

17.69 Section 29 of the *Guardianship and Administration Act 2000* (Qld) provides for the review of an appointment of a guardian or an administrator at any time on GAAT's own initiative or, for a guardian, on the application of a specified person. Section 29 provides:

> **29 Other review of appointment**
>
> (1) The tribunal may review an appointment of a guardian or administrator for an adult at any time—
>
> (a) on its own initiative; or

---

495 However, s 28 does not apply for a guardian for a restrictive practice matter: *Guardianship and Administration Act 2000* (Qld) s 28(2). GAAT must review the appointment of a guardian for a restrictive practice matter at least once before the term of the appointment ends: *Guardianship and Administration Act 2000* (Qld) s 29(2).

496 *Guardianship and Administration Act 2000* (Qld) s 14(5).

497 *Guardianship and Administration Act 2000* (Qld) s 28(1)(a).

498 *Guardianship and Administration Act 2000* (Qld) s 28(1)(b).

499 This was not always the case. See [17.95] below.

500 *Guardianship and Administration Act 2000* (Qld) s 28(1)(a).

501 *Presidential Direction No 1 of 2004: Random Review of the Appointment of Trustee Companies* <http://www.gaat.qld.gov.au/files/2004_-_1_Random_Review_of_the_Appointment_of_Trustee_Companies.pdf> at 1 October 2009. In 2007–08, GAAT undertook 221 random reviews of appointments of the Public Trustee or trustee companies as administrators: Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 43.

(b) for a guardian other than a guardian for a restrictive practice matter under chapter 5B—on the application of any of the following—

(i) the adult;

(ii) an interested person for the adult;

(iii) the public trustee;

(iv) a trustee company under the *Trustee Companies Act 1968*; or

(c) for a guardian for a restrictive practice matter under chapter 5B—on the application of any of the following—

(i) the adult;

(ii) an interested person for the adult;

(iii) a relevant service provider under chapter 5B providing disability services to the adult;

(iv) the chief executive (disability services);

(v) the adult guardian;

(vi) if the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*—the director of mental health.

(2) However, the tribunal must review the appointment of a guardian for a restrictive practice matter under chapter 5B at least once before the term of the appointment ends.

Review of the appointment of an administrator

17.70 Before its amendment on 1 July 2008, section 29 of the *Guardianship and Administration Act 2000* (Qld) was in the following terms:[502]

29 Other review of appointment

The tribunal may review an appointment of a guardian or administrator for an adult at any time—

(a) on its own initiative; or

(b) on the application of any of the following—

(i) the adult;

(ii) an interested person for the adult;

502 *Guardianship and Administration Act 2000* (Qld) s 29 was amended by s 20 of the *Disability Services and Other Legislation Amendment Act 2008* (Qld).

(iii) the public trustee;

(iv) a trustee company under the *Trustee Companies Act 1968*.

17.71 It is clear that application could be made for the review of the appointment of an administrator at any time by a person mentioned in section 29(b). However, the effect of the amendment of section 29(b), which has become section 29(1)(b), is that section 29(1)(b) deals only with the persons who may apply for the review of the appointment of a guardian other than a guardian for a restrictive practice. As a result, section 29(1) does not provide that any specified persons may apply for the review of the appointment of an administrator. The only remaining way in which the appointment of an administrator may be reviewed under section 29 is on GAAT's own initiative.[503]

17.72 This has occurred as the result of an oversight in the drafting of the *Disability Services and Other Legislation Amendment Act 2008* (Qld), which amended section 29 of the *Guardianship and Administration Act 2000* (Qld), and not as the result of an intention to change the way in which the appointment of an administrator may be reviewed.[504]

17.73 This oversight will be corrected when the State Penalties Enforcement and Other Legislation Amendment Bill 2009 (Qld) is passed. Clause 216 of that Bill proposes an amendment to section 29(1)(b) of the *Guardianship and Administration Act 2000* (Qld) so that that paragraph will read:

> (b) for a guardian (other than a guardian for a restrictive practice matter under chapter 5B) or an administrator—on the application of any of the following—
>
> (i) the adult;
>
> (ii) an interested person for the adult;
>
> (iii) the public trustee;
>
> (iv) a trustee company under the *Trustee Companies Act 1968*; or (emphasis added)

17.74 That amendment will be retrospective to 1 July 2008.[505]

Grounds for review

17.75 The main reason for GAAT to initiate a review is that a guardian or an administrator has not complied with its directions to provide documentation

503 *Guardianship and Administration Act 2000* (Qld) s 29(1)(a).

504 See Explanatory Notes, State Penalties Enforcement and Other Legislation Amendment Bill 2009 (Qld) 87.

505 State Penalties Enforcement and Other Legislation Amendment Bill 2009 (Qld) cl 218.

within a certain time frame. Another reason is that the documentation may have raised issues or concerns about the order or appointment.[506]

17.76 The *Guardianship and Administration Act 2000* (Qld) does not set out the grounds on which a specified person may apply for the review of the appointment of a guardian or an administrator. However, Presidential Direction No 2 of 2002 addresses, in paragraph (a), the grounds for a requested review of an appointment made by GAAT. It provides:[507]

> **9. Requested review of an appointment made by the Tribunal**
>
> (a) A review of an appointment of a guardian and/or an administrator made by the Tribunal will be conducted at the end of the period of the appointment as ordered by the Tribunal except in cases where:
>
> (i) New and relevant information has become available since the hearing; or
>
> (ii) A relevant change in circumstances has occurred since the hearing; or
>
> (iii) Relevant information that was not presented to the Tribunal at the hearing has become available;
>
> And, in accordance with s 31 *Guardianship and Administration Act 2000*:
>
> (iv) The current appointee is no longer competent; or
>
> (v) Another person is more appropriate for appointment.
>
> (b) An application for review must be supported by a written report addressing:
>
> (i) The new and relevant information which has become available since the hearing; or
>
> (ii) The relevant change in circumstances which has occurred since the hearing; or
>
> (iii) The information that was not presented to the Tribunal at the hearing; and
>
> (iv) The competence and appropriateness of the current appointee; and
>
> (v) The competence and appropriateness of any proposed appointee/s; and

506 Guardianship and Administration Tribunal, Review <http://www.gaat.qld.gov.au/271.htm> at 1 October 2009.

507 Guardianship and Administration Tribunal, *Presidential Direction No 2 of 2002*, <http://www.gaat.qld.gov.au/files/2002_-_2_General.pdf> at 1 October 2009.

(vi) A report by any current appointee and, in the case of an administrator, a statement of accounts.

(c) The Tribunal or Registrar may dismiss an application for Review which the Tribunal or Registrar determines:

(i) Is not sufficiently supported by the written report required in paragraph 9 above; or

(ii) Is frivolous or vexatious.

17.77 The Presidential Direction states that it 'sets out the minimum standard documentation required by the Tribunal prior to listing the specified applications for hearing'.[508] It is made under section 102(d) of the *Guardianship and Administration Act 2000* (Qld), which empowers the President of GAAT to give directions about 'the tribunal's procedure'. It is arguable, however, that paragraph (a) of Presidential Direction 2 of 2002, in purporting to limit GAAT's discretion under section 29 of the Act, goes beyond regulating GAAT's 'procedure'.[509]

GAAT's powers on a review

17.78 The *Guardianship and Administration Act 2000* (Qld) provides that GAAT may conduct a review of an appointment of a guardian or an administrator in the way it considers appropriate.[510] At the end of the review, it 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.[511] If GAAT is satisfied that the appointment should continue, it may either continue its order making the appointment or change its order making the appointment. Such a change may include, for example, changing the terms of the appointment, removing an appointee or making a new appointment.[512] However, GAAT may make an order removing an appointee only if it considers that the appointee is no longer competent or another person is more

508 GAAT notes on its website that these requirements are intended to ensure that applications that are vexatious, lacking in substance or frivolous do not automatically proceed to hearing or delay other matters that might otherwise have been heard earlier: Guardianship and Administration Tribunal, Review <http://www.gaat.qld.gov.au/271.htm> at 1 October 2009.

509 See *Herald and Weekly Times Ltd v VCAT* [2005] VSC 44, where the Supreme Court of Victoria declared that certain rules of the *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) were *ultra vires* because they went beyond merely regulating 'practice and procedure'.

510 *Guardianship and Administration Act 2000* (Qld) s 31(1).

511 *Guardianship and Administration Act 2000* (Qld) s 31(2).

512 *Guardianship and Administration Act 2000* (Qld) s 31(3).

appropriate for appointment.[513] This test is considered in Chapter 5 of this Discussion Paper.

Review of an appointment by QCAT

17.79 When QCAT commences, the provisions of the *Guardianship and Administration Act 2000* (Qld) dealing with the review of appointments will remain unchanged, except that reviews will be conducted by QCAT, rather than by GAAT.

The law in other jurisdictions

Periodic review of appointments

17.80 There is considerable variation in the review periods of the other Australian jurisdictions.

17.81 In the Northern Territory, a guardianship order is required to be reviewed within two years of the making of the order or at the expiry of such shorter period as may have been specified in the order.[514]

17.82 In the ACT, ACAT must review an order appointing a guardian or manager at least once every three years.[515] Similarly, in South Australia, the Guardianship Board must review the circumstances of a protected person at least once every three years for the purpose of ascertaining whether the order or orders to which the person is subject are still appropriate.[516] In Victoria, VCAT must conduct a reassessment of an order within 12 months of the making of the order unless the VCAT otherwise orders and, in any case, at least once within each three year period after making the order unless VCAT orders otherwise.[517]

17.83 In New South Wales, a guardianship order must be reviewed at the end of the period for which the order has effect.[518] Generally, the relevant period is 12 months in the case of an initial guardianship order and three years in the

---

513 *Guardianship and Administration Act 2000* (Qld) s 31(4). An appointee is no longer competent if, for example, a relevant interest of the adult has not been, or is not being, adequately protected, the appointee has neglected the appointee's duties or abused the appointee's powers, the appointee is an administrator appointed for a matter involving an interest in land and the appointee fails to advise the registrar of titles of the appointment as required under s 21(1), or the appointee has otherwise contravened the Act: s 31(5).

514 *Adult Guardianship Act* (NT) s 23(1). There is no similar requirement under the *Aged and Infirm Persons' Property Act* (NT) in relation to an order appointing a person as the manager of a protected estate.

515 *Guardianship and Management of Property Act 1991* (ACT) s 19(2).

516 *Guardianship and Administration Act 1993* (SA) s 57(1)(b). However, if a protected person is being detained in any place pursuant to an order of the Board, the person's circumstances must be reviewed within six months of the making of the order and subsequently at intervals of not more than one year: s 57(1)(a).

517 *Guardianship and Administration Act 1986* (Vic) s 61(1).

518 *Guardianship Act 1987* (NSW) s 25(2)(b). However, the Tribunal is not required to review a guardianship order in accordance with s 25(2)(b) if the order contains a statement to the effect that the order will not be reviewed at the expiration of the period for which it has effect: s 25(3)(b).

case of an order that is renewed.[519] However, the Administrative Decisions Tribunal may specify a period not exceeding three years for an initial order and five years for an order that is renewed if it is satisfied that the adult has permanent disabilities, it is unlikely that the adult will become capable of 'managing his or her person', and there is a need for an order of longer duration than would otherwise be available.[520] There is no fixed period for the review of a financial management order or for the review of the appointment of a manager.[521]

17.84 In Western Australia, when the State Administrative Tribunal makes a guardianship order or an administration order it must specify a period, not exceeding five years, within which the order is to be reviewed, and ensure that the order is reviewed accordingly.[522]

17.85 In Tasmania, the legislation is framed slightly differently. The *Guardianship and Administration Act 1995* (Tas) provides that a guardianship order and an administration order will lapse after three years unless, on review, the Guardianship and Administration Board continues the order under section 68 of the Act.[523]

Other review of appointments

17.86 As in Queensland, the legislation in most of the other Australian jurisdictions also provides for the review of appointments on application or on the initiative of the relevant body that has jurisdiction to make and revoke appointments.[524]

17.87 The relevant provisions do not generally specify the grounds on which an application for the review of an appointment may be made. In Western Australia, the persons who may apply for a review include 'a person to whom leave has been granted under section 87'.[525] Section 87(1) provides that any person may apply to the State Administrative Tribunal for leave to apply for the review of a guardianship order or an administration order. Section 87(5)(b) provides that the Tribunal may grant leave to the person to apply for the review, either unconditionally or subject to any condition, 'if it is satisfied that because of a change of circumstances or for any other reason a review should be held'.

---

519 *Guardianship Act 1987* (NSW) s 18(1).

520 *Guardianship Act 1987* (NSW) s 18(1A)–(1B).

521 See *Guardianship Act 1987* (NSW) ss 25N, 25S.

522 *Guardianship and Administration Act 1990* (WA) s 84.

523 *Guardianship and Administration Act 1995* (Tas) ss 24, 52.

524 *Guardianship and Management of Property Act 1991* (ACT) s 19(1); *Guardianship Act 1987* (NSW) ss 25(1), (2)(a), 25N(4), 25S(1); *Adult Guardianship Act* (NT) s 23(2); *Guardianship and Administration Act 1995* (Tas) s 67; *Guardianship and Administration Act 1986* (Vic) s 61(2)–(3); *Guardianship and Administration Act 1990* (WA) ss 85, 86. In South Australia the legislation is not expressed in the same terms. However, the Board may, on application, vary or revoke a guardianship order or an administration order: ss 30, 36.

525 *Guardianship and Administration Act 1990* (WA) s 86(1)(c).

Issues for consideration

Periodic review of appointment

17.88 When making an order for the appointment of a guardian or an administrator, GAAT is required, among other things, to exercise its powers under the Act in the way least restrictive of the adult's rights.[526] The regular review of an order appointing a guardian or an administrator provides a mechanism by which the restrictions on the adult's autonomy may be reduced or removed if appropriate.[527] A requirement for a periodic review also provides GAAT with an opportunity to determine whether the original order is working properly and to make any necessary modifications. However, it does not prevent the guardian, administrator or other interested party from seeking a review after a shorter interval.

17.89 Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*, which deals with the measures to be taken to ensure that people with disabilities enjoy equal legal capacity with other people, requires State Parties to ensure that those measures:[528]

> are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

17.90 As noted earlier, the *Guardianship and Administration Act 2000* (Qld) provides for an order for appointment to be reviewed at least every five years, or at an earlier time if GAAT orders.[529]

17.91 In its original 1996 report, the Commission recommended the periodic review of an initial appointment after two years and of any subsequent order after three years.[530]

17.92 The issue of the frequency with which appointment orders should be reviewed raises competing considerations. A shorter statutory review period

---

526 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c). As noted at [17.79] above, these provisions of the *Guardianship and Administration Act 2000* (Qld) will remain unchanged when QCAT commences, except that reviews will be conducted by QCAT, rather than by GAAT.

527 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.66].

528 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006 <http://www.un.org/disabilities/default.asp?navid=12&pid=150> at 1 October 2009.

529 *Guardianship and Administration Act 2000* (Qld) ss 28, 29.

530 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 216.

may impose a considerable burden on GAAT resources.[531] However, a lengthy review period may not sufficiently protect the adult's interests.[532]

17.93 GARD in its submission suggested that the five-yearly review period that applies in Queensland is 'far too long' and noted that, with the exception of Western Australia, the other Australian jurisdictions conduct reviews on a more frequent basis than occurs in Queensland.[533] It suggested that the *Guardianship and Administration Act 2000* (Qld) should be amended to require the initial review of the appointment of a guardian or an administrator to be made within two years of the appointment and to require a subsequent review to be conducted within three years of the most recent review. It also suggested that the scope of reviews should include a consideration of whether the guardian or administrator has applied the General Principles and, in appropriate circumstances, the quality of the decisions being made.[534]

17-4 What is an appropriate period for the periodic review of the appointment of a guardian or an administrator?

Review of the appointment of the Public Trustee or a trustee company

17.94 As mentioned earlier, section 28(1) of the *Guardianship and Administration Act 2000* (Qld), which deals with the periodic review of the appointment of guardians and administrators, does not apply to the appointment of the Public Trustee or a trustee company as an administrator. However, as noted earlier, GAAT may initiate a review of an appointment at any time, and it has a policy of randomly reviewing a certain percentage of these appointments each year.[535]

17.95 Section 28 of the *Guardianship and Administration Act 2000* (Qld) originally provided for the periodic review of the appointment of all guardians and administrators. However, that section was amended in 2003 to exclude the Public Trustee and trustee companies from the requirement for periodic

531 In 2007–08, GAAT completed 484 reviews of guardianship. Of these, 58 were requested, 38 were initiated by the Tribunal, and 388 were periodic reviews, which occurred because the appointment was due to expire. For the same period, GAAT completed 1296 reviews of administration. Of these, 100 were requested, 141 were initiated by the Tribunal, and 834 were periodic reviews, which occurred because the appointment was due to expire. The remaining 221 were random reviews conducted by the Tribunal reviewing the appointment of the Public Trustee and other trustee companies: Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 43.

532 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 212. See also Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.67].

533 Submission C24.

534 Ibid.

535 See [17.68] above.

review.[536] In the second reading speech for the Guardianship and Administration and Other Acts Amendment Bill 2003 (Qld), the then Attorney-General explained the rationale for this change:[537]

> This bill omits the necessity for the tribunal to review the appointment of the Public Trustee and other corporate trustees as administrators every five years. The time spent on reviewing corporate trustees, who already have to comply with other legislative accountability standards is not a good use of the tribunal's time. This reform will save the tribunal an enormous amount of work but ensure that the rights of adults will not suffer. The bill provides that the adult without capacity and the corporate trustee, or any interested person can initiate a review of the appointment at any time as a safeguard. The tribunal has also developed a random review policy of corporate trustees to ensure that their work is of the highest standard.

17.96 An issue is whether the Public Trustee or trustee companies should be subject to the legislative requirement for periodic review that applies to other administrators. An argument against periodic review is that the Public Trustee and trustee companies are professional administrators whose activities are regulated by legislation.[538] In addition, having regard to the high volume of administration orders made appointing the Public Trustee (for example, in 2007–08, the Public Trustee was appointed in 1857 (84.6 per cent) of the 2196 administration orders made by the Tribunal),[539] a requirement to periodically review such orders is likely to have significant resource implications for GAAT. On the other hand, a requirement for the periodic review of these types of appointment may be an additional safeguard for an adult who is the subject of an order, particularly if there is no other interested person who may otherwise request a review.

17-5 Is it appropriate that the requirement for periodic review in section 28(1) of the *Guardianship and Administration Act 2000* (Qld) does not apply to an appointment of the Public Trustee or a trustee company as an administrator or should they be subject to the same requirement for periodic review as other administrators?

Grounds for review

17.97 Although section 29 of the *Guardianship and Administration Act 2000* (Qld) provides that specified persons may apply for the review of an appointment, the section does not prescribe the grounds for such an

536 *Guardianship and Administration and Other Acts Amendment Act 2003* (Qld) s 6.

537 Queensland, *Parliamentary Debates*, Legislative Assembly, 28 October 2003, 4366 (Rod Welford, Attorney-General and Minister for Justice).

538 *Public Trustee Act 1978* (Qld); *Trustee Companies Act 1968* (Qld).

539 Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 41.

application. In this respect, section 29 is consistent with the provisions in most of the other jurisdictions that provide specifically for a requested review.

17.98 However, as mentioned earlier, Presidential Direction No 2 of 2002 refers to three grounds for review:[540]

(i) New and relevant information has become available since the hearing; or

(ii) A relevant change in circumstances has occurred since the hearing; or

(iii) Relevant information that was not presented to the Tribunal at the hearing has become available;

17.99 The inclusion of grounds for review may be of some assistance to people who may not otherwise be aware of the circumstances in which they may apply for a review. The inclusion of specific grounds may also serve as a mechanism to filter out unmeritorious applications. However, if the grounds on which a person may apply for a review are too narrow, the review process will be less useful as a means of ensuring that a particular order continues to be appropriate to the circumstances and needs of the adult concerned.

17-6 Should the *Guardianship and Administration Act 2000* (Qld) be amended to include the specific grounds on which application may be made for the review of the appointment of a guardian or an administrator? If so, what should those grounds be?

540 See [17.76]–[17.77] above for a discussion of Presidential Direction No 2 of 2002.

Chapter 18

The Adult Guardian

INTRODUCTION

18.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including:

- the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation; and

- the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework.[541]

18.2 In reviewing the legislation the Commission is to have regard to a number of specified matters, including 'the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts'.[542]

18.3 Chapter 8 of the *Guardianship and Administration Act 2000* (Qld) provides for the appointment of the Adult Guardian,[543] an independent officer[544] whose statutory role is to protect the rights and interests of adults who have impaired capacity.[545] The Adult Guardian has a broad range of protective and investigative functions and powers; as a result, the Adult Guardian forms an important part of the investigative and regulatory framework referred to in the terms of reference.

18.4 This chapter examines a number of issues in relation to the functions and powers of the Adult Guardian. It also examines whether a mechanism for external review of the Adult Guardian's decisions would strengthen the current legislative framework.

THE ADULT GUARDIAN'S FUNCTIONS

18.5 The Adult Guardian has a broad range of functions, which are set out in section 174 of the *Guardianship and Administration Act 2000* (Qld):

> **174 Functions**
>
> (1) The adult guardian's role is to protect the rights and interests of adults who have impaired capacity for a matter.
>
> (2) The adult guardian has the functions given to the adult guardian by this Act or another Act, including the following functions—
>
> (a) protecting adults who have impaired capacity for a matter from neglect, exploitation or abuse;

---

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

542 Ibid.

543 *Guardianship and Administration Act 2000* (Qld) s 173. The Adult Guardian was originally established by s 126 of the *Powers of Attorney Act 1998* (Qld). The provisions in the *Powers of Attorney Act 1998* (Qld) dealing with the Adult Guardian were repealed when the *Guardianship and Administration Act 2000* (Qld) was passed, and were re-enacted in the latter Act.

544 In performing the Adult Guardian's functions and exercising the Adult Guardian's powers, the Adult Guardian is not under the control or direction of the Minister: *Guardianship and Administration Act 2000* (Qld) s 176.

545 *Guardianship and Administration Act 2000* (Qld) s 174(1).

(b) investigating complaints and allegations about actions by—

(i) an attorney; or

(ii) a guardian or administrator; or

(iii) another person acting or purporting to act under a power of attorney, advance health directive or order of the tribunal made under this Act;

(c) mediating and conciliating between attorneys, guardians and administrators or between attorneys, guardians or administrators and others, for example, health providers, if the adult guardian considers this appropriate to resolve an issue;

(d) acting as attorney—

(i) for a personal matter under an enduring power of attorney; or

(ii) under an advance health directive; or

(iii) for a health matter if authorised as a statutory health attorney; or

(iv) if appointed by the court or the tribunal;

(e) acting as guardian if appointed by the tribunal;

(ea) approving, under chapter 5B, part 4, the use of a restrictive practice in relation to an adult to whom that chapter applies;

(f) consenting to a forensic examination under section 198A;

(g) seeking help (including help from a government department, or other institution, welfare organisation or provider of a service or facility) for, or making representations for, an adult with impaired capacity for a matter;

(h) educating and advising persons about, and conducting research into, the operation of this Act and the *Powers of Attorney Act 1998*.

(3) In performing a function or exercising a power, the adult guardian must apply the general principles and the health care principle.

(4) In subsection (2)(b) and (c)—

attorney means—

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

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

(c) a statutory health attorney.

power of attorney means—

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

(b) an enduring power of attorney; or

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

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

18.6 Of particular significance is the Adult Guardian's function as a guardian when appointed by the Tribunal. The Adult Guardian is sometimes referred to as the guardian of 'last resort' because the Tribunal may appoint the Adult Guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter.[546] The Adult Guardian is also the statutory health attorney for exercising power for a health matter for an adult if no other person with a higher priority is available and culturally appropriate to exercise the power.[547] The Adult Guardian also has a significant role in investigating allegations of neglect, exploitation or abuse.

18.7 Earlier this year, the Government announced its intention to transfer to the Adult Guardian the function of systemic advocacy that is currently performed by the Public Advocate.[548] That issue is considered in Chapter 20 of this Discussion Paper.

THE ADULT GUARDIAN'S POWERS

18.8 The Adult Guardian has the powers given under the *Guardianship and Administration Act 2000* (Qld) or another Act,[549] and may also 'do all things necessary or convenient to be done to perform the adult guardian's functions'.[550]

18.9 The *Guardianship and Administration Act 2000* (Qld) makes provision for the delegation of the Adult Guardian's powers. Generally, the Adult

---

546 *Guardianship and Administration Act 2000* (Qld) s 14(2). This limitation on the appointment of the Adult Guardian is considered in Chapter 5 of this Discussion Paper.

547 *Powers of Attorney Act 1998* (Qld) s 63(2).

548 See *Government Response to the Report, Brokering Balance: A Public Interest Map for Queensland Government Bodies — An Independent Review of Queensland Government Boards, Committees and Statutory Authorities* <http://www.premiers.qld.gov.au/government/assets/government-response-to-part-b-report.pdf> at 4 October 2009.

549 *Guardianship and Administration Act 2000* (Qld) s 175(1). For example, if the Adult Guardian is the guardian of an adult ('the aggrieved') and the Adult Guardian considers that the aggrieved does not have capacity to make an application for a protection order, the Adult Guardian may make the application: *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1)(d), (4)(b).

550 *Guardianship and Administration Act 2000* (Qld) s 175(2).

Guardian may delegate his or her powers to an appropriately qualified member of the Adult Guardian's staff.[551] In addition, the Adult Guardian may delegate his or her mediation and conciliation powers to an appropriately qualified person.[552]

18.10 If the Adult Guardian has the power to make decisions about personal matters for an adult, the Adult Guardian may delegate the power to make day-to-day decisions about those matters to one of the following:[553]

- an appropriately qualified carer of the adult;[554]
- a health provider of the adult;
- an attorney under an enduring document;
- one of the persons who could be eligible to be the adult's statutory health attorney.

18.11 The specific investigative and protective powers that support the Adult Guardian's functions are considered below.

The investigation of complaints[555]

18.12 Section 180 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may investigate any complaint or allegation that an adult with impaired capacity:

- is being, or has been, neglected, exploited or abused; or
- has inappropriate or inadequate decision-making arrangements.

18.13 If the Adult Guardian decides to investigate a complaint or allegation, he or she may generally delegate to an appropriately qualified person the Adult

551 *Guardianship and Administration Act 2000* (Qld) s 177(1). However, the Adult Guardian may not delegate the power to give notices under ss 185(1) or 189 of the Act. The Adult Guardian's power to give notices under those provisions is considered at [18.26]–[18.27] and [18.36]–[18.39] below.

552 *Guardianship and Administration Act 2000* (Qld) s 177(2).

553 *Guardianship and Administration Act 2000* (Qld) s 177(4). Section 177(5) defines 'day-to-day decision' to mean 'a minor, uncontroversial decision about day-to-day issues that involves no more than a low risk to the adult' and gives as an example 'a decision about podiatry, physiotherapy, non-surgical treatment of pressure sores and health care for colds and influenza'.

554 *Guardianship and Administration Act 2000* (Qld) s 177(5) provides that 'appropriately qualified, for a person to whom a power may be delegated' includes 'having the qualifications, experience or standing appropriate to exercise the power'.

555 Issues in relation to the Adult Guardian's investigations of complaints are considered at [18.85]–[18.87] below.

Guardian's investigative powers under chapter 8, part 2 of the *Guardianship and Administration Act 2000* (Qld).[556]

18.14 If a delegate is given power to carry out an investigation, the delegate must, after carrying out the investigation, make a written report and give a copy of the report to the Adult Guardian.[557] It is a lawful excuse for the publication of any defamatory statement made in the report that the publication is made in good faith and is, or purports to be, made for the *Guardianship and Administration Act 2000* (Qld).[558]

18.15 The Adult Guardian's Annual Report for 2007–08 notes that the majority of the investigations undertaken during that period related to allegations of financial abuse:[559]

> As has been the trend over the years, most of the investigations carried out by the Adult Guardian relate to financial abuse by attorneys under an Enduring Power of Attorney. Each referral is prioritised according to the level and immediacy of the risk and the nature and severity of the alleged abuse. The needs of the adult are also considered as a priority.

Records and audit

18.16 Section 182 provides that the Adult Guardian may, by written notice to an attorney who has power for financial matters for an adult or to an administrator for an adult, require the attorney or administrator by a given date to file with the Adult Guardian a summary of receipts and expenditure, or more detailed accounts of dealings and transactions, for the adult for a specified period.[560]

18.17 The attorney or administrator must comply with the notice unless he or she has a reasonable excuse.[561]

18.18 A summary of accounts filed may be audited by an auditor appointed by the Adult Guardian.[562]

---

556 *Guardianship and Administration Act 2000* (Qld) s 181(1). However, the Adult Guardian may not delegate the power to give notices under ss 185(1) or 189 of the Act: s 181(1).

557 *Guardianship and Administration Act 2000* (Qld) s 181(4).

558 *Guardianship and Administration Act 2000* (Qld) s 181(5).

559 Office of the Adult Guardian, *Adult Guardian Annual Report 07–08* (2008) 20.

560 *Guardianship and Administration Act 2000* (Qld) s 182(1).

561 *Guardianship and Administration Act 2000* (Qld) s 182(3). Section 182(3) provides for a maximum penalty of 100 penalty units, that is, $10 000: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

562 *Guardianship and Administration Act 2000* (Qld) s 182(4).

Power to require information to be given for an investigation or audit

18.19 In conducting an investigation or audit, the Adult Guardian has extensive powers to require that information be given to the Adult Guardian.

The Adult Guardian's right to information

18.20 Section 183 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian has a right to 'all information necessary to investigate a complaint or allegation or to carry out an audit'.[563] The Adult Guardian may, by written notice given to a person who has custody or control of the information, require the person:[564]

> (a) to give the information to the adult guardian; and
>
> (b) if the person is an attorney or administrator and the information is contained in a document—to give the document to the adult guardian; and
>
> (c) if the person is not an attorney or administrator and the information is contained in a document—to allow the adult guardian to inspect the document and take a copy of it.

18.21 A person to whom such a notice is given must comply with the notice unless he or she has a reasonable excuse.[565] The section preserves the privilege against self-incrimination and provides expressly that it is a reasonable excuse for a person to fail to comply with the notice that complying with the notice might tend to incriminate the person.[566]

18.22 The Adult Guardian's right to information under section 183 is extremely broad. Section 183(5) provides:

> **183 Right to information**
>
> …
>
> (5) Subject to subsection (4), this section overrides—
>
> (a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and
>
> (b) any claim of confidentiality or privilege, including a claim based on legal professional privilege.

---

563 *Guardianship and Administration Act 2000* (Qld) s 183(1).

564 *Guardianship and Administration Act 2000* (Qld) s 183(2).

565 *Guardianship and Administration Act 2000* (Qld) s 183(3). Section 183(3) provides for a maximum penalty of 100 penalty units, that is, $10 000: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

566 *Guardianship and Administration Act 2000* (Qld) s 183(4).

18.23 With the exception of the privilege against self-incrimination, the Adult Guardian's right to information under section 183 overrides any other restriction about the disclosure or confidentiality of the information or any claim of confidentiality of privilege. Accordingly, the Adult Guardian would have a right to require an attorney or administrator to give a document to the Adult Guardian even though the document was the subject of legal professional privilege. Similarly, in relation to a document held by a person other than an attorney or administrator, the Adult Guardian would have the right to inspect and take a copy of the document even though the document was the subject of legal professional privilege.

The power to require information to be given by statutory declaration

18.24 Section 184 of the *Guardianship and Administration Act 2000* (Qld) provides that, if a person is required to give information to the Adult Guardian under the *Guardianship and Administration Act 2000* (Qld), the Adult Guardian may, by written notice to the person, require the person to give the information by statutory declaration.[567] The person must comply with the notice unless he or she has a reasonable excuse.[568]

18.25 The significance of the power to require information to be given by statutory declaration lies in the criminal sanctions that apply if false information is given. If a person makes a statement in a statutory declaration that is, to the person's knowledge, false in any material particular and the person was required by law to make the statement by way of a statutory declaration, the person is guilty of a crime and is liable to imprisonment for up to seven years.[569]

The power to require a person's attendance as a witness

18.26 Section 185 of the *Guardianship and Administration Act 2000* (Qld) provides that, for the performance of the Adult Guardian's functions, the Adult Guardian may, by written notice, require a person to attend before the Adult Guardian to give information and answer questions, or to produce stated documents or things:

> **185 Witnesses**
>
> (1) For the performance of the adult guardian's functions, the adult guardian may, by written notice given to a person, require the person to attend before the adult guardian at a stated time and place to give information and answer questions, or produce stated documents or things.
>
> (2) The person must comply with the notice, unless the person has a reasonable excuse.

---

567 *Guardianship and Administration Act 2000* (Qld) s 184(1).

568 *Guardianship and Administration Act 2000* (Qld) s 184(2). Section 184(2) provides for a maximum penalty of 100 penalty units, that is, $10 000: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

569 Criminal Code (Qld) s 193.

Editor's note—

See section 188 (Self-incrimination not a reasonable excuse).

Maximum penalty—100 penalty units.

(3) The adult guardian may—

(a) require the person either to take an oath or make an affirmation; and

(b) administer an oath or affirmation to the person, or, if technology allowing reasonably contemporaneous and continuous communication is to be used, make the arrangements the adult guardian considers appropriate in the circumstances for administering an oath or affirmation to the person; and

(c) allow the person to give information by tendering a written statement, verified, if the adult guardian directs, by oath or affirmation.

(4) The person must comply with a requirement under subsection (3)(a), unless the person has a reasonable excuse.

Maximum penalty—100 penalty units.

(5) The adult guardian must pay or tender to the person an amount equivalent to the fees and expenses allowable under the *Uniform Civil Procedure Rules 1999* if the person were a witness appearing in a Magistrates Court.

18.27 The Adult Guardian may not delegate the power to give a notice under section 185(1).[570]

18.28 Section 186 of the *Guardianship and Administration Act 2000* (Qld) provides that, if a person, without reasonable excuse, fails to comply with a notice given by the Adult Guardian under section 185(1), a Magistrates Court may, at the request of the Adult Guardian, issue a subpoena[571] requiring the person's attendance before the court.[572]

18.29 The court may require the person either to take an oath or make an affirmation.[573] If the person attends the court under a subpoena to give

570 *Guardianship and Administration Act 2000* (Qld) s 181(1).

571 For the purpose of s 186 of the *Guardianship and Administration Act 2000* (Qld), 'subpoena' means a subpoena for production, a subpoena to give evidence, or a subpoena for production and to give evidence: s 186(6).

572 *Guardianship and Administration Act 2000* (Qld) s 186(1)–(2). The *Uniform Civil Procedure Rules 1999* (Qld), other than rr 417, 418 and 420, apply in relation to the subpoena: s 186(3).

573 *Guardianship and Administration Act 2000* (Qld) s 186(4).

evidence or a subpoena for production and to give evidence, the Adult Guardian may examine the person.[574]

18.30 If a person who was subpoenaed under section 186 attends before the court and, without reasonable excuse, refuses to be sworn or to affirm, refuses to answer a question put to the person, or fails to give an answer to the court's satisfaction, the court may treat the person's refusal or failure as a contempt of court.[575]

18.31 Section 188 of the *Guardianship and Administration Act 2000* (Qld) abrogates the privilege against self-incrimination for the purpose of sections 185(1) and 186. However, subject to specified exceptions, section 188(3) provides a derivative use immunity in relation to the person's answer or the document or thing that is produced.[576] Evidence of, or directly or indirectly derived from, the person's answer or the production of the document or thing, that might tend to incriminate the person is not admissible in evidence against the person in a civil or criminal proceeding.

18.32 Section 188 provides:

> **188 Self-incrimination not a reasonable excuse**
>
> (1) This section applies to—
>
> (a) a person who fails to comply with a notice under subsection 185(1) to give information and answer questions or to produce documents or things; or
>
> (b) a person subpoenaed under section 186 who attends before a Magistrates Court and refuses to answer a question put to the person or fails to give an answer to the court's satisfaction.
>
> (2) It is not a reasonable excuse for the person to—
>
> (a) fail to comply with the notice; or
>
> (b) refuse to answer the question or fail to give an answer to the court's satisfaction;
>
> because compliance with the notice, answering the question or giving an answer to the court's satisfaction might tend to incriminate the person.
>
> (3) However, evidence of, or directly or indirectly derived from, a person's answer or production of a document or thing that might tend to incriminate the person is not admissible in evidence against the person in a civil or criminal proceeding, other than—

574 *Guardianship and Administration Act 2000* (Qld) s 186(5).

575 *Guardianship and Administration Act 2000* (Qld) s 187.

576 For a discussion of a derivative use immunity, see Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination*, Report No 59 (2004) 19–20, 82–4.

(a) a proceeding for an offence about the falsity of the answer, document or thing; or

(b) if the answer or production is relevant to the person's employment—a proceeding brought by or for the person against the person's employer; or

(c) if the answer or production is relevant to the person's professional registration or licence—a proceeding about the registration, licence or approval; or

(d) if the answer or production is relevant to the person's registration, licence or approval as proprietor or operator of a service or facility involved in the care of adults with impaired capacity for a matter—a proceeding about the registration, licence or approval.

Offences

18.33 The *Guardianship and Administration Act 2000* (Qld) creates several offences in relation to the provision of false or misleading statements or documents to the Adult Guardian and the obstruction of an investigation or audit.

18.34 It is an offence for a person:

- to state anything to the Adult Guardian that the person knows is false or misleading in a material particular;[577]
- to give the Adult Guardian a document containing false information that the person knows is false or misleading in a material particular, unless the person, when giving the document:[578]
  - tells the Adult Guardian, to the best of the person's ability, how the document is false or misleading; and
  - if the person has, or can reasonably obtain, the correct information — gives the correct information;
- to obstruct or improperly influence the conduct of an investigation or audit.[579]

577 *Guardianship and Administration Act 2000* (Qld) s 190(1). It is sufficient for a complaint for an offence against s 190(1) to state that the statement made was 'false or misleading' to the person's knowledge, without stating which: s 190(2).

578 *Guardianship and Administration Act 2000* (Qld) s 191(1). It is sufficient for a complaint for an offence against s 191(1) to state that the document contained information that was 'false or misleading' to the person's knowledge, without stating which: s 191(3).

579 *Guardianship and Administration Act 2000* (Qld) s 192(1).

18.35 The maximum penalty for each of these offences is 100 penalty units, that is, $10 000.[580]

Cost of investigations and audits

18.36 Section 189 of the *Guardianship and Administration Act 2000* (Qld) deals with the cost of an investigation or audit undertaken by the Adult Guardian. It provides that, in two situations, the Adult Guardian may require a person to pay the amount that the Adult Guardian considers appropriate for the investigation or audit.

18.37 The first situation is where the Adult Guardian undertakes an investigation about a financial matter or an audit at the request of a person. Section 189(1) provides that, if the Adult Guardian is satisfied that the request was frivolous or vexatious or otherwise without good cause, the Adult Guardian may, by written notice, require the person who requested the investigation or audit to pay to the Adult Guardian the amount that the Adult Guardian considers appropriate for the cost of the investigation or audit.

18.38 The second situation is where the Adult Guardian undertakes an investigation about a financial matter or an audit and considers that the attorney or administrator concerned has contravened the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld). Section 189(2) provides that, in that case, the Adult Guardian may, by written notice, require the attorney or administrator personally to pay to the Adult Guardian the amount that the Adult Guardian considers appropriate for the cost of the investigation or audit.

18.39 The Adult Guardian may also, by written notice, require a person who requests an investigation or audit to pay to the Adult Guardian the amount that the Adult Guardian considers appropriate as security for a payment under section 189(1).

Adult Guardian's report after investigation or audit

18.40 After the Adult Guardian has carried out an investigation or audit in relation to an adult, the Adult Guardian must make a written report and give a copy of the report to:[581]

- the person at whose request the investigation or audit was carried out; and
- every attorney, guardian or administrator, for the adult.

---

580 See *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

581 *Guardianship and Administration Act 2000* (Qld) a 193(1).

18.41 The Adult Guardian must also allow an 'interested person' to inspect a copy of the report at all reasonable times and, at the person's own expense, to be given a copy of the report.[582]

18.42 It is a lawful excuse for the publication of a defamatory statement made in the report that the publication is made in good faith and is, or purports to be, made for the purpose of the *Guardianship and Administration Act 2000* (Qld).[583]

18.43 If a report made by the Adult Guardian contains information about a person and the Adult Guardian considers it appropriate to protect the person's identity, the Adult Guardian may remove, from the copy of the report to be given or inspected, information likely to result in the person's identification.[584]

Specific powers in relation to health matters

18.44 If the Adult Guardian:

- is appointed by the Tribunal as an adult's guardian;
- is appointed under an enduring power of attorney as an adult's attorney for personal matters; or
- is an adult's statutory health attorney;

the Adult Guardian may make decisions about health matters for the adult in accordance with the priority set out in section 66 of the *Guardianship and Administration Act 2000* (Qld).

18.45 However, the *Guardianship and Administration Act 2000* (Qld) also confers specific powers on the Adult Guardian to make decisions about health matters for an adult, even though the Adult Guardian is not the adult's guardian, attorney or statutory health attorney.

Where substitute decision-makers disagree about a health matter

18.46 Section 42 of the *Guardianship and Administration Act 2000* (Qld) provides that, if there is a disagreement about a health matter for an adult and the disagreement cannot be resolved by mediation by the Adult Guardian, the Adult Guardian may exercise power for the health matter.

18.47 For the purpose of this section, 'disagreement' means:[585]

582 *Guardianship and Administration Act 2000* (Qld) s 193(3).

583 *Guardianship and Administration Act 2000* (Qld) s 193(2).

584 *Guardianship and Administration Act 2000* (Qld) s 193(4).

585 *Guardianship and Administration Act 2000* (Qld) s 42(3).

- a disagreement between a guardian or attorney for an adult and another person who is a guardian or attorney for the adult about the way in which the power for the health matter should be exercised; or

- a disagreement between or among two or more eligible statutory health attorneys for an adult about:

  – which of them should be the adult's statutory health attorney; or

  – the way in which the power for a health matter should be exercised.

18.48 If the Adult Guardian exercises his or her power under section 42 in relation to a health matter for an adult, the Adult Guardian must advise the Tribunal in writing of the following details:[586]

- 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;

- the decision made by the Adult Guardian.

Substitute decision-maker acting contrary to the Health Care Principle

18.49 Section 43(1) of the *Guardianship and Administration Act 2000* (Qld) provides that, if a guardian or attorney[587] for a health matter for an adult:

- refuses to make a decision about the health matter and the refusal is contrary to the Health Care Principle; or

- makes a decision about the health matter and the decision is contrary to the Health Care Principle

the Adult Guardian may exercise the power for the health matter.

18.50 If the Adult Guardian exercises his or her power under section 43 in relation to a health matter for an adult, the Adult Guardian must advise the Tribunal in writing of the following details:[588]

- the name of the adult;

---

586 *Guardianship and Administration Act 2000* (Qld) s 42(2).

587 For s 43 of the *Guardianship and Administration Act 2000* (Qld), 'attorney' means an attorney under an advance health directive, an attorney under an enduring power of attorney, or a statutory health attorney: s 43(3).

588 *Guardianship and Administration Act 2000* (Qld) s 43(2).

- the name of the guardian or attorney;
- a statement as to why the refusal or decision is contrary to the Health Care Principle;
- the decision made by the Adult Guardian.

Advice and supervision of attorneys, guardians and administrators

18.51 Section 179(1) of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may:

- give advice to an attorney, guardian or administrator;
- by written notice, make an attorney, guardian or administrator subject to the Adult Guardian's supervision for a reasonable period if the Adult Guardian believes, on reasonable grounds, that it is necessary in the adult's interests including, for example, because the attorney, guardian or administrator has contravened the Act or his or her duties, but has not done so wilfully; and
- require an attorney appointed in relation to financial matters, or an administrator, to present a plan of management for approval.

18.52 If the Adult Guardian has exercised a power under section 179 in relation to an attorney, guardian or administrator, that person may apply to the Tribunal about:

- the Adult Guardian's advice;
- a notice by the Adult Guardian making the attorney, guardian or administrator subject to the Adult Guardian's supervision; or
- the Adult Guardian's requirement for a financial plan;

and the Tribunal may make such order as it considers appropriate.[589]

Proceedings for the protection of an adult's property

18.53 Section 194 of the *Guardianship and Administration Act 2000* (Qld) provides that, if the Adult Guardian considers that:

- property of an adult with impaired capacity is wrongfully held, detained converted or injured; or
- money is payable to the adult;

589 *Guardianship and Administration Act 2000* (Qld) s 179(2).

the Adult Guardian may, by application to the Supreme Court,[590] made in either the name of the Adult Guardian or the adult, claim and recover possession of the property, damages for conversion of or injury to the property, or payment of the money.

Suspension of an attorney's power under an enduring power of attorney or advance health directive[591]

18.54 Section 195 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may, by written notice to an attorney, suspend the operation of all or some of an attorney's power under an enduring power of attorney or an advance health directive for up to three months if the Adult Guardian 'suspects, on reasonable grounds, that the attorney is not competent'.[592] The Act provides that:[593]

> An attorney is not competent if, for example—
>
> (a) a relevant interest of the adult has not been, or is not being, adequately protected; or
>
> (b) the attorney has neglected the attorney's duties or abused the attorney's powers, whether generally or in relation to a specific power; or
>
> (c) the attorney has otherwise contravened this Act or the *Powers of Attorney Act 1998*.

18.55 The Adult Guardian may lift the suspension on the terms he or she considers appropriate.[594] An attorney whose powers have been suspended may apply to the Tribunal and the Tribunal may make such order as it considers appropriate.[595]

18.56 During the suspension of the operation of an attorney's power, the attorney must not exercise the power.[596] If the power that is suspended is for a personal matter, the Adult Guardian is taken to be the attorney during the suspension of the power.[597] If the power that is suspended is for a financial

---

590 See *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'court').

591 Issues in relation to the suspension of an attorney's power are considered at [18.99]–[18.116] below.

592 *Guardianship and Administration Act 2000* (Qld) s 195(1), (3), (6). Section 195 is set out at [18.100] below.

593 *Guardianship and Administration Act 2000* (Qld) s 195(2).

594 *Guardianship and Administration Act 2000* (Qld) s 195(4).

595 *Guardianship and Administration Act 2000* (Qld) s 195(5).

596 *Guardianship and Administration Act 2000* (Qld) s 196(1). Section 196(1) provides for a maximum penalty of 100 penalty units, that is, $10 000: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

597 *Guardianship and Administration Act 2000* (Qld) s 196(2).

matter, the Public Trustee is taken to be the attorney during the suspension of the power.[598]

Power to apply for an entry and removal warrant

18.57 Section 197 of the *Guardianship and Administration Act 2000* (Qld) provides that, if the Adult Guardian considers that there are reasonable grounds for suspecting that there is 'an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse,' to an adult with impaired capacity, the Adult Guardian may apply to the Tribunal for a warrant to enter a place and to remove the adult.

18.58 The Tribunal's power to issue a warrant is found in section 149 of the *Guardianship and Administration Act 2000* (Qld), which is considered in Chapter 15 of this Discussion Paper.

18.59 As soon as practicable after an adult has been removed under a warrant, the Adult Guardian must apply to the Tribunal for orders that the Adult Guardian considers appropriate about:[599]

- the adult's personal welfare;
- a power of attorney or advance health directive of the adult; and
- a guardian, administrator or attorney of the adult.

Power to consent to a forensic examination

18.60 Section 198A of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may consent to the forensic examination[600] of an adult with impaired capacity if:

- the Adult Guardian reasonably considers that the examination is in the adult's best interests; and
- any of the following applies:

---

598 *Guardianship and Administration Act 2000* (Qld) s 196(3).

599 *Guardianship and Administration Act 2000* (Qld) s 151.

600 *Guardianship and Administration Act 2000* (Qld) sch 4 defines 'forensic examination' in the following terms:

> ***forensic examination*** of an adult means a medical or dental procedure for the adult that is carried out for forensic purposes, other than because the adult is suspected of having committed a criminal offence.
>
> *Note—*
>
> For procedures in relation to an adult suspected of having committed an indictable offence, see the *Police Powers and Responsibilities Act 2000*, chapter 17 (Forensic procedures), part 3 (Forensic procedure orders).

- no guardian or attorney for the adult is appointed or available to consent to the examination;
- any guardian or attorney for the adult who is available has failed to consent;
- the Adult Guardian reasonably considers that the adult's interests would not be adequately protected if the consent of any guardian or attorney for the adult were sought.

18.61 The section gives, as an example of a forensic examination that may be in the adult's best interest, 'a forensic examination to obtain evidence that a criminal offence has been committed against the adult'.

18.62 A person who carries out a forensic examination that is authorised by a guardian or an attorney for the adult, or the Adult Guardian under section 198A, is not liable for an act or omission to any greater extent than if the adult were an adult with capacity to consent and the act or omission happened with the adult's consent.[601]

THE LAW IN OTHER JURISDICTIONS

18.63 The guardianship legislation in all other Australian jurisdictions establishes a body with similar functions to the Queensland Adult Guardian. In the ACT, South Australia, Victoria and Western Australia, the relevant body is known as the Public Advocate.[602] In New South Wales, the Northern Territory and Tasmania, the relevant body is known as the Public Guardian.[603]

Functions of the interstate Public Advocates and Public Guardians

18.64 In all other Australian jurisdictions the Public Advocate or the Public Guardian, as the case may be, is able to be appointed as a guardian for an adult (in most jurisdictions, as a guardian or last resort).[604]

---

601 *Guardianship and Administration Act 2000* (Qld) s 248A(1), (3); *Powers of Attorney Act 1998* (Qld) s 104(1). The legislation also provides that a forensic examination authorised by a guardian or attorney for the adult, or by the Adult Guardian under s 198A, is not unlawful: *Guardianship and Administration Act 2000* (Qld) s 248A(2); *Powers of Attorney Act 1998* (Qld) s 104(2).

602 *Public Advocate Act 2005* (ACT) s 6(1); *Guardianship and Administration Act 1993* (SA) s 18; *Guardianship and Administration Act 1986* (Vic) s 14(1); *Guardianship and Administration Act 1990* (WA) s 91(1).

603 *Guardianship Act 1987* (NSW) s 77(1); *Adult Guardianship Act* (NT) s 5(1); *Guardianship and Administration Act 1995* (Tas) s 14.

604 *Guardianship and Management of Property Act 1991* (ACT) s 9(1), (4), *Public Advocate Act 2005* (ACT) s 10(h); *Guardianship Act 1987* (NSW) ss 15, 17*; Adult Guardianship Act* (NT) ss 5(2)(d), 14(4); *Guardianship and Administration Act 1993* (SA) s 29(4); *Guardianship and Administration Act 1995* (Tas) s 15(1)(h); *Guardianship and Administration Act 1986* (Vic) ss 16(1)(a), 23(4); *Guardianship and Administration Act 1990* (WA) ss 44(5), 97(1)(aa).

18.65 In addition, except in New South Wales and the Northern Territory, the Public Advocate or Public Guardian generally has the following functions:

- providing community education and information about that jurisdiction's guardianship system[605] (including giving advice about the guardianship legislation);[606]
- investigating allegations of neglect, exploitation or abuse of adults;[607]
- representing adults in their dealing with service providers and government departments[608] (or court systems)[609] — that is, an individual advocacy function; and
- functions relating to systemic advocacy.[610]

18.66 In New South Wales, the Public Guardian does not appear to have an investigative function or a function of systemic advocacy. He or she does, however, have a function of providing information to the public, and is required to ensure that information is readily available to the public about the provisions of the *Guardianship Act 1987* (NSW) in relation to the appointment of guardians and the exercise of their functions, the functions of the Public Guardian, the rights of persons under the *Guardianship Act 1987* (NSW) or any other Act or law in relation to the exercise by the Public Guardian of those functions, and

605 *Public Advocate Act 2005* (ACT) s 10(i); *Guardianship and Administration Act 1995* (Tas) s 15(1)(i); *Guardianship and Administration Act 1986* (Vic) s 15(c); *Guardianship and Administration Act 1990* (WA) s 97(1)(f).

606 *Guardianship and Administration Act 1993* (SA) s 21(1)(f); *Guardianship and Administration Act 1995* (Tas) s 15(1)(j); *Guardianship and Administration Act 1986* (Vic) s 16(1)(g); *Guardianship and Administration Act 1990* (WA) s 97(1)(e).

607 *Public Advocate Act 2005* (ACT) s 11(1)(c)(ii) (specifically, investigating complaints and allegations about the actions of a guardian, manager or a person acting or purporting to act under an enduring power of attorney); *Guardianship and Administration Act 1995* (Tas) s 17 (specifically, investigating complaints and allegations about the actions of a guardian or administrator or person acting or purporting to act under an enduring power of attorney and any matter that the Guardianship and Administration Board asks it to investigate); *Guardianship and Administration Act 1986* (Vic) s 16(h); *Guardianship and Administration Act 1990* (WA) s 97(1)(c). In South Australia, the Public Advocate's function is more limited. Section 28 of the *Guardianship and Administration Act 1993* (SA) provides that the Public Advocate must, if the Guardianship Board so directs after an application has been lodged with the Board for an order under pt 4 of the Act, investigate the affairs of the person the subject of the application.

608 *Public Advocate Act 2005* (ACT) s 10(f); *Guardianship and Administration Act 1995* (Tas) s 15(1)(e); *Guardianship and Administration Act 1986* (Vic) s 16(1)(e)–(f); *Guardianship and Administration Act 1990* (WA) s 97(1)(d). In South Australia, s 21(1)(d) of the *Guardianship and Administration Act 1993* (SA) provides that one of the Public Advocate's functions is to 'speak for and negotiate on behalf of any mentally incapacitated person in the resolution of any problem faced by that person arising out of his or her mental incapacity'.

609 *Public Advocate Act 2005* (ACT) s 10(b)–(c); *Guardianship and Administration Act 1995* (Tas) s 15(1)(f); *Guardianship and Administration Act 1990* (WA) s 97(1)(b), (d).

610 *Public Advocate Act 2005* (ACT) s 10(a); *Guardianship and Administration Act 1993* (SA) s 21(1)(a)–(c), (e); *Guardianship and Administration Act 1995* (Tas) s 15(1)(a)–(c); *Guardianship and Administration Act 1986* (Vic) s 15(a)–(b); *Guardianship and Administration Act 1990* (WA) s 97(1)(g)–(h).

any practice or procedure followed by the Public Guardian in the exercise of those functions.[611]

18.67 In the Northern Territory, the Public Guardian does not have a function of providing information to the public, undertaking systemic advocacy, or investigating allegations of neglect, exploitation or abuse. However, the Local Court, which exercises jurisdiction in relation to guardianship matters, may require the Public Guardian to provide a report to the court on any matter relating to the proceedings before the court.[612]

Investigative and protective powers of the interstate Public Advocates and Public Guardians

18.68 The investigative and protective powers of the interstate Public Advocates and Public Guardians are generally more limited than the powers of the Queensland Adult Guardian.

ACT

18.69 In the ACT, the Public Advocate may investigate complaints and allegations about:

- matters in relation to which he or she has a function; or
- the actions of a guardian or manager or a person acting under, or purporting to act under, an enduring power of attorney.[613]

18.70 If the principal for an enduring power of attorney has impaired decision-making capacity, the Public Advocate may, by written notice to the person appointed as attorney under the enduring power of attorney, require the person to give the Public Advocate stated books, accounts or other records of transactions carried out by the person for the principal.[614] However, the Public Advocate does not have the power to give a similar notice to a manager.

18.71 In specified circumstances, the ACT Civil and Administrative Tribunal may issue a warrant authorising the Public Advocate, with the police officers who may be required, and using the force that is necessary and reasonable, to enter a particular place to remove an adult with impaired capacity from that place.[615]

---

611 *Guardianship Act 1987* (NSW) s 79.

612 *Adult Guardianship Act* (NT) s 12(3).

613 *Public Advocate Act 2005* (ACT) s 11(1)(c). A manager is the ACT equivalent of an administrator under the *Guardianship and Administration Act 2000* (Qld).

614 *Guardianship and Management of Property Act 1991* (ACT) s 64.

615 *Guardianship and Management of Property Act 1991* (ACT) s 68.

Tasmania

18.72 In Tasmania, the *Guardianship and Administration Act 1995* (Tas) provides that the Public Guardian may investigate complaints and allegations concerning the actions of a guardian or administrator or a person acting or purporting to act under an enduring power of attorney.[616] However, the Act does not confer any specific investigative powers on the Public Guardian.

18.73 If the Guardianship and Administration Board receives information that a person with a disability is being unlawfully detained against his or her will or is likely to suffer damage to his or her physical, emotional or mental health or well-being unless immediate action is taken, and the Board considers it necessary to do so in order to secure access to the person, the Board may empower the Public Guardian, or some other person specified in the order, to visit the person with a disability in the company of a police office for the purpose of preparing a report for the Board.[617]

Victoria

18.74 In Victoria, the *Guardianship and Administration Act 1986* (Vic) provides that the Public Advocate may investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship.[618] The Act provides that, for the purpose of such an investigation, the Public Advocate may require a person, government department, public authority, service provider, institution or welfare organisation to provide information.[619] However, it is a reasonable excuse for a person to refuse or fail to provide information that the person would otherwise be required to provide if providing the information would tend to incriminate the person.[620]

18.75 Section 18A of the Act also gives the Public Advocate the power to enter premises on which certain institutions are situated and:[621]

- inspect those premises;
- see any person who is a resident of those premises or who is receiving any service from the institution;
- make enquiries relating to the admission, care, detention, treatment or control of any such person; and

---

616 *Guardianship and Administration Act 1995* (Tas) s 17(1).

617 *Guardianship and Administration Act 1995* (Tas) s 29(1).

618 *Guardianship and Administration Act 1986* (Vic) s 16(1)(h).

619 *Guardianship and Administration Act 1986* (Vic) s 16(1)(ha).

620 *Guardianship and Administration Act 1986* (Vic) s 16(1A).

621 *Guardianship and Administration Act 1986* (Vic) s 18A(1).

- inspect any document relating to any such person or any record required to be kept under the *Guardianship and Administration Act 1986* (Vic), the *Health Services Act 1988* (Vic), the *Disability Act 2006* (Vic) or the *Mental Health Act 1986* (Vic).[622]

18.76 The person in charge and the members of staff or management of the institution must provide the Public Advocate with any reasonable assistance that the Public Advocate requires to perform or exercise any power, duty or function under section 18A.

18.77 A person in charge or a member of the staff or management of an institution must not:[623]

- unreasonably refuse or neglect to give assistance when required to do so by the Public Advocate;

- refuse or fail to give full and true answers to the best of that person's knowledge to any questions asked by the Public Advocate in the performance or exercise of any power, duty or function under section 18A; or

- assault, obstruct or threaten the Public Advocate in the performance or exercise of any power, duty or function under section 18A.

18.78 The Public Advocate may apply to the Victorian Civil and Administrative Tribunal ('VCAT') for an order that an attorney under an enduring power of attorney lodge with the Tribunal accounts or other documents relating to the exercise of the power or that the accounts be examined or audited by a person appointed by VCAT.[624] However, unlike the Queensland Adult Guardian, the Public Advocate does not have the power to require that the documents be produced in order to conduct an audit.

New South Wales, Northern Territory and South Australia

18.79 In New South Wales and the Northern Territory, the legislation does not confer investigative or protective powers on the Public Guardian.

18.80 In South Australia, although the Public Advocate has a limited investigative function,[625] the legislation does not confer any investigative or protective powers on the Public Advocate.

---

622 However, the Public Advocate may not inspect a person's medical records without the person's consent and may not inspect the personnel records of a person unless the person to whom they relate consents: *Guardianship and Administration Act 1986* (Vic) s 18A(2).

623 *Guardianship and Administration Act 1986* (Vic) s 18A(4). Section 18A(4) provides for a maximum penalty of 25 penalty units, that is $2920: *Monetary Units Act 2004* (Vic) ss 5(2)–(3), 7(2), (4); *Victorian Government Gazette*, No S132, 15 May 2009 1 (which fixed the value of a penalty unit at $116.82).

624 *Instruments Act 1958* (Vic) s 125ZB.

625 See n 607 above.

ISSUES FOR CONSIDERATION

The Adult Guardian's functions

18.81 The Adult Guardian has a broad range of functions under section 174 of the *Guardianship and Administration Act 2000* (Qld) — namely:[626]

- investigating complaints and allegations about the actions of attorneys, guardians, administrators and persons purporting to act under a power of attorney, advance health directive or order of the Tribunal;
- mediating and conciliating between attorneys, guardians and administrators or between those substitute decision-makers and other persons, such as health providers;
- acting as a substitute decision-maker for an adult, whether as an attorney appointed by the adult under an enduring power of attorney or advance health directive, a statutory health attorney, or a guardian appointed by the Tribunal;
- approving the use of restrictive practices for adults to whom Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) applies;[627]
- consenting to forensic examinations under section 198A of the *Guardianship and Administration Act 2000* (Qld);
- seeking help for, or making representations for, an adult with impaired capacity for a matter — that is, an individual advocacy function;[628] and
- educating and advising persons about, and conducting research into, the operation of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).

18.82 These functions are generally more wide-ranging than those of the Public Advocates and Public Guardians in the other Australian jurisdictions. The Commission is not aware of any additional functions that might be given to the Adult Guardian. However, the Commission invites submissions on the appropriateness of the Adult Guardian's functions.

---

626 *Guardianship and Administration Act 2000* (Qld) s 174 is set out at [18.5] above

627 As explained in Chapter 2 of this Discussion Paper, the Commission is not generally reviewing ch 5B of the *Guardianship and Administration Act 2000* (Qld). However, Chapter 7 considers a number of specific issues that have been raised in relation to the use of restrictive practices.

628 This is in contrast to the systemic advocacy function of the Public Advocate, which is considered in Chapter 20 of this Discussion Paper.

18-1 Are the functions of the Adult Guardian, as provided for by section 174 of the *Guardianship and Administration Act 2000* (Qld), appropriate to enable the Adult Guardian to perform the role of protecting the rights and interests of adults with impaired capacity?

18-2 If no to Question 18-1, what function or functions should be given to, or removed from, the Adult Guardian?

The Adult Guardian's powers

18.83 The Adult Guardian has extensive investigative and protective powers under the *Guardianship and Administration Act 2000* (Qld). The Adult Guardian may:

- investigate any complaint or allegation that an adult with impaired capacity is being, or has been, neglected, exploited or abused or that the adult has inappropriate or inadequate decision-making arrangements;[629]
- require an attorney for financial matters or an administrator to file a summary of receipts and expenditure and have the summary of accounts audited;[630]
- for the purposes of an investigation or audit:[631]
  - require information to be given to the Adult Guardian, require attorneys and administrators to give documents to the Adult Guardian, and require other persons to allow the Adult Guardian to inspect and copy documents;
  - require information to be given by statutory declaration;
  - require a person's attendance before the Adult Guardian to give information and answer questions or produce stated documents or things;
- require a person to pay the cost of an investigation or audit conducted by the Adult Guardian;[632]

629 See [18.12]–[18.15] above.

630 See [18.16]–[18.18] above.

631 See [18.19]–[18.35] above.

632 See [18.36]–[18.39] above.

- make a decision about a health matter for an adult with impaired capacity if the adult's substitute decision-makers disagree about the adult's health care or the adult's substitute decision-maker is acting contrary to the Health Care Principle;[633]

- subject an attorney, guardian or administrator to the Adult Guardian's supervision;[634]

- commence proceedings in the Supreme Court to recover or claim property or money that belongs to, or is payable to, an adult with impaired capacity;[635]

- suspend an attorney's powers under an enduring power of attorney or advance health directive;[636]

- apply for an entry and removal warrant to enter premises to remove an adult with impaired capacity;[637] and

- consent to a forensic examination of an adult.[638]

18.84 The Commission notes that the powers of the Adult Guardian are considerably more extensive than those that may be exercised by the Adult Guardian's interstate counterparts. Although the Commission is not aware of any additional powers that might be needed to support the Adult Guardian's protective and investigative functions, the Commission invites submissions on the appropriateness of the Adult Guardian's powers.

18-3 Are the powers of the Adult Guardian, as conferred by the *Guardianship and Administration Act 2000* (Qld), appropriate to enable the Adult Guardian to:

(a) protect adults with impaired capacity from neglect, exploitation or abuse; and

(b) investigate allegations of neglect, exploitation or abuse?

633 See [18.44]–[18.50] above.

634 See [15.104]–[15.105] above.

635 See [18.53] above.

636 See [18.54]–[18.56] above.

637 See [18.57] above.

638 See [18.60]–[18.62] above.

18-4 If no to Question 18-3, what power or powers should be given to, or removed from, the Adult Guardian?

The investigation of complaints

The Adult Guardian's discretion to investigate complaints

18.85 The Adult Guardian has very wide powers to investigate complaints and allegations that an adult with impaired capacity is being, or has been, neglected, exploited or abused. The Adult Guardian's Annual Report for 2007–08 notes the sources from which matters are referred to the Adult Guardian for investigation:[639]

> Referrals for investigation are received from a number of sources, including family members, service providers, friends and neighbours. By far the majority of referrals are from family members who are concerned by the actions of other family members, usually the attorney(s) for the adult, appointed under an Enduring Power of Attorney.

18.86 Matters may also be referred to the Adult Guardian for investigation by the Public Advocate and community visitors.

18.87 Under the *Guardianship and Administration Act 2000* (Qld), the Adult Guardian has a discretion whether to investigate an allegation that has been referred for investigation. While this would generally seem to be appropriate, it raises the issue of whether there are any allegations that the Adult Guardian should have a duty to investigate, rather than merely a power — for example, allegations referred by the Public Advocate or a community visitor, who have formal roles under the *Guardianship and Administration Act 2000* (Qld) of promoting the protection of adults with impaired capacity from neglect, exploitation or abuse[640] and safeguarding the interests of consumers at visitable sites.[641]

18-5 Should the Adult Guardian have a duty to investigate complaints and allegations that are referred by other agencies within the guardianship system, such as the Public Advocate or community visitors?

---

639 Office of the Adult Guardian, *Adult Guardian Annual Report 07–08* (2008) 20.

640 *Guardianship and Administration Act 2000* (Qld) s 209(b). The role of the Public Advocate is considered in Chapter 20 of this Discussion Paper.

641 *Guardianship and Administration Act 2000* (Qld) s 223(1). The role of community visitors is considered Chapter 21 of this Discussion Paper.

Investigation of the conduct of an attorney or administrator after the adult has died

18.88 As noted above, the Adult Guardian has the function of investigating complaints and allegations about the actions of attorneys and administrators.[642] In particular, the Adult Guardian has the power to initiate an audit of an attorney's or administrator's accounts.[643]

18.89 However, the power to investigate the conduct of an attorney or administrator appears to cease when the adult dies. Section 182(1) of the *Guardianship and Administration Act 2000* (Qld) is expressed to apply to 'an attorney for an adult under an enduring power of attorney who has power for a financial matter or to an administrator'. Section 51 of the *Powers of Attorney Act 1998* (Qld) provides that an enduring power of attorney is revoked when the principal dies.[644] As a result, the attorney would no longer have power for a financial matter for the adult. Similarly, section 26(1)(d) of the *Guardianship and Administration Act 2000* (Qld) provides that the appointment of an administrator ends when the adult dies. As a result, a person who had been an adult's administrator would not be the adult's administrator after the adult dies.

18.90 The Adult Guardian has explained the focus of investigations in the following terms:[645]

> The priority outcome sought from the investigations functions is the protection of an adult with impaired capacity from the risk of ongoing or future abuse, neglect or exploitation. Therefore, the focus is on achieving positive outcomes for the adult rather than the processes of investigation. The purpose of an investigation will not be to substantiate that abuse, neglect or exploitation has occurred with the perpetrator/s clearly identified, but to consider whether appropriate measures are in place, or need to be put into place, to ensure the ongoing protection of the rights and interests of the adult with impaired capacity.

18.91 This is consistent with the Adult Guardian's primary statutory role which is 'to protect the rights and interests of adults who have impaired capacity for a matter'.[646]

18.92 An issue to consider, however, is whether this restriction should continue to operate or whether the Adult Guardian should have power to investigate the actions of an attorney or administrator after the adult has died.

---

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

643 *Guardianship and Administration Act 2000* (Qld) s 182.

644 It is an offence for an attorney to exercise a power that has been revoked: *Powers of Attorney Act 1998* (Qld) s 71. Section 71 provides for a maximum penalty of 200 penalty units, that is, $20 000: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

645 Office of the Adult Guardian, *Annual Report 2005–06* (2006) 20.

646 *Guardianship and Administration Act 2000* (Qld) s 174(1).

18.93 The existence of such a power might operate as a measure to prevent neglect, exploitation or abuse. The possibility that actions of an attorney or administrator might be investigated after the adult has died might discourage the attorney or administrator from engaging in such conduct during the life of the adult.

18.94 Additionally, the investigation of the conduct of an attorney or administrator and, in particular, the audit of accounts may be particularly important as a step in the process of seeking appropriate compensation for the adult's estate.

18.95 Section 106 of the *Powers of Attorney Act 1998* (Qld) provides, for example, that a court may order an attorney to compensate the principal or, if the principal has died, the principal's estate for a loss caused by the attorney's failure to comply with the legislation:

> **106 Compensation for failure to comply**
>
> (1) An attorney may be ordered by a court to compensate the principal (or, if the principal has died, the principal's estate) for a loss caused by the attorney's failure to comply with this Act in the exercise of a power.
>
> (2) Subsection (1) applies even if the attorney is convicted of an offence in relation to the attorney's failure.
>
> (3) If the principal or attorney has died, the application for compensation must be made to a court within 6 months after the death.
>
> (4) If the principal and attorney have died, the application for compensation must be made to a court within 6 months after the first death.
>
> (5) A court may extend the application time.
>
> (6) Compensation paid under a court order must be taken into account in assessing damages in a later civil proceeding in relation to the attorney's exercise of the power.
>
> (7) In this section—
>
> ***attorney*** means an attorney under—
>
> (a) a general power of attorney made under this Act; or
>
> (b) an enduring document; or
>
> (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.
>
> ***court*** means any court.

18.96 Similarly, section 59 of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal or a court may order a guardian or an administrator for an adult to compensate the adult or, if the adult has died, the

adult's estate for a loss caused by the guardian's or administrator's failure to comply with the legislation.

18.97 However, it may be only after the Adult Guardian has conducted an investigation or audit that a person would have sufficient grounds to seek compensation under either of those provisions.

18.98 A further issue to consider is whether, if the Adult Guardian's power to investigate the conduct of an attorney or administrator is to continue after the adult has died, there should be a time limit on the Adult Guardian's ability to initiate an investigation. From a practical point of view, it might be difficult for the Adult Guardian to conduct an investigation several years after the adult has died. However, the legislation could be amended to provide that, within a specified period of time after an adult's death, the Adult Guardian may initiate an investigation of the conduct of the adult's attorney or administrator. In considering what is an appropriate period, a factor that might be relevant is the time within which an application to compensate an adult's estate must be made under section 106 of the *Powers of Attorney Act 1998* (Qld) and section 59 of the *Guardianship and Administration Act 2000* (Qld). Generally, an application must be made within six months after the adult's death.[647] However, if the attorney or administrator has also died, the application must be made within six months after the first death.[648]

18-6 Should the Adult Guardian have power to investigate a complaint about the conduct of an attorney under an enduring power of attorney who had power for a financial matter, or an administrator, after the adult has died (including the power to require summaries and accounts under section 182 of the *Guardianship and Administration Act 2000* (Qld))?

18-7 If yes to Question 18-6, should there be a time limit on the Adult Guardian's power to initiate such an investigation and, if so, what should the time limit be?

Suspension of an attorney's power under an enduring power of attorney or advance health directive

Appropriateness of suspension by the Adult Guardian

18.99 As explained earlier in this chapter, section 195 of the *Guardianship and Administration Act 2000* (Qld) provides that, in certain circumstances, the Adult Guardian may, by written notice to an attorney, suspend the operation of

647 *Powers of Attorney Act 1998* (Qld) s 106(3); *Guardianship and Administration Act 2000* (Qld) s 59(3).

648 *Powers of Attorney Act 1998* (Qld) s 106(4); *Guardianship and Administration Act 2000* (Qld) s 59(4).

all or some of an attorney's power under an enduring power of attorney or an advance health directive.[649] However, only the Tribunal and the Supreme Court may remove an attorney and appoint a new attorney or revoke all or part of an enduring power of attorney or advance health directive.[650]

18.100 Section 195 provides:

> **195 Suspension of attorney's power**
>
> (1) The adult guardian may, by written notice to an attorney, suspend the operation of all or some of an attorney's power for an adult if the adult guardian suspects, on reasonable grounds, that the attorney is not competent.
>
> (2) An attorney is not competent if, for example—
>
> (a) a relevant interest of the adult has not been, or is not being, adequately protected; or
>
> (b) the attorney has neglected the attorney's duties or abused the attorney's powers, whether generally or in relation to a specific power; or
>
> (c) the attorney has otherwise contravened this Act or the *Powers of Attorney Act 1998*.
>
> (3) The suspension may not be for more than 3 months.
>
> (4) The adult guardian may lift the suspension on the terms the adult guardian considers appropriate.
>
> (5) The attorney whose power has been suspended may apply to the tribunal and the tribunal may make the order it considers appropriate.
>
> (6) In this section—
>
> ***attorney*** means an attorney under an enduring document.

18.101 The Guardianship and Administration Reform Drivers ('GARD') have suggested that the Adult Guardian should not have the power to suspend an enduring power of attorney.[651] In GARD's view, it is more appropriate for that power to be exercised by the Tribunal:[652]

> In many circumstances an enduring power of attorney is one of the clearest indications of the adult's intentions and should be treated as such. There needs to be stronger evidence [for suspension] combined with the use of clear

649 See [18.54]–[18.56] above.

650 *Powers of Attorney Act 1998* (Qld) ss 109A, 116(a), (d).

651 GARD is an informal alliance of community-based organisations and is comprised 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.

652 Submission C24.

> procedures and criteria, before such a forceful power is invoked. It does not seem to be an appropriate power to be exercised by a body such as the Adult Guardian. The exercise of such a forceful power, which not only has vast ramifications on the lives of the adult and his/her family, but also goes against the express wishes of the adult, should be reserved for an entity such as a Court or the Tribunal. Given the nature of this power and the impact that such a decision could have, it is more appropriate that it be the subject of consideration by an independent body such as the Tribunal. These should be the only entities capable of suspension of such an important entitlement, that is, the entitlement of a capable person to expressly stipulate their wishes as to who will make decisions on their behalf in the event of them becoming incapacitated.

18.102 GARD observes that no other Australian jurisdiction confers on its equivalent of the Adult Guardian the power to suspend an enduring power of attorney.[653]

18.103 Given that the Adult Guardian has the function of investigating complaints and allegations about the actions of attorneys, the power to suspend all or some of an attorney's power may be seen as part of the Adult Guardian's investigative function. Further, where it is necessary to suspend an attorney's power quickly in order to protect the adult's interests, suspension by the Adult Guardian avoids the need for a Tribunal hearing and the time that would be involved in convening the hearing.

18.104 However, the conferral on the Tribunal of the power to suspend all or some of an attorney's power under an enduring power of attorney or advance health directive would be consistent with the Tribunal's power under section 155 of the *Guardianship and Administration Act 2000* (Qld). That section, which deals with the suspension by the Tribunal of the operation of all or some of the power of a guardian or administrator, provides:

> **155 Suspension of guardianship order or administration order**
>
> (1) The tribunal may, by order,[654] suspend the operation of all or some of the power of a guardian or administrator (an appointee) for an adult if the tribunal suspects, on reasonable grounds, that the appointed person is not competent.
>
> (2) An appointee is not competent if, for example—
>
> (a) a relevant interest of the adult has not been, or is not being, adequately protected; or

653 Ibid.

654 *Guardianship and Administration Act 2000* (Qld) s 115 provides that an application made to the Tribunal for, among other things, an order in relation to an adult about something in, or related to, the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) may be made by:

- the adult concerned; or
- unless the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) states otherwise — another interested person.

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

(c) the appointee has otherwise contravened this Act.

(3) The tribunal may make an order under subsection (1) in a proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of this Act.

(4) The suspension may not be for more than 3 months.

(5) During the suspension of the operation of power of a guardian, the adult guardian is taken to be the guardian for the adult for the exercise of the suspended power.

(6) During the suspension of the operation of power of an administrator, the public trustee is taken to be the administrator for the adult for the exercise of the suspended power. (note added)

18-8 Should the Adult Guardian have the power under section 195 of the *Guardianship and Administration Act 2000* (Qld) to suspend all or some of an attorney's power under an enduring power of attorney or an advance health directive?

18-9 If no to Question 18-8, should the *Guardianship and Administration Act 2000* (Qld) be amended:

(a) to repeal section 195; and

(b) to provide that the Tribunal may, by order, suspend the operation of all or some of an attorney's power under an enduring power of attorney or an advance health directive?

The procedure for an application to suspend the operation of an attorney's power

18.105 If the *Guardianship and Administration Act 2000* (Qld) is amended to provide that the Tribunal may, by order, suspend all or some of an attorney's power, section 115 of the Act, which deals with applications under the Act, will enable an application for such an order to be made by the adult concerned or an interested person.

18.106 An issue that arises for consideration is what notice requirements should apply to such an application.

18.107 Ordinarily, section 118 of the *Guardianship and Administration Act 2000* (Qld) requires that, at least seven days before the hearing of an

application about a matter, the Tribunal must give notice of the hearing to the adult concerned and, as far as practicable, to each of the following:[655]

- if the adult concerned is not the applicant — the applicant;
- the members of the adult's family;
- any primary carer of the adult;
- all current guardians, administrators and attorneys for the adult;
- the Adult Guardian;
- the Public Trustee; and
- anyone else the Tribunal considers should be notified.

18.108 However, if it is necessary to give notice to the attorney who is the subject of the application, that could put the adult, or the adult's property, at greater risk.

18.109 As noted above, section 155(3) of the *Guardianship and Administration Act 2000* (Qld) provides, in relation to the Tribunal's power to suspend the power of a guardian or an administrator, that the Tribunal may make an order in a proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of this Act.[656] Other provisions in the Act also include a similar provision.

18.110 Section 129 of the *Guardianship and Administration Act 2000* (Qld), which deals with the Tribunal's power to make an interim order, provides in part:

> **129 Interim order**
>
> (1) This section applies if the tribunal is satisfied, on reasonable grounds, there is an immediate risk of harm to the health, welfare or property of the adult concerned in an application, including because of the risk of abuse, exploitation or neglect of, or self-neglect by, the adult.
>
> (2) The tribunal may make an interim order in the proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of this Act, including section 118.
>
> …

18.111 Section 148, which deals with the Tribunal's power to issue an entry and removal warrant, also provides that section 118 does not apply to the application:

---

655 *Guardianship and Administration Act 2000* (Qld) s 118(1)(a)–(f), (g). Section 118(1)(fa) specifies the persons to whom notice must be given for a proceeding under ch 5B of the Act.

656 *Guardianship and Administration Act 2000* (Qld) s 155 is set out at [18.104] above.

148 Application for entry and removal warrant

(1) An application by the adult guardian for a warrant to enter a place and to remove an adult must be sworn and state the grounds on which the warrant is sought.

(2) Sections 116[657] and 118 do not apply to the application and the tribunal may issue a warrant without notice of the application having been given to the adult or any other person.

(3) The tribunal may refuse to consider the application until the adult guardian gives the tribunal all the information the tribunal requires about the application in the way the tribunal requires. (note added)

Example—

The tribunal may require additional information supporting the application be given by statutory declaration.

18-10 If the *Guardianship and Administration Act 2000* (Qld) is amended to provide that the Tribunal may, by order, suspend the operation of all or some of an attorney's power under an enduring power of attorney or an advance health directive, should the Act also be amended to provide that the Tribunal may make such an order in a proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of the Act, including the notice requirements in section 118?

The test for suspension

18.112 The test for suspension of an enduring power of attorney under section 195 of the *Guardianship and Administration Act 2000* (Qld) is that the Adult Guardian 'suspects, on reasonable grounds, that the attorney is not competent'. Under that section, the Adult Guardian may suspend an attorney's power as soon as the Adult Guardian suspects that the attorney is not competent, which includes situations where:

- a relevant interest of the adult has not been, or is not being, adequately protected;
- the attorney has neglected the attorney's duties or abused the attorney's powers; or
- the attorney has otherwise contravened the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

657 When the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) commences, s 1448 of that Act will omit s 116 of the *Guardianship and Administration Act 2000* (Qld). Section s 1463 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) will amend s 148(2) of the *Guardianship and Administration Act 2000* (Qld) to omit the reference to s 116 of that Act.

18.113 The Adult Guardian's Annual Report for 2007–08 outlines the approach taken in relation to the suspension of an attorney's powers:[658]

> This year, the investigations team has continued its proactive focus protecting people with impaired capacity from abuse. The number of suspensions of attorneys has increased significantly compared to last year. Previously investigations may have taken months. The current view is that if there is sufficient information to suggest that an adult with impaired capacity is at risk of imminent or ongoing abuse or exploitation by their attorney, immediate suspension of the attorney is justified.
>
> The investigation can continue during the period of the suspension.

18.114 GARD has suggested that enduring powers of attorney should not be too readily suspended:[659]

> It is imperative that a decision-maker who is granted such a significant power ensures that the power is exercised properly, with due care and based upon proper evidence. GARD believes that in order to ensure this occurs, statutory based criteria and procedures should be provided for in the Queensland Act which include the requirement that there be strong evidence in support of any such decision.

18.115 Queensland Health, on the other hand, has suggested that the *Guardianship and Administration Act 2000* (Qld) should be amended to allow an enduring power of attorney to be suspended if the threat to the adult's property is immediate:[660]

> Some clinicians present the argument that the Adult Guardian's suspension powers are not immediate enough to protect people with impaired capacity from financial abuse or exploitation. Clinicians suggest that upon receipt of concerns about alleged financial abuse, the Adult Guardian should be able to respond within 24 hours and immediately suspend the attorney's powers until the matter has been investigated.
>
> Queensland Health considers that natural justice is an essential component in investigation matters. However, where there may be imminent risk to the adult's finances or property, the principles of natural justice should yield to the protection of the adult.
>
> … An additional provision in the [*Guardianship and Administration Act 2000* (Qld)] that authorises the Adult Guardian to immediately suspend an attorney, in circumstances where the threat to the adult's property is immediate and is necessary for the continued protection of the adult's person or property.

18.116 The suspension of an attorney's power, even for a short period, is likely to disrupt the arrangements put in place to meet the adult's personal and financial decision-making needs. However, that disruption needs to be

---

658 Office of the Adult Guardian, *Adult Guardian Annual Report 07–08* (2008) 20.

659 Submission C24.

660 Submission C87B.

balanced against the importance of protecting the adult, and his or her property, from neglect, exploitation or abuse.

18.117 The test in section 195(1) of the *Guardianship and Administration Act 2000* (Qld) is consistent with the test in section 155(1) for the suspension by the Tribunal of all or some of the power of a guardian or an administrator.[661]

18-11 Is the test under section 195 of the *Guardianship and Administration Act 2000* (Qld) for the suspension of an attorney's power (that is, that the Adult Guardian 'suspects, on reasonable grounds, that the attorney is not competent') appropriate?

EXTERNAL REVIEW OF THE ADULT GUARDIAN'S DECISIONS

The law in Queensland

18.118 If a person is dissatisfied with a decision made by the Adult Guardian, there are currently several formal mechanisms by which the person may seek to have the decision changed.

18.119 If the Adult Guardian is a guardian or an attorney, the adult concerned or an interested person may apply to the Tribunal under section 115 of the *Guardianship and Administration Act 2000* (Qld) for an order directing the Adult Guardian to make a decision about the matter in a particular way. The Tribunal's power to give advice or directions is found in section 138 of the Act.[662]

18.120 In *Re WFM*,[663] the Tribunal held that 'its power to give directions extends to how a decision maker should exercise its powers, and to how a matter for which a decision maker has been appointed should be decided'.[664]

18.121 Further, a person who is dissatisfied with a decision of the Adult Guardian may seek (although indirectly) to have a different decision made about a matter by applying for the removal of the Adult Guardian as the adult's guardian or attorney. If the Adult Guardian is a guardian, application may be made to the Tribunal under section 29 of the *Guardianship and Administration Act 2000* (Qld) for a review of the appointment of the Adult Guardian. On such a review, the Tribunal may remove the appointed guardian (in this case, the

661 *Guardianship and Administration Act 2000* (Qld) s 155 is set out at [18.104] above.

662 *Guardianship and Administration Act 2000* (Qld) s 138 is set out at [15.29] above.

663 [2006] QGAAT 54. That decision and the power to give directions are considered in Chapter 15 of this Discussion Paper.

664 [2006] QGAAT 54, [33].

Adult Guardian) and make a new appointment.[665] If the Adult Guardian is an attorney, application may be made to the Tribunal or the Supreme Court to remove the Adult Guardian and appoint a new attorney or to remove a power from the Adult Guardian and to give the removed power to another attorney or to a new attorney.[666]

18.122 Because the Adult Guardian may be appointed only when there is no other appropriate person available for appointment,[667] once the Adult Guardian has been appointed as an adult's guardian, it might not be feasible for the Adult Guardian to be removed. The Tribunal has observed that 'the removal of a decision maker of last resort is not in reality an effective option for the Tribunal'.[668] Moreover, the fact that the Tribunal might, if it were the decision-maker, make a different decision, does not of itself mean that the Adult Guardian is generally inappropriate to be the adult's guardian.

18.123 In addition to these formal mechanisms, there are also some limited options for internal review of the Adult Guardian's decisions. However, these options are based on internal policies of the Office of the Adult Guardian and do not have a statutory basis. These options are:

(1) If a person considers that a decision was made on incorrect or incomplete information, he or she may seek an internal review of the decision. An internal review may occur if the information that the person provides is not already known to the officer who made the decision or if the officer's manager considers that there are grounds for a review.[669]

(2) If a person considers that a decision made by the Adult Guardian is not in the adult's interests, he or she may ask for the decision to be reviewed, setting out the grounds for his or her dissatisfaction relating to the adult's rights and interests. The request for the review will be considered in accordance with the Adult Guardian's policy for resolving complaints.[670]

A person who is still dissatisfied with the Adult Guardian's decision may make a complaint to the Ombudsman, although the Ombudsman does not have the power to change the decision.[671]

---

665 *Guardianship and Administration Act 2000* (Qld) s 31(3)(b)(ii)–(iii).

666 *Powers of Attorney Act 1998* (Qld) ss 110, 116(a)–(b).

667 *Guardianship and Administration Act 2000* (Qld) s 14(2).

668 *Re WFM* [2006] QGAAT 54. It is possible, however, that an appropriate person who was not available when the Adult Guardian was appointed has since become available.

669 Department of Justice and Attorney-General, Guardianship <http://www.justice.qld.gov.au/224.htm> at 16 October 2009.

670 Ibid.

671 The Ombudsman's functions, as provided for by s 12 of the *Ombudsman Act 2001* (Qld), are:

The law in other jurisdictions

18.124 New South Wales is the only Australian jurisdiction that provides a formal external mechanism for reviewing the decisions of the New South Wales Public Guardian.[672] Section 80A of the *Guardianship Act 1987* (NSW) provides that prescribed decisions of the Public Guardian made in connection with the Public Guardian's functions under that Act as guardian are reviewable by the New South Wales Administrative Decisions Tribunal ('the ADT'). Section 80A provides:

> **80A Review by ADT of guardianship decisions of Public Guardian**
>
> (1) An application may be made to the ADT for a review of a decision of the Public Guardian that:
>
> (a) is made in connection with the exercise of the Public Guardian's functions under this Act as a guardian, and
>
> (b) is of a class of decision prescribed by the regulations for the purposes of this section.
>
> (2) An application under this section may be made by:
>
> (a) the person to whom the decision relates, or
>
> (b) the spouse of the person, or
>
> (c) the person who has the care of the person to whom the decision relates, or
>
> (d) any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.

18.125 The *Guardianship Regulation 2005* (NSW) provides that all decisions made by the Public Guardian 'in connection with the exercise of the Public Guardian's functions under the Act as a guardian' are prescribed for the purposes of section 80A of the *Guardianship Act 1987* (NSW).[673]

18.126 Section 80A was inserted by the *Guardianship and Protected Estates Legislation Amendment Act 2002* (NSW) in response to a recommendation in a

---

- to investigate the administrative actions of agencies;
- to consider the administrative practices and procedures of an agency whose actions are being investigated and to make recommendations to the agency about appropriate ways of addressing the effects of inappropriate administrative actions or for the improvement of the practices and procedures; and
- to consider the administrative practices and procedures of agencies generally and to make recommendations or provide information or other help to the agencies for the improvement of the practices and procedures.

The Adult Guardian is an agency for the purposes of the Act: *Ombudsman Act 2001* (Qld) ss 8(1)(c), 9(1)(d).

672 It also provides a formal external mechanism for reviewing decisions of the NSW Trustee and Guardian: see *NSW Trustee and Guardian Act 2009* (NSW) s 62.

673 *Guardianship Regulation 2005* (NSW) reg 17.

report by the Public Bodies Review Committee of the New South Wales Parliament (the 'Committee') that the decisions of the Public Guardian and Protective Commissioner should be reviewable.[674] The Committee noted a range of concerns that had been raised about the Public Guardian, including:[675]

- a perceived lack of information provided and explained to parties about guardianship;
- concern about Public Guardian staff being unaware of client circumstances;
- a concern expressed in general terms by a number of respondents that:

> rhetoric about maintenance of family relationships in the Act and in the Public Guardian's literature is eroded in practical terms by a perceived organisational philosophy that applies stereotypes, fails to adequately take into account the view of family members, or judges these to be of less value than people providing services to a person under guardianship …

18.127 The Committee noted that there had been improvements in the Public Guardian's complaint handling systems.[676] However, it also noted that:[677]

> Submissions to the Committee indicate significant public concern in respect to people's inability to take their complaints to an outside organisation. This inability has led to frustration and continued disaffection, irrespective of the many accomplishments of [the office].

18.128 The Committee considered that, even if a complaint is unresolved by external review, 'at least the process by which an external body can be involved may often significantly reduce levels of tension or ill-will'.[678] It therefore recommended that the Administrative Decisions Tribunal of New South Wales (the 'ADT') should be the first point of external appeal from decisions of the Public Guardian.[679] It noted in this regard that the ADT was established 'to provide a central, cost effective and convenient way for people to obtain a review of administrative decisions'.[680]

---

674 Parliament of New South Wales, Public Bodies Review Committee, *Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner*, Report (2001). The report is available at <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/8db02477d7af85c7ca256cf500146a97/$FILE/Committee%20Report%2001%20October%202001%20-%20Inquiry%20into%20General%20Matters.pdf> at 16 October 2009.

675 Ibid 47.

676 Ibid 50.

677 Ibid 53.

678 Ibid 54.

679 Ibid 56, Recommendation 17.

680 Ibid 54.

18.129 The Committee also considered that there was a need for an external agency to monitor the complaints handling processes and to identify and assist in the resolution of any systemic deficiencies.[681] It noted that, although the New South Wales Ombudsman cannot reverse a decision or substitute a new decision, the Ombudsman has an important role in reviewing the decision-making processes of agencies and reporting on any deficiencies observed, and of working with agencies to resolve those issues.[682] It therefore recommended that the *Ombudsman Act 1974* (NSW) should be amended to make the Office of the Public Guardian subject to the scrutiny of the New South Wales Ombudsman.[683]

Issues for consideration

Creation of an external review mechanism

18.130 Although the Commission has not previously sought submissions about the Adult Guardian, a number of submissions have raised concerns about the decision-making function and operations of the Adult Guardian.

18.131 Concerns have been raised about a variety of matters, including:

- decisions by the Adult Guardian to restrict contact between family members and the adult;[684]
- decisions by the Adult Guardian about the adult's accommodation;[685]
- decisions by the Adult Guardian to remove and relocate the adult;[686]
- a failure to protect the adult from abuse and exploitation;[687]
- lack of consultation with family members;[688]
- insufficient information given to family members (including about matters such as the discharge of the adult from hospital or the relocation of the adult to new accommodation);[689]

681 Ibid 55.

682 Ibid.

683 Ibid 56, Recommendation 18.

684 Submissions C17, 11.

685 Submissions C16B, C17, C91, C110, C124, 2, 18, 31, 89.

686 Submissions C17, C100, 89.

687 Submissions C6, C33, 4, 19, 47.

688 Submissions C3, C58, C115, C142, 2.

689 Submissions C16, C110, C142, 11, 18.

- high turnover of delegated guardians or case workers for the adult,[690] which can lead to frustration in dealing with the Office of the Adult Guardian[691] and make it difficult for family members to establish any rapport with the relevant case worker;[692]
- taking the side of service providers;[693] and
- a lack of oversight of the Adult Guardian's activities[694] and a lack of accountability and scrutiny.[695]

18.132 It should be noted that the Commission has also received positive feedback about the Adult Guardian. One respondent said that he had a good relationship with the Adult Guardian and that he was grateful for what the Adult Guardian did as his mother's guardian.[696] Another respondent commented that the Adult Guardian had acted efficiently and quickly to secure accommodation for her father.[697] Yet another commented that she was able to have significant input into the decisions made by the Adult Guardian as her mother's guardian.[698]

18.133 Generally, however, it would be fair to say that the views expressed to date by respondents have revealed dissatisfaction with a number of the decisions made by the Adult Guardian and, in many cases, frustration and distress about their dealings with the Adult Guardian. It is probably inevitable that a review of this kind will attract negative feedback, and it cannot be assumed that this is necessarily representative of the wider community's experience of the Adult Guardian's guardianship services.

18.134 Nevertheless, it is important to consider, to the extent that these criticisms may be justified, how the Adult Guardian's role as guardian can be improved. Some matters raised about the Adult Guardian, such as problems arising from high staff turnover, do not sound in a legislative solution.[699]

---

690 Submissions C19, C115, C142, C147. One respondent referred noted that the adult had six case workers in a two and a half year period: C147.

691 Submission C78.

692 Submission C142.

693 Submission C3.

694 Submission C4.

695 Submission 31.

696 Submission 20.

697 Submission C114.

698 Submission C147.

699 The Annual Report of the Office of the Adult Guardian for 2006–07 acknowledges that there is substance to the complaint that there may be a number of different guardians who may be responsible for a matter during the time that the Adult Guardian holds an appointment. The Annual Report states that 'the movement of files through different hands is distressing for families and is an issue the office will strive to minimise': Office of the Adult Guardian, *Adult Guardian Annual Report 2006–07* (2007) 12.

18.135 Other concerns, however, may be able to be addressed by a mechanism for external review. The Cerebral Palsy League, has commented in relation to the current system:[700]

> Clients, advocates and families are wary of the AG [Adult Guardian] system because there is no openness, transparency and accountability. … [O]pportunities for scrutiny about failures and ways to improve the system are lost and squandered.

18.136 A mechanism for external review has the capacity to promote transparency and accountability in relation to the decision-making function of the Adult Guardian, and to enhance public confidence in the decisions of the Adult Guardian.

18.137 One option for creating an external review mechanism for the Adult Guardian's decisions is to make those decisions reviewable under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the 'QCAT Act').

18.138 One of the objects of the QCAT Act is 'to enhance the openness and accountability of public administration'.[701] When the Queensland Civil and Administrative Tribunal ('QCAT') commences operation, it will have, in addition to its original and appeals jurisdiction, a review jurisdiction that will enable it to review decisions made by certain entities.[702]

18.139 Section 17 of the QCAT Act provides:

> **17 Generally**
>
> (1) The tribunal's review jurisdiction is the jurisdiction conferred on the tribunal by an enabling Act to review a decision made or taken to have been made by another entity under that Act.
>
> (2) For this Act, a decision mentioned in subsection (1) is a ***reviewable decision*** and the entity that made or is taken to have made the decision is the ***decision-maker*** for the reviewable decision.

18.140 Accordingly, for QCAT to have jurisdiction to review a decision made by a particular entity, it is necessary for another Act (referred to in the QCAT Act as an 'enabling Act') to confer jurisdiction on QCAT to review the decisions of that entity.

---

700 Submission C86.

701 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(e).

702 See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 9(2). As explained in Chapter 17 of this Discussion Paper, when QCAT commences it will exercise the jurisdiction currently exercised by the Guardianship and Administration Tribunal, including the jurisdiction under ch 3, pt 3, div 2 of the *Guardianship and Administration Act 2000* (Qld) to review the appointment of guardians and administrators. Note, however, that jurisdiction under ch 3, pt 3, div 2 will form part of QCAT's original jurisdiction, rather than its review jurisdiction: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 10(2).

18.141 To make the Adult Guardian's decisions reviewable by QCAT, it would therefore be necessary to amend the *Guardianship and Administration Act 2000* (Qld) to provide that the Adult Guardian's decisions are reviewable decisions for the purposes of the QCAT Act. In that context, the *Guardianship and Administration Act 2000* (Qld) would be an enabling Act.

18.142 QCAT's review jurisdiction may be exercised if a person applies to QCAT under the QCAT Act to exercise its review jurisdiction for a reviewable decision.[703] A person may apply to QCAT to exercise its review jurisdiction for a reviewable decision, and QCAT may deal with the application, even if the decision is also the subject of a complaint, preliminary inquiry or investigation under the *Ombudsman Act 2001* (Qld).[704]

18.143 In exercising its review jurisdiction, QCAT:[705]

- must decide the review in accordance with the QCAT Act and the enabling Act under which the reviewable decision was made;
- may perform the functions conferred on QCAT by the QCAT Act or the relevant enabling Act; and
- has all the functions of the decision-maker for the reviewable decision.

18.144 The purpose of the review of a reviewable decision 'is to produce the correct and preferable decision'.[706] QCAT must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.[707]

18.145 Section 21 of the QCAT Act provides that the decision-maker for a reviewable decision must use his or her best endeavours to assist QCAT so that it can make its decision on the review, and sets out the nature of the assistance that must be provided, including the provision to QCAT of a written statement of the reasons for the decision and any document or thing in the decision-maker's possession or control that may be relevant to QCAT's review of the decision:

> **21 Decision-maker must help tribunal**
>
> (1) In a proceeding for the review of a reviewable decision, the decision-maker for the reviewable decision must use his or her best endeavours to help the tribunal so that it can make its decision on the review.

703 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 18(1).

704 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 18(2).

705 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 19.

706 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(1).

707 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(2).

(2) Without limiting subsection (1), the decision-maker must provide the following to the tribunal within a reasonable period of not more than 28 days after the decision-maker is given a copy of the application for the review under section 37—

(a) a written statement of the reasons for the decision;

(b) any document or thing in the decision-maker's possession or control that may be relevant to the tribunal's review of the decision.

(3) If the tribunal considers there are additional documents or things in the decision-maker's possession or control that may be relevant to the tribunal's review of the reviewable decision, the tribunal may, by written notice, require the decision-maker to provide the documents or things.

(4) If the tribunal considers the statement of reasons given under subsection (2)(a) is not adequate, the tribunal may, by written notice, require the decision-maker to give the tribunal an additional statement containing stated further particulars.

(5) The decision-maker must comply with a notice given under subsection (3) or (4) within the period stated in the notice.

(6) A requirement under this section that the decision-maker give the tribunal information or a document or other thing applies despite any provision in an Act prohibiting or restricting the disclosure of the information or the information contained in the document or thing.

Notes—

1 Under section 66, the tribunal may make an order prohibiting the publication of the information, or the information contained in the document or thing, other than in the way and to the persons stated in the order.

2 Under section 90(2), the tribunal may direct a hearing, or a part of a hearing, in which the information, or information contained in the document or thing, is disclosed to be held in private.

18.146 Generally, the commencement of a proceeding for the review of a reviewable decision under the QCAT Act does not affect the operation of the decision or prevent the implementation of the decision[708] — that is, it does not operate as a stay of the decision. The operation of the decision will be affected only if the relevant enabling Act provides for that to be the case or QCAT makes an order staying the operation of the reviewable decision under section 22 of the QCAT Act and the order is still in effect.[709]

18.147 QCAT may, on the application of 'a party' or on its own initiative, make an order staying the operation of a reviewable decision if a proceeding for the review of the decision has been commenced under the QCAT Act.[710] However,

708 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 22(1).

709 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 22(2).

710 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 22(3).

it may make such an order only if it considers that the order is desirable after having regard to:[711]

- the interests of any person whose interests may be affected by the making of the order or the order not being made;
- any submission made to QCAT by the decision-maker for the reviewable decision; and
- the public interest.

18.148 At any stage of a proceeding for the review of a reviewable decision, QCAT may invite the decision-maker for the decision to reconsider the decision.[712]

18.149 In a proceeding for a review of a reviewable decision, QCAT may:[713]

- confirm or amend the decision;
- set aside the decision and substitute its own decision; or
- set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with the directions that QCAT considers appropriate.

18.150 QCAT's decision to confirm or amend a decision or to set aside a decision and substitute its own decision:[714]

- is taken to be the decision of the decision-maker for the reviewable decision except for the purpose of QCAT's review jurisdiction or an appeal under part 8 of the QCAT Act; and
- subject to any contrary order of QCAT, has effect from when the reviewable decision takes, or took, effect.

18.151 The QCAT Act provides that QCAT may make written recommendations to the chief executive of the entity in which the reviewable decision was made 'about the policies, practices and procedures applying to reviewable decisions of the same kind'.[715] If QCAT makes written recommendations and the chief executive is not the decision-maker for the

711 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 22(4).

712 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 23(1). If such an invitation is made, the decision-maker has 28 days to reconsider the decision, and may confirm the decision, amend the decision, or set aside the decision and substitute a new decision: s 23(2).

713 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(1).

714 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(2).

715 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(3).

reviewable decision, QCAT must give a copy of the recommendations to the decision-maker.[716] This means that QCAT is not restricted simply to confirming or amending the decision, or substituting another decision for the decision under review, but has a wider power to comment on matters affecting the quality of the entity's decision-making functions.

18.152 As mentioned earlier in this chapter, the Guardianship and Administration Tribunal has the power to make an order directing how a substitute decision-maker for an adult (which would include the Adult Guardian when he or she is acting in that capacity) should exercise its power for a matter. In some respects, the effect of such a direction is similar, in outcome, to a review by QCAT that results in the amendment of a reviewable decision or in the setting aside of the decision and the substitution of QCAT's own decision. However, the fact that QCAT's review jurisdiction enables it to make recommendations to the chief executive of the entity that made the reviewable decision is a significant difference. That power is especially relevant to the stated object of the QCAT Act 'to enhance the quality and consistency of decisions made by decision-makers'.[717]

18-12 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that specified decisions of the Adult Guardian may be reviewed by QCAT in accordance with *Queensland Civil and Administrative Tribunal Act 2009* (Qld)?

The decisions that should be reviewable

18.153 Two issues arise for consideration in relation to the decisions of the Adult Guardian that should be reviewable decisions for the purposes of the QCAT Act.

18.154 The first issue is whether all, or only some, of the decisions made by the Adult Guardian in his or her capacity as a substitute decision-maker under the Queensland guardianship legislation (that is, as a guardian, attorney or statutory health attorney) should be reviewable. In New South Wales, all decisions made by the Public Guardian in connection with the exercise of the Public Guardian's functions under the *Guardianship Act 1987* (NSW) as a guardian are reviewable by the Administrative Decisions Tribunal.[718]

18.155 Another option would be to make particular classes of decisions that appear to be contentious reviewable decisions, rather than all decisions. From the submissions that have been received to date, these could include

716 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(4).

717 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(d).

718 *Guardianship Act 1987* (NSW) s 80A; *Guardianship Regulation 2005* (NSW) reg 17.

accommodation decisions[719] and decisions about visitation or contact[720] (for example, where the Adult Guardian decides that a certain person is or is not to be permitted to visit the adult). They could also include decisions delegating day-to-day decision-making[721] and decisions about restrictive practices.[722]

18.156 The second issue that arises is whether external review should apply to decisions made by the Adult Guardian in relation to a matter for an adult, even though the Adult Guardian is not acting as a guardian, attorney or statutory health attorney for the adult in making the decision. For example, sections 42 and 43 of the *Guardianship and Administration Act 2000* (Qld) provide, in effect, that in the relevant circumstances, the Adult Guardian may make a decision about a health matter for an adult, even though the Adult Guardian is not the adult's guardian, attorney or statutory health attorney.[723]

18.157 As a matter of principle, if a particular type of decision is to be subject to external review — for example, a decision in relation to the withholding or withdrawal of a life-sustaining measure for an adult — it is difficult to distinguish between a decision made by the Adult Guardian as the adult's guardian and a decision made by the Adult Guardian under the power conferred by sections 42 or 43 of the *Guardianship and Administration Act 2000* (Qld).

18.158 Although in New South Wales, external review is available in relation to decisions made by the Public Guardian in connection with the exercise of the Public Guardian's functions 'as a guardian', the *Guardianship Act 1987* (NSW) differs from the Queensland legislation in that it does not confer on the Public Guardian the additional decision-making powers that are conferred by the *Guardianship and Administration Act 2000* (Qld).

18-13 If the *Guardianship and Administration Act 2000* (Qld) is amended to provide that decisions of the Adult Guardian should be reviewable, which decisions should be reviewable:

(a) all of the Adult Guardian's decisions made as a guardian, attorney, or statutory health attorney for an adult with impaired capacity; or

719 Submissions C16, C17, C91, C110, C124, 2, 18, 31, 89.

720 Submissions C17, C47, 11.

721 See [18.10] above.

722 See [7.16] in vol 1 of this Discussion Paper.

723 *Guardianship and Administration Act 2000* (Qld) ss 42 and 43 are considered at [18.44]–[18.50] above.

(b) specific classes of decisions made by the Adult Guardian as a guardian, attorney or statutory health attorney for an adult with impaired capacity, for example:

(i) accommodation decisions;

(ii) visitation or contact decisions;

(iii) delegation of the power to make day-to-day decisions;

(iv) health care decisions generally;

(v) decisions about the withholding or withdrawal of a life-sustaining measure in particular;

(vi) decisions about the use of restrictive practices?

18-14 Should decisions made by the Adult Guardian for an adult, but not in the capacity of the adult's guardian, attorney or statutory health attorney be reviewable, for example, making a decision about a health matter under sections 42 or 43 of the *Guardianship and Administration Act 2000* (Qld)?

Persons who may seek the review of a decision of the Adult Guardian

18.159 If decisions, or certain classes of decisions, made by the Adult Guardian are to be reviewable decisions for the purposes of the QCAT Act, a further issue arises in relation to which persons should be able to seek the review of a relevant decision.

18.160 The *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) amends a number of Acts to provide that decisions made under those Acts will be reviewable decisions under the QCAT Act. For example, it amends the *Introduction Agents Act 2001* (Qld) to provide that:[724]

- an applicant for a licence to carry on the business of an introduction agent may apply to QCAT for a review of a decision of the chief executive to grant a licence subject to conditions or to refuse the grant of a licence;
- a licensee may apply to QCAT for a review of a decision of the chief executive to suspend his or her licence or to refuse to replace a lost, stolen or destroyed licence.

724 *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 602.

18.161 In the context of a legislative scheme such as the *Introduction Agents Act 2001* (Qld), the applicant for external review can properly be restricted to the person who is directly aggrieved by the particular decision.

18.162 However, decision-making in the context of the guardianship system, where the adult's interests are the primary focus, is quite different. The person who is directly affected by a decision of the Adult Guardian will usually be an adult with impaired capacity, who in all likelihood will lack the capacity to seek the review of a decision personally. It is more likely to be members of the adult's family and support network who are concerned about the decision that has been made in relation to the adult and who wish to seek an external review of the decision. The *Guardianship and Administration Act 2000* (Qld) uses the term 'interested person', which is defined to mean 'a person who has a sufficient and continuing interest in the other person'.[725] That may be an appropriate way to capture the nature of the interest of the concerned members of the adult's family and support network.

18-15 Who, if any, of the following should be able to apply to QCAT for the review of a reviewable decision made by the Adult Guardian:

(a) the adult who is the subject of the decision;

(b) an interested person?

18-16 Should anyone else be able to apply to QCAT for the review of a reviewable decision made by the Adult Guardian?

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

Chapter 19

The Public Trustee

INTRODUCTION

19.1 The Public Trustee of Queensland (the 'Public Trustee') is established under the *Public Trustee Act 1978* (Qld),[726] rather than under the *Guardianship and Administration Act 2000* (Qld). However, because the Public Trustee is eligible for appointment as an administrator and an attorney, and is commonly appointed as an administrator,[727] the Public Trustee is generally regarded as one of the agencies forming the guardianship system.

19.2 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 extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework.[728] In reviewing the legislation the Commission is to have regard to a number of specified matters, including 'the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts'.[729]

19.3 This chapter outlines the role of the Public Trustee under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). It also examines whether a mechanism for external review of the

---

726 *Public Trustee Act 1978* (Qld) s 7(1). In contrast, the Adult Guardian and the Public Advocate are both established by the *Guardianship and Administration Act 2000* (Qld): see Chapters 18 and 20 of this Discussion Paper.

727 See [19.6] below.

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

729 Ibid.

Public Trustee's decisions as an administrator or attorney would strengthen the current legislative framework of the guardianship system.

THE ROLE OF THE PUBLIC TRUSTEE[730]

Role under the *Guardianship and Administration Act 2000* (Qld)

Appointment as an administrator

19.4 The *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may appoint the Public Trustee as an administrator to make decisions about financial matters for an adult.[731] When so appointed, the Public Trustee has the same powers as any other administrator.[732] The only difference is that the requirement for the Tribunal to review the appointment of a guardian or administrator at least every five years does not apply to an appointment of the Public Trustee (or a trustee company).[733]

19.5 Although the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may appoint the Adult Guardian as a guardian for a matter only if there is no other appropriate person available for the matter,[734] the Act does not include a similar limitation on the appointment of the Public Trustee as an administrator. In Chapter 5 of this Discussion Paper, the Commission has considered whether the Act should be amended to provide that the Public Trustee may be appointed as an administrator only if no other appropriate person is available for appointment.[735]

19.6 At 30 June 2008, the Public Trustee was the appointed administrator for 6887 adults with impaired capacity, an increase of 5.4 per cent from 30 June 2007.[736] This represents a significant proportion of administrator appointments made by the Tribunal, as indicated by the Table below.

730 The Public Trustee's role as a litigation guardian is considered in Chapter 23 of this Discussion Paper.

731 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii). However, the Public Trustee is not eligible to be appointed as a guardian to make personal decisions for an adult: s 14(1)(a).

732 The functions and powers of guardians and administrators are considered in Chapter 5 of this Discussion Paper.

733 *Guardianship and Administration Act 2000* (Qld) s 28(1). The background to this provision is considered at [17.95] above.

734 *Guardianship and Administration Act 2000* (Qld) s 14(2).

735 See [5.83]–[5.86] in vol 1 of this Discussion Paper.

736 Public Trustee of Queensland, *Annual Report 2007–2008* (2008) 31.

Financial year	Adults for whom an administrator was appointed	Adults for whom the Public Trustee was appointed as the sole administrator	Percentage of appointments of the Public Trustee
2007–08[737]	2196	1857	84.6%
2006–07[738]	1917	1645	85.8%
2005–06[739]	1740	1463	84%
2004–05[740]	1471	1250	85%
2003–04[741]	1688	1262	74.8%

Table 1

19.7 In limited circumstances, the Public Trustee may also act as an adult's administrator even though no formal appointment has been made by the Tribunal:

- If the Tribunal suspects, on reasonable grounds, that an administrator is not competent, it may suspend the operation of all or some of the administrator's power for a period of up to three months.[742] During the period of suspension, the Public Trustee is taken to be the adult's administrator for the exercise of the suspended power.[743]

- If the Adult Guardian suspects, on reasonable grounds, that an attorney is not competent, the Adult Guardian may suspend the operation of all or some of an attorney's power for a period of up to three months.[744] During the period of suspension, the Public Trustee is taken to be the adult's attorney for the exercise of the suspended power.[745]

19.8 When making a decision as an administrator, the Public Trustee must apply the General Principles.[746]

737 Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 41.

738 Guardianship and Administration Tribunal, *Annual Report 2006–2007* (2007) 41.

739 Guardianship and Administration Tribunal, *Annual Report 2005–2006* (2006) 38.

740 Guardianship and Administration Tribunal, *Annual Report 2004–2005* (2005) 22.

741 Guardianship and Administration Tribunal, *Annual Report 2003–2004* (2004) 22.

742 *Guardianship and Administration Act 2000* (Qld) s 155(1), (4).

743 *Guardianship and Administration Act 2000* (Qld) s 155(6).

744 *Guardianship and Administration Act 2000* (Qld) s 195(1), (3).

745 *Guardianship and Administration Act 2000* (Qld) s 196(3).

746 *Guardianship and Administration Act 2000* (Qld) s 34(1).

19.9 Further, if the adult also has a guardian, attorney or another administrator, the Public Trustee must, as the adult's administrator, consult with the guardian, attorney or other administrator 'on a regular basis to ensure the adult's interests are not prejudiced by a breakdown in communication between them'.[747]

Role under the *Powers of Attorney Act 1998* (Qld)

Appointment as an attorney under an enduring power of attorney

19.10 The *Powers of Attorney Act 1998* (Qld) provides that an adult (the 'principal') may by an enduring power of attorney appoint one or more persons who are eligible attorneys to do in relation to one or more financial matters or personal matters anything that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised.[748]

19.11 An eligible person, for a matter under an enduring power of attorney, includes the Public Trustee.[749] The *Powers of Attorney Act 1998* (Qld) does not limit the matters for which the Public Trustee is an eligible attorney.[750] Accordingly, the Public Trustee may be appointed to make decisions about both financial matters and personal matters (including health matters).[751] This is in contrast to the position under the *Guardianship and Administration Act 2000* (Qld). As mentioned above, although the Tribunal may appoint the Public Trustee as an administrator to make decisions about financial matters for an adult,[752] it does not have the power to appoint the Public Trustee as a guardian to make personal decisions for an adult.[753]

19.12 As mentioned in Chapter 9 of this Discussion Paper, the Commission has been informed that it is not the Public Trustee's practice to accept an appointment as an attorney under an enduring power of attorney for personal matters.[754] The Commission has sought submissions in that Chapter on whether section 29(1) of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that, for a matter under an enduring power of attorney, the Public Trustee is an eligible attorney for a financial matter only.

---

747 *Guardianship and Administration Act 2000* (Qld) s 40(1).

748 *Powers of Attorney Act 1998* (Qld) s 32(1)(a). Enduring powers of attorney are considered in Chapter 9 of this Discussion Paper.

749 *Powers of Attorney Act 1998* (Qld) s 29(1)(b).

750 See *Powers of Attorney Act 1998* (Qld) s 29.

751 In contrast, the Adult Guardian is an eligible attorney only for personal matters: *Powers of Attorney Act 1998* (Qld) s 29(1)(d).

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

753 See *Guardianship and Administration Act 2000* (Qld) s 14(1)(a).

754 See [9.60] in vol 1 of this Discussion Paper.

19.13 In exercising a power as an attorney under an enduring power of attorney for a financial matter, the Public Trustee must comply with the General Principles.

19.14 If, contrary to its practice, the Public Trustee accepted an appointment as an attorney under an enduring power of attorney for personal matters (or a more limited appointment for health matters) and exercised a power for a health matter, the Public Trustee would also be required to comply with the Health Care Principle.[755]

19.15 In either case, if the principal also has a guardian, administrator or another attorney, the Public Trustee must consult with the guardian, administrator or other attorney on a regular basis to ensure that the principal's interests are not prejudiced by a breakdown in communication between them.[756]

Acting as an attorney under an advance health directive

19.16 The *Powers of Attorney Act 1998* (Qld) provides that an adult principal may by an advance health directive give directions about both health matters and special health matters for his or her future health care.[757] The principal may also give information about those directions, and may appoint one or more persons who are eligible attorneys to exercise power for a health matter for the principal in the event that the directions prove inadequate.[758] Subject to the terms of the advance health directive and the *Powers of Attorney Act 1998* (Qld), an attorney appointed under an advance health directive may also do anything in relation to a health matter for the principal that the principal could lawfully do if he or she had capacity for the matter.[759]

19.17 An eligible person, for a matter under an advance health directive, includes the Public Trustee.[760]

19.18 As mentioned in Chapter 11 of this Discussion Paper, the Commission has been informed that it is not the Public Trustee's practice to accept an appointment as an attorney under an advance health directive.[761] The Commission has sought submissions in that Chapter on whether section

755 *Powers of Attorney Act 1998* (Qld) ss 75(a), 76.

756 *Powers of Attorney Act 1998* (Qld) s 79(1).

757 *Powers of Attorney Act 1998* (Qld) s 35(1)(a). Advance health directives are considered in Chapter 11 of this Discussion Paper.

758 *Powers of Attorney Act 1998* (Qld) s 35(1)(b)–(c). Even though a principal may give directions in an advance health directive about special health matters, because s 35(1)(c) refers to health matters, an attorney appointed under an advance health directive may make decisions only about health matters and has no power to make decisions about special health matters for the principal.

759 *Powers of Attorney Act 1998* (Qld) s 36(4)–(5).

760 *Powers of Attorney Act 1998* (Qld) s 29(2)(b).

761 See [11.47] in vol 1 of this Discussion Paper.

29(2)(b) of the *Powers of Attorney Act 1998* (Qld) should be omitted so that the Public Trustee is no longer an eligible attorney for a matter under an advance health directive.

19.19 If, contrary to its practice, the Public Trustee accepted an appointment as attorney under an advance health directive and exercised a power for a health matter, the Public Trustee would be required to comply with the General Principles and the Health Care Principle.[762] Further, if the principal also had a guardian, administrator or another attorney, the Public Trustee would be required to consult with the guardian, administrator or other attorney on a regular basis to ensure that the principal's interests were not prejudiced by a breakdown in communication between them.[763]

The role of the Public Trustee (or equivalent) under the interstate guardianship legislation

19.20 In all other Australian jurisdictions, the Public Trustee (or equivalent)[764] may be appointed as an administrator (or equivalent) to make financial decisions for an adult who has impaired capacity for those decisions.[765]

19.21 In addition, the Public Trustee (or equivalent) may be appointed as an attorney under an enduring power of attorney to make financial decisions for a principal.[766]

Issues for consideration

19.22 As mentioned earlier, the powers of the Public Trustee when acting as an administrator or as an attorney under an enduring power of attorney are the same as any other administrator or attorney. Those powers are considered in Chapters 6 and 9 of this Discussion Paper. Nevertheless, the Commission invites submissions on whether there are particular issues that arise when the Public Trustee acts as an administrator or as an attorney.

---

762 *Powers of Attorney Act 1998* (Qld) ss 75(a), 76.

763 *Powers of Attorney Act 1998* (Qld) s 79(1).

764 In New South Wales, the equivalent of the Public Trustee is the NSW Trustee: see *NSW Trustee and Guardian Act 2009* (NSW). In Victoria, the equivalent of the Public Trustee is State Trustees Limited: see *State Trustees (State Owned Company) Act 1994* (Vic).

765 *Guardianship and Management of Property Act 1991* (ACT) ss 8, 9 (manager); *Guardianship Act 1987* (NSW) s 25E (manager); *Aged and Infirm Persons' Property Act* (NT) ss 11, 13(1)(a) (manager); *Guardianship and Administration Act 1993* (SA) s 35(1), (2)(b) (administrator); *Guardianship and Administration Act 1995* (Tas) ss 51, 54(1)(a) (administrator); *Guardianship and Administration Act 1986* (Vic) ss 46, 47(1), (4) (administrator); *Guardianship and Administration Act 1990* (WA) ss 3(1) (definition of 'corporate trustee'), 64, 68(1)(b)–(d) (administrator).

766 *Powers of Attorney Act 2006* (ACT) ss 13, 14(1)(a); *Powers of Attorney Act 2003* (NSW) s 19, *NSW Trustee and Guardian Act 2009* (NSW) s 11(1)(d); *Powers of Attorney Act* (NT) s 13, *Public Trustee Act* (NT) s 32(1)(j); *Powers of Attorney and Agency Act 1984* (SA) s 6, *Public Trustee Act 1995* (SA) s 5(2)(a); *Powers of Attorney Act 2000* (Tas) s 30, *Public Trustee Act 1930* (Tas) s 12(1); *Instruments Act 1958* (Vic) s 115, *State Trustees (State Owned Company) Act 1994* (Vic) s 1(b), *Trustee Companies Act 1984* (Vic) s 15(1).

19-1 Should the *Guardianship and Administration Act 2000* (Qld) be amended to change the powers of the Public Trustee when acting as an administrator?

19-2 Should the *Powers of Attorney Act 1998* (Qld) be amended to change the powers of the Public Trustee when acting as an attorney under an enduring document?

EXTERNAL REVIEW OF THE PUBLIC TRUSTEE'S DECISIONS

The law in Queensland

19.23 If a person is dissatisfied with a decision made by the Public Trustee as an adult's administrator or attorney, there are several formal mechanisms by which the person may seek to have the decision changed. These are similar to the mechanisms discussed in Chapter 18 in relation to decisions by the Adult Guardian.

19.24 If the Public Trustee is an administrator or attorney, the adult concerned or another interested person may apply to the Tribunal under section 115 of the *Guardianship and Administration Act 2000* (Qld) for an order directing the Public Trustee to make a decision about the matter in a particular way. The Tribunal's power to give advice or directions is found in section 138 of the Act.[767]

19.25 If the Public Trustee is an administrator, it may be possible to seek to have a different decision made about a matter by applying under section 29 of the *Guardianship and Administration Act 2000* (Qld) for a review of the appointment of the Public Trustee as the adult's administrator.[768] On such a review, the Tribunal may remove the appointed administrator (in this case, the Public Trustee) and make a new appointment.[769]

19.26 Further, if a person is dissatisfied with a decision made by the Public Trustee as an adult's attorney under an enduring power of attorney, the person may apply to the Tribunal or the Supreme Court for an order to:[770]

---

767 *Guardianship and Administration Act 2000* (Qld) s 138 is set out at [15.29] above.

768 Before s 29 of the *Guardianship and Administration Act 2000* (Qld) was amended by s 20 of the *Disability Services and Other Legislation Amendment Act 2008* (Qld), it was clear that an application for the review of the appointment of an administrator could be made by the adult, an interested person for the adult, the Public Trustee or a trustee company. However, it appears that the amendment of s 29 has had the effect that the Tribunal may review of the appointment of an administrator only on its own initiative and not on the application of some specified person. This issue is considered in more detail at [17.70]–[17.74] above.

769 *Guardianship and Administration Act 2000* (Qld) s 31(3)(b)(ii)–(iii).

770 *Powers of Attorney Act 1998* (Qld) ss 109A, 110, 116.

- remove the Public Trustee and appoint a new attorney;
- remove a power from the Public Trustee and give the removed power to another attorney or to a new attorney;
- change the terms of the enduring power of attorney; or
- revoke all or part of the enduring power of attorney.

19.27 However, the fact that the Tribunal or, in the case of an enduring power of attorney, the Supreme Court might have made a different decision if it were the decision-maker does not of itself mean that the Public Trustee is inappropriate to be the adult's administrator or attorney.

19.28 In addition to these formal mechanisms, there are also some limited options for internal review of the Public Trustee's decisions. However, these options are based on internal policies of the Public Trust Office and do not have legislative force. The Public Trustee has a Complaint Management Policy for resolving client complaints.[771] Under that policy, the Managing Officer is to provide a response to the complainant outlining the result of the investigation of the complaint and advising of the remedial action (if any) to be taken.[772]

19.29 A complainant who is dissatisfied with the outcome of his or her complaint may request a review of the complaint to be undertaken by the Public Trustee.[773] A person who is still dissatisfied with the outcome of his or her complaint may lodge a complaint with the Ombudsman. However, the Ombudsman does not have the power to change the decision.[774]

The law in other jurisdictions

19.30 New South Wales is the only Australian jurisdiction that has a legislative mechanism for the external review of decisions made by that jurisdiction's equivalent of the Public Trustee.

19.31 Section 62 of the *NSW Trustee and Guardian Act 2009* (NSW) provides that prescribed decisions of the NSW Trustee[775] made in connection with the NSW Trustee's functions in respect of the estates of managed persons

771 Public Trustee of Queensland, <http://www.pt.qld.gov.au/pubs/docs/ComplaintManagementPolicy.pdf> at 21 September 2009.

772 Ibid 6.

773 Ibid.

774 See *Ombudsman Act 2001* (Qld) s 12, which is considered at n 671 above.

775 The NSW Trustee and Guardian is established by s 5 of the *NSW Trustee and Guardian Act 2009* (NSW) and is generally referred to in that Act as the NSW Trustee: s 3(1). The Act abolishes and dissolves the offices of the Public Trustee and the Protective Commissioner and provides that the NSW Trustee is taken, for all purposes, including the rules of private international law, to be a continuation of and the same legal entity as the former corporations: sch 1 cll 10–11.

are reviewable by the Administrative Decisions Tribunal (the 'ADT') in that State. Section 62 provides:

> **62 Review by ADT of decisions by NSW Trustee under this Division**
>
> (1) An application may be made to the ADT for a review of a decision of the NSW Trustee that:
>
> (a) is made in connection with the exercise of the NSW Trustee's functions under this Division, and
>
> (b) is of a class of decision prescribed by the regulations for the purposes of this section.
>
> (2) Subsection (1) does not apply if the decision of the NSW Trustee was made in accordance with a direction given by the Supreme Court to the NSW Trustee.
>
> (3) An application under this section may be made by:
>
> (a) a managed person in respect of whose estate the decision was made, or
>
> (b) the spouse of a managed person in respect of whose estate the decision was made, or
>
> (c) any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.

19.32 Clause 43 of the *NSW Trustee and Guardian Regulation 2008* (NSW) provides:

> **43 Review by ADT of estate management decisions of NSW Trustee**
>
> All decisions made by the NSW Trustee in connection with the exercise of the NSW Trustee's functions under Division 1 of Part 4.5 of the Act are prescribed for the purposes of section 62 of the Act.

19.33 The reference in clause 43 to the NSW Trustee's functions under Division 1 of Part 4.5 of the *NSW Trustee and Guardian Act 2009* (NSW)[776] includes the functions of the NSW Trustee when the NSW Guardianship Tribunal orders that the estate of a person be subject to management under the *NSW Trustee and Guardian Act 2009* (NSW).[777] However, clause 43 does not

776 Div 1 of pt 4.5 of the *NSW Trustee and Guardian Act 2009* (NSW) applies 'in respect of the estate of a managed person that is committed to the management of the NSW Trustee': s 55 (emphasis added). Section 38 of the Act defines 'managed person' to mean 'a protected person, managed missing person or patient whose estate is subject to management under this Act'. It further defines 'protected person' to mean 'a person in respect of whom an order is in force under Part 4.2 or 4.3 or the *Guardianship Act 1987* that the whole or any part of the person's estate be subject to management under this Act'.

777 See *Guardianship Act 1987* (NSW) s 25E.

appear to include decisions made by the NSW Trustee in the capacity of an attorney under an enduring power of attorney.[778]

19.34 Section 62 of the *NSW Trustee and Guardian Act 2009* (NSW) replaced section 28A of the *Protected Estates Act 1983* (NSW) when the latter Act was repealed in 2009.[779] Section 28A of the *Protected Estates Act 1983* (NSW) was inserted by the *Guardianship and Protected Estates Legislation Amendment Act 2002* (NSW) in response to a recommendation in a report by the Public Bodies Review Committee of the New South Wales Parliament ('the Committee') that the decisions of the Public Guardian and the Protective Commissioner (now the NSW Trustee)[780] should be reviewable.[781] The Committee noted a range of concerns that had been raised about the Protective Commissioner, including:[782]

- concern about the length of time to get bills paid;
- perceived unfairness in fees charged;
- perception that staff are not consulting with, or working with, families; and
- insufficient client contact or knowledge.

19.35 The Committee considered that:[783]

> there is a strong need for an external review mechanism that provides for a review of individual decisions, and also provides a mechanism that may highlight deficiencies and improve their service delivery.

19.36 It therefore recommended that the New South Wales ADT be the first point of external appeal from decisions of the Protective Commissioner.[784] It noted in this regard that the ADT was established 'to provide a central, cost

---

778 As explained at n 776 above, div 1 of pt 4.5 of the *NSW Trustee and Guardian Act 2009* (NSW) applies 'in respect of the estate of a managed person that is committed to the management of the NSW Trustee': s 55. The definition of 'managed person' does not appear to include a person who appoints the NSW Trustee as an attorney under an enduring power of attorney.

779 The *Protected Estates Act 1983* (NSW) was repealed by s 4 of the *NSW Trustee and Guardian Act 2009* (NSW).

780 As explained at n 775 above, the Protective Commissioner has recently been abolished and replaced by the NSW Trustee.

781 Parliament of New South Wales, Public Bodies Review Committee, *Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner*, Report (2001). The report is available at <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/8db02477d7af85c7ca256cf500146a97/$FILE/Committee%20Report%2001%20October%202001%20-%20Inquiry%20into%20General%20Matters.pdf> at 28 August 2009.

782 Ibid 48.

783 Ibid 54.

784 Ibid 56, Recommendation 17.

effective and convenient way for people to obtain a review of administrative decisions'.[785]

19.37 The Committee also recommended that the *Ombudsman Act 1974* (NSW) be amended to make the Office of the Protective Commissioner subject to the scrutiny of the New South Wales Ombudsman.[786]

Issues for consideration

Creation of an external review mechanism

19.38 Although the Commission has not previously sought submissions about the Public Trustee, a number of submissions have raised concerns about the decision-making function and operations of the Public Trustee.

19.39 Concerns have been raised about a variety of matters, including:

- lack of communication with the adult, including about how the adult's funds are being expended;[787]
- insufficiency of funds made available for the adult for living expenses;[788]
- delays in making funds available for the adult's expenses;[789]
- decisions by the Public Trustee not to expend funds on repairs and improvements to the adult's home;[790]
- not paying the adult's bills on time;[791]
- lack of consultation with the adult and the adult's guardians, family and support network;[792]
- staff turnover;[793]
- cost;[794] and

785 Ibid 54.

786 Ibid 56, Recommendation 18.

787 Submission C8.

788 Submissions C8, C13, C35, C39, C147, CF11.

789 Submissions C35A, 84.

790 Submission C8.

791 Submissions C13, C92.

792 Submissions C35, C58, C142, 20, 61, 84.

793 Submissions C35A, C92.

794 Submissions C35, C39, C116, C130, C150.

- lack of an effective complaints mechanism.[795]

19.40 Some of these respondents revealed a high degree of frustration and distress about their dealings with the Public Trustee. As noted in Chapter 18 in relation to the submissions that have been received about the Adult Guardian, it is not surprising that a review of this kind will attract criticism of those Offices. It is more difficult to determine whether the concerns raised are representative of the wider community's experience of the Public Trustee's financial administration services. The most recent Annual Report of the Queensland Ombudsman records the 15 State agencies about which the most complaints were received. The Public Trustee appears as the sixth agency on that list. The Annual Report notes that complaints made to the Queensland Ombudsman about the Public Trustee increased from 127 in 2006–07 to 133 in 2007–08, an increase of five per cent.[796] However, it does not give a breakdown of the types of matters about which these complaints were made; accordingly, it is not known how many of them relate to the administration of estates where the Public Trustee has been appointed as the adult's administrator.

19.41 In Chapter 18, the Commission has raised the possibility of external review as a mechanism for promoting transparency and accountability of the Adult Guardian's decision-making function. As explained in that Chapter, when the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the 'QCAT Act') commences, it will establish a review jurisdiction that will enable QCAT to review the decisions of certain entities.[797] For QCAT to have jurisdiction to review a decision made by a particular entity, it is necessary for another Act (referred to in the QCAT Act as an 'enabling Act') to confer jurisdiction on QCAT to review the decisions of that entity.[798]

19.42 To make the Public Trustee's decisions as an administrator reviewable by QCAT, it would therefore be necessary to amend the *Guardianship and Administration Act 2000* (Qld) to provide that those decisions are reviewable decisions for the purposes of the QCAT Act. Similarly, it would be necessary to amend the *Powers of Attorney Act 1998* (Qld) to provide that the Public Trustee's decisions as an attorney are reviewable decisions for the purposes of the QCAT Act. In that context, each of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) would be an enabling Act.

19.43 QCAT's review jurisdiction is considered in detail in Chapter 18 of this Discussion Paper.[799] The significant features of the review jurisdiction are that:

---

795 Submission C35A.

796 Queensland Ombudsman, *Fair Decisions. Our Business. Annual Report 2007–2008* (2008) 25.

797 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 9(2), which is considered at [18.137]–[18.138] above.

798 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 17, which is set out at [18.139] above.

799 See [18.137]–[18.152] above.

- QCAT has all the functions of the decision-maker for the reviewable decision.[800]

- QCAT must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.[801]

- The decision-maker for the reviewable decision must give QCAT a written statement of the reasons for the decision and any document or thing in the decision-maker's possession that may be relevant to QCAT's review of the decision.[802]

- If QCAT considers that there are additional documents or things in the decision-maker's possession or control that may be relevant to its review of the reviewable decision, QCAT may by written notice require the decision-maker to provide the document or things.[803]

- If QCAT considers that the statement of reasons for the decision given by the decision-maker to QCAT is not adequate, it may by written notice require the decision-maker to give QCAT an additional statement containing stated further particulars.[804]

- QCAT may, at any stage of a proceeding for the review of a reviewable decision, invite the decision-maker for the decision to reconsider the decision.[805]

- QCAT may confirm or amend the decision, set aside the decision and substitute its own decision, or set aside the decision and return the matter for reconsideration to the decision-maker for the decision with such directions as QCAT considers appropriate.[806]

- QCAT may make written recommendations to the chief executive of the entity in which the reviewable decision was made 'about the policies, practices and procedures applying to reviewable decisions of the same kind'.[807] This means that QCAT is not restricted simply to confirming or amending the decision, or substituting another decision for the decision under review, but has a wider power to comment on matters affecting the quality of the entity's decision-making functions.

---

800 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 19(c).

801 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(2).

802 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(2).

803 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(3).

804 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(4).

805 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 23(1).

806 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(1).

807 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(3).

19.44 The last of these powers is particularly relevant to the stated object of the QCAT Act 'to enhance the quality and consistency of decisions made by decision-makers'.[808]

19-3 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Public Trustee's decisions as an administrator appointed under that Act may be reviewed by QCAT in accordance with the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)?

19-4 Should the *Powers of Attorney Act 1998* (Qld) be amended to provide that the Public Trustee's decisions as an attorney appointed under an enduring power of attorney may be reviewed by QCAT in accordance with the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)?

The decisions that should be reviewable

19.45 If decisions of the Public Trustee are to be reviewable, there is an issue as to whether all decisions made by the Public Trustee as an administrator or attorney should be reviewable or whether external review should be limited to particular classes of decisions. In Chapter 18, the Commission has sought submissions on whether all the decisions of the Adult Guardian should be reviewable or whether review should be limited to specific classes of decisions — for example, accommodation decisions, visitation decisions, decisions delegating day-to-day decisions, health care decisions and decisions in relation to the use of restrictive practices.

19.46 Unless the Public Trustee has been appointed as an attorney under an enduring power of attorney for personal decisions or under an advance health directive,[809] the decisions that may be made by the Public Trustee as an administrator or attorney will always be financial decisions. Within the range of financial decisions that can be made by the Public Trustee, it might be possible, if it were considered desirable, to limit external review to financial decisions of a particular significance. However, it could be difficult to exclude certain decisions from review in a way that operated fairly. For an adult with a fairly modest estate, for example, a decision to reduce the adult's weekly allowance by even a relatively small amount could be as significant to the adult as a decision about a larger sum of money in the context of an adult with a larger estate.

808 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(d).

809 But see [19.11]–[19.12], [19.17]–[19.18] above in relation to the Public Trustee's practice regarding appointments of these kinds.

19-5 If the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) are amended to provide that decisions of the Public Trustee should be reviewable by QCAT, which decisions should be reviewable:

(a) all of the Public Trustee's decisions made as an administrator or attorney for an adult with impaired capacity; or

(b) particular decisions made by the Public Trustee as an administrator or attorney for an adult with impaired capacity and, if so, which ones?

Persons who may seek the review of a decision of the Public Trustee

19.47 If decisions, or certain decisions, of the Public Trustee are to be reviewable decisions for the purposes of the QCAT Act, a further issue arises in relation to which persons should be able to seek the review of a relevant decision.

19.48 In Chapter 18 of this Discussion Paper, the Commission noted that, in the context of the guardianship system, where the adult's interests are the primary focus, it might not be sufficient simply to enable a person who is directly affected by a decision to seek its review.[810] In many cases, it is likely to be members of the adult's family and support network who are concerned about the decision that has been made for the adult and who wish to seek an external review of the decision. It was suggested that the term 'interested person', which is defined in the *Guardianship and Administration Act 2000* (Qld) to mean 'a person who has a sufficient and continuing interest in the other person',[811] may be an appropriate way to capture the nature of the interest of concerned members of the adult's family and support network.[812]

19-6 Who, if any, of the following should be able to apply to QCAT for the review of a reviewable decision of the Public Trustee:

(a) the adult who is the subject of the decision;

(b) an interested person?

810 See [18.162] above.

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

812 See [18.162] above.

19-7 Should anyone else be able to apply to QCAT for the review of a reviewable decision of the Public Trustee?

Chapter 20

The Public Advocate

INTRODUCTION

20.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including:

- the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation; and

- the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework.[813]

20.2 Chapter 9 of the *Guardianship and Administration Act 2000* (Qld) establishes the Public Advocate,[814] a statutory appointee with the function of systemic advocacy.[815] Although the Government has announced its intention to abolish the Public Advocate and transfer the powers of the Public Advocate to the Adult Guardian,[816] the Public Advocate is currently one of the bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation, and forms part of the regulatory framework referred to in the terms of reference.

---

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

814 *Guardianship and Administration Act 2000* (Qld) s 208.

815 *Guardianship and Administration Act 2000* (Qld) s 209.

816 See [20.24] below.

20.3 This chapter examines the functions and powers of the Public Advocate and examines a number of issues in relation to those functions and powers, including whether, in terms of a comprehensive investigative and regulatory framework, those functions and powers are more appropriately and effectively performed and exercised by the Public Advocate or the Adult Guardian.

THE LAW IN QUEENSLAND

The Public Advocate's functions

20.4 The functions of the Public Advocate are set out in section 209 of the *Guardianship and Administration Act 2000* (Qld), which provides:

> **209 Functions—systemic advocacy**
>
> The public advocate has the following functions—
>
> (a) promoting and protecting the rights of adults with impaired capacity for a matter;
>
> (b) promoting the protection of the adults from neglect, exploitation or abuse;
>
> (c) encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy;
>
> (d) promoting the provision of services and facilities for the adults;
>
> (e) monitoring and reviewing the delivery of services and facilities to the adults.

20.5 The function of the Public Advocate is concerned with systemic advocacy — that is, advocating for changes to improve the systems and services that affect adults with impaired capacity.[817] This function differs from the function of the Adult Guardian, whose primary functions of acting as guardian and investigating allegations of abuse, neglect and exploitation are performed in relation to specific adults with impaired capacity.[818]

20.6 The Public Advocate's Annual Report for 2007–08 outlines a broad range of advocacy work undertaken in the following areas: the disability system, the guardianship system, the housing system, the mental health system, the

---

817 The Commission notes that the Guardianship and Administration Reform Drivers ('GARD') have suggested that the clarification of the functions of the Public Advocate is necessary in order to provide the Public Advocate, stakeholders and the public at large with a clear statement of the functions of the Public Advocate: Submission C24. However, the systemic advocacy functions conferred by the guardianship legislation in the other Australian jurisdictions on their relevant statutory officeholder are expressed in similarly broad terms: see n 826 below. GARD is an informal alliance of community-based organisations and is comprised 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.

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

health system, the criminal justice and corrective services systems, the legal system, the advocacy system, the aged care system and workforce systems.[819] This has involved monitoring the outcome of legislative and policy reform in these areas, making submissions in response to various inquiries, papers or exposure drafts,[820] and participating in reference or advisory committees.

The Public Advocate's powers

20.7 The powers of the Public Advocate are set out in section 210 of the *Guardianship and Administration Act 2000* (Qld), which provides:

> **210 Powers**
>
> (1) The public advocate may do all things necessary or convenient to be done to perform the public advocate's functions.
>
> (2) The public advocate may intervene in a proceeding before a court or tribunal, or in an official inquiry, involving protection of the rights or interests of adults with impaired capacity for a matter.
>
> (3) However, intervention requires the leave of the court, tribunal or person in charge of the inquiry and is subject to the terms imposed by the court, tribunal or person in charge of the inquiry.

20.8 The Public Advocate has recently intervened in proceedings that raised issues about:

- the remuneration of a trustee company that is appointed as the administrator of an adult under the *Guardianship and Administration Act 2000* (Qld);[821]
- whether the administration on an antilibidinal drug to an adult with impaired capacity constitutes a health matter, a personal matter, or a restrictive practice matter under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld);[822] and

---

819 See Office of the Public Advocate (Qld), *Annual Report 2007–2008* (2008).

820 See eg the submissions that the Public Advocate has made since 1 January 2009 in response to the following inquiries, papers or exposure drafts: Exposure Draft of the Health Practitioner Regulation National Law 2009; National Human Rights Consultation Secretariat, Background Paper: National Human Rights Consultation; Consultation draft Victims of Crime Assistance Bill 2009; Exposure Draft of Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009; Queensland Law Reform Commission, Discussion Paper, WP No 64, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*; *A Public Interest Map: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities*; Senate Finance and Public Administration Committee inquiry into residential and community aged care in Australia; Queensland Corrective Services, Green Paper: *Reform of Low Security Custody in Queensland*. These submissions and other submissions made by the Office of the Public Advocate are available at <http://www.justice.qld.gov.au/656.htm> at 5 August 2009.

821 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323.

822 *Re AAG* [2009] QGAAT 43. This issue is considered in detail in Chapter 7 of this Discussion Paper.

- the circumstances in which the Tribunal is required to apply the presumption of capacity.[823]

Independence of the Public Advocate

20.9 The Public Advocate is an independent statutory officer. Section 211 of the *Guardianship and Administration Act 2000* (Qld) provides that the Public Advocate, in performing his or her functions and in exercising his or her powers, is not under the control or direction of the Minister.

20.10 The *Guardianship and Administration Act 2000* (Qld) currently provides that a person may not hold office as Public Advocate while the person holds office as Adult Guardian or Public Trustee.[824] This provision ensures that there is no conflict of interest for the Public Advocate in performing systemic advocacy functions in relation to services provided by either of these bodies.

ISSUES FOR CONSIDERATION

Separation of the roles of the Public Advocate and the Adult Guardian

Other Australian jurisdictions

20.11 Although the guardianship legislation in all other Australian jurisdictions establishes a body with similar functions and powers to the Queensland Adult Guardian,[825] no other Australian jurisdiction includes, as part of its guardianship system, a body with the sole function of systemic advocacy. However, the functions of the Public Advocate in the ACT, South Australia, Victoria and Western Australia, and the Public Guardian in Tasmania, include several functions relating to systemic advocacy.[826]

Background to the creation of a separate office of the Public Advocate

20.12 The creation of a separate office of the Public Advocate was a specific recommendation of this Commission in its original 1996 report.[827] The Commission considered that the reason that advocacy and other functions

---

823 *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] QSC 128.

824 *Guardianship and Administration Act 2000* (Qld) s 213(4).

825 In the ACT, South Australia, Victoria and Western Australia, the relevant body is the Public Advocate: *Public Advocate Act 2005* (ACT) s 6(1); *Guardianship and Administration Act 1993* (SA) s 18; *Guardianship and Administration Act 1986* (Vic) s 14(1); *Guardianship and Administration Act 1990* (WA) s 91(1). In New South Wales, the Northern Territory and Tasmania, the relevant body is the Public Guardian: *Guardianship Act 1987* (NSW) s 77(1); *Adult Guardianship Act* (NT) s 5(1); *Guardianship and Administration Act 1995* (Tas) s 14.

826 *Public Advocate Act* 2005 (ACT) s 10(a); *Guardianship and Administration Act 1993 (*SA) s 21(1)(a)–(c), (e); *Guardianship and Administration Act 1995* (Tas) s 15(1)(a)–(c); *Guardianship and Administration Act 1986* (Vic) s 15(a)–(b); *Guardianship and Administration Act 1990* (WA) s 97(1)(g)–(h).

827 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, 432.

have, in other Australian jurisdictions, been combined in the one statutory office was an economic one.[828] The Commission considered that the need for an independent office to undertake a systemic advocacy role had been highlighted by the Ward 10B Inquiry and the investigation of the Basil Stafford Centre.[829]

20.13 In its original 1996 report, the Commission noted that the submissions received in response to its draft report strongly supported the separation of the systemic advocacy role from the role of decision-maker of last resort.[830] The Commission noted that the submissions advanced three main arguments for separating these roles.

20.14 First, '[i]t was seen as essential that, to minimise potential conflict of interest, the decision-making role should be separated from the advocacy role'.[831] The Commission referred to a submission from an advocacy organisation for people with disabilities:[832]

> With all advocacy or protective service endeavours the need to minimise conflict of interest is of extreme importance. … While the functions of a protective service (Adult Guardian) and advocacy are closely related, when these are carried out within one agency, … conflict of interest will occur. For example, [a protective service provider] could not be expected to advocate on behalf of a person who believes they are getting a raw deal from [the protective service provider].

20.15 The second reason advanced for the separation of the two roles was 'the need for focus and clarity of roles'.[833] The Commission referred to the submission that raised this issue:[834]

> Both the Adult Guardian and Public Advocate will undertake very demanding roles. Both offices will have high expectations placed upon them by many in the community. Many of these expectations will be unrealistic, either because of limited resources or because of a misunderstanding about the strengths and limits of a protective service on the one hand, and advocacy on the other. In order to withstand those expectations and develop community acceptance, a high degree of focus and clarity will be needed by both agencies. Were they to be combined, that focus and that clarity of roles would be extremely difficult to maintain [and] a true advocacy focus could be lost within a larger agency.

---

828 Ibid 421, referring to 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) 194.

829 Ibid. In relation to the two inquiries, see Hon WJ Carter QC, *Queensland Commission of Inquiry into the Care and Treatment of Patients in the Psychiatric Unit of Townsville General Hospital between 2nd March, 1975 and 20th February, 1988*, Report (1991); Criminal Justice Commission, *Report of an Inquiry Conducted by the Honourable DG Stewart into Allegations of Misconduct at the Basil Stafford Centre*, Report (1995) <http://www.cmc.qld.gov.au/data/portal/00000005/content/30013001200355733952.pdf> at 4 August 2009.

830 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, 422.

831 Ibid.

832 Ibid referring to Submission 64A.

833 Ibid 423.

834 Ibid referring to Submission 64A.

20.16 Finally, the Commission noted that, although two submissions observed that acting as a decision-maker would often lead to an awareness of systemic issues, another submission had warned that 'issues arising from the work of the Tribunal or from other functions proposed by the Commission should not be allowed to drive the work of the Public Advocate at the expense of broader systemic issues of importance to the interests of people with a decision-making disability in Queensland'.[835] By way of example, this submission explained that 'the systemic problems facing people with intellectual disability who come into contact with the criminal justice system, whether as victims or accused, may not be directly raised through the work of the Tribunal or the Adult Guardian'.[836]

The Webbe-Weller Review and the Government's response

20.17 In 2008, the Government initiated a review of 457 Queensland Government boards, committees and statutory authorities (the 'Webbe-Weller Review') to identify which bodies were working efficiently and which should be abolished.[837] Although the Public Advocate is not a board, committee or statutory authority,[838] the Public Advocate was nevertheless included in the review.

20.18 Several organisations made submissions to the Webbe-Weller Review emphasising the importance of a separate Public Advocate.[839]

20.19 One respondent, UnitingCare Centre for Social Justice, commented that '[a]t minimum the existing governance arrangements need to be maintained' in relation to the Office of the Public Advocate:[840]

> The Office holds a unique and precious role in advocating on the manner in which services are delivered to society's most marginalised people. No other body has a role like this one which is essential and its integrity of function and reporting must be maintained.
>
> We recognise the value for money that the Office of the Public Advocate provides on behalf of the government. Despite the combination of such a small office and a wide mandate the Office has consistently delivered broad benefits. It has provided strong advocacy and issue promotion and a significant number and quality of discussion papers and reports. Those papers and reports demonstrate excellent consultative processes and have resulted in stimulating

835 Ibid 423.

836 Ibid referring to Submission 64A.

837 S Webbe and P Weller AO, *A Public Interest Map: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities*, Part A Report (2008) 3.

838 Note, s 221 of the *Guardianship and Administration Act 2000* (Qld) provides that the Public Advocate is not a statutory body for the *Statutory Bodies Financial Arrangements Act* (Qld) or the *Financial Administration and Audit Act 1977* (Qld).

839 See the submissions at <http://www.premiers.qld.gov.au/government/boards-committees/review/part-a-report-subs.aspx> at 5 August 2009.

840 Submission 46.

> discussion amongst both government and church and community providers. In turn this has led to further work by the community sector and universities on studies and practical efforts at service improvements.

20.20 Two other respondents, the Community Resource Unit Inc and the Queensland Disability Housing Coalition, commented that any attempt to remove or lessen the capacity, independence and role of the Office of the Public Advocate would be 'a grave injustice to, and represent the loss of a significant safeguarding mechanism for, people with a disability'.[841]

20.21 The final report of the Webbe-Weller Review, which was completed in March 2009, records that the Department of Justice and Attorney-General made a submission to the effect that the Public Advocate should be abolished and that the functions of the Public Advocate should be transferred to the Adult Guardian on the ground that the Public Advocate has insufficient access to the information necessary to meet the objectives of that office:[842]

> The Department of Justice and Attorney-General contended that the Public Advocate position should be abolished with the systems advocacy function transferred to the Office of the Adult Guardian because, by being separated from the experiences of the Adult Guardian, the Public Advocate does not have sufficient access to information to amass a systemic assessment based on objective data and meet its original objectives.

20.22 Although the reviewers acknowledged the submissions that strongly recommended the Public Advocate's continuing contribution, they accepted the contention of the Department of Justice and Attorney-General that the Public Advocate does not have access to the information that is essential to meet the functions of that office, and should therefore be abolished:[843]

> The Reviewers consider that stakeholder support and clear focus on objectives is important but *the ability to perform its critical role of systems advocacy is more important*. If by reason of its separate structure the Public Advocate has not been able to access data and experience the necessary body of evidence to enable it to undertake its role effectively, then government and stakeholder ambitions for the role have been undersold by an organisational form ultimately that is not fit for purpose. (emphasis in original)

20.23 The report included the following recommendation about the abolition of the Public Advocate:[844]

---

841 Submissions 26, 63.

842 S Webbe and P Weller AO, *Brokering Balance: A Public Interest Map for Queensland Government Bodies — An Independent Review of Queensland Government Boards, Committees and Statutory Authorities*, Part B Report (2009) 142 <http://www.premiers.qld.gov.au/government/assets/part-b-report-brokering-balance.pdf> at 3 August 2009.

843 Ibid 142–3.

844 Ibid 143.

> Pending analysis of a different finding (in favour) of the structural capability of the Public Advocate to perform its essential role in the current guardianship laws review by the Queensland Law Reform Commission due by 31 December 2009, the Public Advocate should be abolished and its function transferred to the Adult Guardian.

20.24 Following the release of that report, the Government published its response to the recommendations made in the Webbe-Weller Review.[845] The Government expressly supported the recommendation in relation to the Public Advocate. The Government response states:[846]

> The government acknowledges that the Review's recommendation is consistent with how the role of the Public Advocate operates in some of the other Australian jurisdictions. The functions will continue, but will be carried out by the Adult Guardian.

20.25 The recommendation in the Webbe-Weller Report proposing the abolition of the Public Advocate, and the Government's endorsement of that recommendation, appear to assume that the critical information for the performance of the Public Advocate's role is information within the knowledge of the Office of the Adult Guardian. However, while the Adult Guardian has extensive experience in relation to matters affecting those adults for whom the Adult Guardian has been appointed as guardian, there are many adults with impaired capacity who do not have any guardian appointed at all. Further, the information required by the Public Advocate to perform the function of that office may well be held by persons or agencies other than the Adult Guardian — for example, the Department of Health or Disability Services Queensland.

20.26 The Public Advocate has commented on the variety of sources that inform her advocacy functions, and has cautioned against relying solely on the experiences of the statutory guardianship agencies in developing an agenda for systemic advocacy:[847]

> OPA [Office of the Public Advocate] informs itself broadly from a variety of sources including available statistical data, relevant research, and stakeholder information. It would not be desirable for the experiences of the statutory guardianship agencies alone to drive the systems advocacy agenda. Many adults with impaired capacity have no or rare involvement/contact with the guardianship regime (for example, many persons who are homeless and persons who are caught in the criminal justice/corrective services system), yet encounter significant systems issues. Another large group live in the community and have family members or close friends as informal and formal substitute decision-makers and have no contact with OAG [the Office of the Adult Guardian] or CVP [the Community Visitor Program].

---

845 See *Government Response to the Report, Brokering Balance: A Public Interest Map for Queensland Government Bodies — An Independent Review of Queensland Government Boards, Committees and Statutory Authorities* <http://www.premiers.qld.gov.au/government/assets/government-response-to-part-b-report.pdf> at 3 August 2009.

846 Ibid.

847 Correspondence from the Public Advocate dated 12 June 2009.

20.27 In considering the Public Advocate's 'structural capability … to perform its essential role', the Webbe-Weller Report appears to have addressed the issue of capacity solely in terms of the Public Advocate's access to information.[848] An equally important issue in relation to structural capacity is the capacity of the body charged with the responsibility for systemic advocacy to deal with any systemic issues that might arise in relation to the services provided by the Adult Guardian, such as guardianship services or investigations undertaken by the Adult Guardian. The structural capacity of the Public Advocate to perform that function is arguably superior to that of the Adult Guardian, as it does not raise a conflict of interest for the Public Advocate. In contrast, there is a real issue about the structural capacity of the Adult Guardian to perform the function of systemic advocacy where that function could potentially include advocacy about the services and systems for which the Adult Guardian is responsible.

20-1 Should the function of systemic advocacy for adults with impaired capacity be performed by the Public Advocate or the Adult Guardian and why?

20-2 If the function of systemic advocacy is to be performed by the Adult Guardian, is it possible for the Adult Guardian to avoid a conflict of interest in relation to systemic issues about the services and systems for which the Adult Guardian is responsible? If so, how?

The Public Advocate's powers

The power to compel the provision of information

20.28 The Public Advocate's powers under section 210 of the *Guardianship and Administration Act 2000* (Qld) do not include a power to compel the provision of information.[849] As discussed above, the Webbe-Weller Review recommended the abolition of the Public Advocate and the transfer of the Public Advocate's functions to the Adult Guardian, the rationale being that the Public Advocate does not have the necessary degree of access to data to undertake its advocacy function. This directly raises the issue of whether, instead of abolishing the Public Advocate, the *Guardianship and Administration Act 2000* (Qld) should be amended to ensure that the Public Advocate has the power to compel the provision of relevant information.

20.29 The Guardianship and Administration Reform Drivers ('GARD') have observed that the Public Advocate lacks the power to compel the production of

848 To the extent that this is an issue, options for addressing this issue are considered at [20.28]–[20.33] below.

849 *Guardianship and Administration Act 2000* (Qld) s 210 is set out at [20.7] above.

information, and have suggested that this detracts from the independence of the Public Advocate. GARD commented that:[850]

> the Public Advocate performs its systemic advocacy function by analysing information from a wide range of sources, including site visits, public meetings, specific consultations, research, reports, conference proceedings, Courts, community advocates, service providers and disability workers. The Public Advocate does not have the power to compel agencies or individuals to provide information. In this regard the Public Advocate relies on influence only. …
>
> Given that the Public Advocate must rely on service providers in order to perform its advocacy functions, we consider that the lack of information compulsion powers on the part of the Public Advocate operate so as to detract and impede the Public Advocate's independence.

20.30 GARD recommended that the Public Advocate should have access to files of investigations conducted by the Adult Guardian.[851]

20.31 However, because the information required for the Public Advocate's systemic advocacy function comes from a range of sources, it raises the wider issue of whether it would be appropriate for the Public Advocate to have the power to compel the provision of information not just from the Adult Guardian, but from other individuals, organisation or agencies.

20.32 In the Public Advocate's view, the ability to influence change relies to a significant degree on the ongoing establishment of respectful and constructive relationships with stakeholders.[852] However, there may be a need at times for a power to compel the provision of information required for systemic advocacy, regardless of which body within the guardianship system performs that function:[853]

> This Office works with a broad range of stakeholders. As Public Advocate, I have consistently sought to engage constructively in discussions about identified systems issues with a view to working collaboratively with agencies to improve systems for the benefit of the vulnerable adults for whom OPA advocates. … A more confrontative approach would only be considered in the event of persistent non-cooperation and/or significant concerns about the protection of the rights and interests of adults with impaired capacity or possible abuse, neglect or exploitation.
>
> However, access to information which could potentially inform the work of this Office can currently easily be limited or entirely blocked. The Public Advocate has no power to require the provision of information, and where an agency or party doesn't provide information, there is nothing the Public Advocate can do to access the information.

---

850 Submission C24.

851 Ibid.

852 Correspondence from the Public Advocate dated 7 August 2009.

853 Correspondence from the Public Advocate dated 12 June 2009.

> This suggests that in reconsidering the issue of how systems advocacy should be done in the guardianship regime, it would be useful to consider the issue of the powers that may be required to ensure that agencies can be compelled to provide information and engage around issues, wherever the systems advocacy resides. Penalties in the event of non-compliance would also need to be considered.

20.33 The Public Advocate has also commented on the fact that the Public Advocate has no power to enter the premises of a service provider:[854]

> at the moment, if the public advocate wishes to visit the premises of a service provider, it can only be done with the agreement of the service provider, as there is no power to compel entry. This means that a sanitised version of the service delivered or facility can be presented to the public advocate.

20.34 The Public Advocate has also raised a concern that the new *Information Privacy Act 2009* (Qld) could impede the provision of personal information to the Public Advocate by government agencies.[855]

20.35 Regardless of which body within the guardianship system is responsible for systemic advocacy, there is an important issue about whether the systemic advocacy function should be supported by a power to compel the provision of different types of information.

20.36 The Public Advocate has suggested that consideration should be given to providing the Public Advocate or systems advocate with the following general powers to assist in the performance of functions of the Public Advocate:[856]

- Power to require that information reasonably within the knowledge and/or control of the person/agency regarding a system under consideration by the systems advocate be provided within a reasonable time frame (penalty for non-compliance is suggested to discourage same);
- Power to compel written answers to specific questions within a reasonable timeframe (again, penalty for non-compliance is suggested); and
- Power to tender a report regarding one or more systems issue/s to the Attorney-General at any time during the year and the Attorney-General is obliged to tender the report in Parliament within, say 5 sitting days (note that 14 days is considered too long since it is expected that these reports might sometimes detail serious deficiencies which may warrant immediate action).

20.37 The Public Advocate has also suggested that consideration should be given to providing the Public Advocate or systems advocate with the following powers to support the Public Advocate's function of monitoring and reviewing

---

854 Correspondence from the Public Advocate dated 7 August 2009.

855 Correspondence from the Public Advocate dated 24 July 2009.

856 Correspondence from the Public Advocate dated 7 August 2009.

the delivery of services and facilities:[857]

- Power to require from a person the provision of documents and information (relating to the arrangements for individuals or a class or classes of individuals and/or other relevant policy and procedure documentation which applies within the service/agency/facility) reasonably within the power, custody, knowledge or control of the person (penalty for non-compliance is suggested to discourage non-compliance);

- Power to require a person who is responsible for a service or facility to give answers to specific questions (again, a penalty for non-compliance is suggested);

- Power to conduct visits to premises without notice (again, penalty provisions for non-compliance).

20.38 The Public Advocate has also suggested that consideration should be given to a legislative requirement that agencies performing functions under the guardianship system:[858]

> be required to collect and provide to the systems advocate statistical information regarding the performance of their functions which might be expected to be useful and to provide some systemic trend information. It is desirable that the guardianship system understand the demographics and characteristics of its clientele very well (to aid systems work and also plan for future needs) and so detailed information will always be appropriately collected. Priorities for the systems advocate may make access to particular categories of data desirable from time to time. Better data systems, which allow differential interrogation of the data according to targeted priorities would also be useful.

20.39 In the view of the Public Advocate, the ability to influence change relies to a significant degree on the establishment of respectful and constructive relationships with stakeholders. However, 'in circumstances when it was necessary, powers such as these would enable the systems advocate to compel cooperation, to protect vulnerable adults'.[859]

20-3 Should the *Guardianship and Administration Act 2000* (Qld) be amended so that Public Advocate has the following powers:

(a) the power to require a person who has the custody or control of information or documents relating to a system under consideration by the Public Advocate to give the information or access to the documents (including copies) to the Public Advocate;

857 Ibid.

858 Ibid.

859 Ibid.

(b) the power to require a person who has the custody or control of information or documents to give the Public Advocate information or access to documents (including copies) relating to:

(i) the arrangements for individuals or a class or individuals; or

(ii) policies and procedures that apply within a service, agency or facility;

(c) the power to require a person (including a person who is responsible for a service or facility) to give the Public Advocate written answers to specific questions;

(d) the power to enter the premises of a service provider, without notice, to monitor the delivery of services at those premises;

(e) the power to require agencies performing a function within the guardianship system to collect and provide statistical information about the performance of their functions;

(f) some other power?

20-4 Alternatively, or in addition, should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that agencies must disclose personal information about an adult that the Public Advocate reasonably considers to be necessary for the performance of his or her functions?

20-5 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that:

(a) the Public Advocate may give a report about a systems issue to the Attorney-General at any time during the year; and

(b) the Attorney-General must tender the report in Parliament within five sitting days?

20-6 If the *Guardianship and Administration Act 2000* (Qld) is amended to confer any of these powers on the Public Advocate, should the Act also impose sanctions for non-compliance?

The power to investigate

20.40 GARD has suggested in its submission that the Public Advocate should be provided with investigative powers.[860] It acknowledged that the Public Advocate does not have a function of individual advocacy, but suggested that investigative powers were still important in relation to systemic advocacy:[861]

> the Public Advocate does not have any individual advocacy or complaints functions and it therefore does not deal with individual cases like the Adult Guardian, but instead it looks at widespread deficiencies in institutions and systems that affect a large number of people with impaired capacity. It could be argued that even though the function relates to the investigation of issues affecting large numbers of people, the function requires much the same type of information gathering processes as the investigation of individual matters.

20.41 GARD therefore recommended that, in order to fully perform its functions under the *Guardianship and Administration Act 2000* (Qld), 'the Public Advocate should be granted similar investigative powers to those of the Adult Guardian'. As explained in Chapter 18 of this Discussion Paper, the Adult Guardian's investigative powers include:

- a right to all information necessary to investigate a complaint or allegation or to carry out an audit (section 183);
- if a person is required to give information to the Adult Guardian — the power to require the person to give the information by statutory declaration (section 184); and
- the power to require a person, by written notice, to attend before the Adult Guardian to give information and answer questions, or produce stated documents or things (section 185).[862]

20.42 As mentioned above, the Public Advocate has also suggested that consideration should be given to conferring a range of specific powers on the Public Advocate or systems advocate. Some of the powers already suggested would be relevant to the conduct of investigations by the Public Advocate.

20-7 Should the *Guardianship and Administration Act 2000* (Qld) be amended to confer any specific investigative powers on the Public Advocate in addition to the powers mentioned in Question 20-3 above?

860 Submission C24.

861 Ibid.

862 Section 185(2) of the *Guardianship and Administration Act 2000* (Qld) provides that a person must comply with the notice unless the person has a reasonable excuse. However, s 188 provides that it is not a reasonable excuse for a person to fail to comply with a notice under s 185(1) that compliance with the notice or answering the question might tend to incriminate the person.

20-8 If yes to Question 20-7, what power or powers should be conferred?

PRELIMINARY VIEW

20.43 The Commission's preliminary view is that the function of systemic advocacy can most effectively be performed by a separate systems advocate whose function is supported by a wide range of investigative powers. It follows that the Commission is also of the preliminary view that the statutory office of the Public Advocate should not be abolished and that the function of systemic advocacy should not be transferred to the Adult Guardian.

20.44 The function of systemic advocacy is an important one within the guardianship system. While individual advocacy can address the concerns of a particular person, systemic advocacy addresses issues on a broader scale. Its goal is to influence and improve the broad range of systems that affect the lives of adults with impaired capacity.[863]

20.45 The Commission is concerned that, if the function of systemic advocacy were transferred to the Adult Guardian, there is a real risk that the function would not assume the same priority that it currently has within the Office of the Public Advocate. This is not intended as a criticism of the Adult Guardian; rather it is a recognition of the very high, and growing, demand for the Adult Guardian's services. It would be difficult for the function of systemic advocacy, which can involve sustained efforts to achieve incremental improvements, not to be overwhelmed by the resource-intensive and often urgent cases for which the Adult Guardian is responsible.

20.46 More importantly, however, the Commission is concerned that, even if the current resources of the Office of the Public Advocate could be quarantined within the Office of the Adult Guardian, the transfer of the function of systemic advocacy from the Public Advocate to the Adult Guardian would create a potential conflict of interest for the Adult Guardian. If systemic issues arose in relation to the services provided by the Adult Guardian, it would be the Adult Guardian who would be responsible for advocating for the improvement of those services. Even the perception of such a conflict must inevitably erode public confidence in the Adult Guardian's capacity to perform the function of systemic advocacy.

20.47 The Webbe-Weller Review placed considerable importance on the need for the systems advocate to have access to relevant data and experience.[864] The Commission does not disagree with that view. However, its preliminary view is that the need for access to relevant information is much

863 See eg the range of systems mentioned at [20.6] above.

864 See [20.22] above.

better addressed by examining what additional powers may be necessary or desirable to enhance the effectiveness of the Public Advocate's systemic advocacy function[865] rather than by transferring that function to the Adult Guardian.

20.48 The Commission notes that, unlike Queensland, the other Australian jurisdictions have not separated the responsibilities for systemic and individual advocacy.[866] However, the Commission considers that the establishment of a separate office of the Public Advocate in Queensland was an innovation in this area, and that this approach continues to provide the most effective means of undertaking systemic advocacy. The Commission therefore considers that the transferring of the Public Advocate's functions to the Adult Guardian would be a retrograde step.

865 This issue is considered at [20.28]–[20.39] above.

866 See [20.11] above.

Chapter 21

Community visitors

INTRODUCTION

21.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* (Qld), including:[867]

- the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation; and
- the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework.

21.2 Chapter 10 of the *Guardianship and Administration Act 2000* (Qld) provides for community visitors, whose purpose is to 'to safeguard the interests of consumers at … visitable sites'.[868] Community visitors 'visit residents at visitable sites across the mental health, disability and supported accommodation (hostel) sectors'.[869] They aim, through 'their regular

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

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

869 Office of the Adult Guardian (Qld), *Adult Guardian Annual Report 07–08* (2008) 47.

unannounced visits to sites … to safeguard the rights and interests of vulnerable residents and reduce the risk of resident abuse, neglect and exploitation'.[870] Community visitors have both inquiry and complaint functions, and form part of the investigative and regulatory framework of the guardianship system.

THE LAW IN QUEENSLAND

'Consumers' and 'visitable sites'

21.3 The functions and powers of community visitors are performed and exercised in relation to consumers at visitable sites. The *Guardianship and Administration Act 2000* (Qld) includes a broad definition of 'consumer':[871]

> ***consumer*** means—
>
> (a) for a visitable site that is an authorised mental health service under the *Mental Health Act 2000*—any person who lives or receives services at the visitable site; or
>
> (b) for another visitable site—an adult—
>
> (i) with impaired capacity for a personal matter or a financial matter or with a mental or intellectual impairment; and
>
> (ii) who lives or receives services at the visitable site.

21.4 Because the definition refers to an adult with impaired capacity for a personal matter or a financial matter or with a mental or intellectual impairment, the community visitor provisions have a wide application, and are not, for example, limited to adults who have had a guardian or an administrator appointed.

21.5 The *Guardianship and Administration Act 2000* (Qld) defines 'visitable site' in the following terms:[872]

> ***visitable site*** means a place, other than a private dwelling house, where a consumer lives or receives services and that is prescribed under a regulation.

21.6 Private dwelling houses are excluded from the definition of 'visitable site'. The Act includes the following definition of 'private dwelling house':[873]

---

870 Ibid.

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

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

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

private dwelling house means premises that are used, or are used principally, as a separate residence for—

(a) if a restrictive practice under chapter 5B is being used at the premises—1 family; or

(b) otherwise—1 family or person.

21.7 The *Guardianship and Administration Regulation 2000* (Qld) prescribes the following places as visitable sites:[874]

A place, other than a private dwelling house, that is any of the following—

(a) a place where a consumer lives that is wholly or partly funded by—

(i) Disability Services Queensland; or

(ii) the Department of Health;

(b) a place where a consumer—

(i) lives; and

(ii) receives services from—

(A) Disability Services Queensland; or

(B) an entity that receives financial assistance from Disability Services Queensland or the Department of Health to supply the service;

(c) for a consumer with a mental or intellectual impairment—a place, other than an aged care facility, where the consumer—

(i) lives; and

(ii) receives services from the Department of Health;

(d) for a consumer with impaired capacity for a personal matter or a financial matter or with a mental or intellectual impairment—a place where the consumer lives if—

(i) a residential service conducted in the premises that the place is part of is registered under the *Residential Services (Accreditation) Act 2002* and personal care services are provided in the premises; or

(ii) there is a current application for level 3 accreditation under that Act of a residential service conducted in the premises that the place is part of; or

(iii) a residential service conducted in the premises that the place is part of is accredited at level 3 under that Act;

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

(e) a place declared to be an authorised mental health service under the *Mental Health Act 2000*, section 495,[7] where a consumer receives services as an inpatient.

7 *Mental Health Act 2000*, section 495 (Declaration of authorised mental health services)

Functions of community visitors

21.8 Community visitors have inquiry and complaint functions. Those functions are set out in section 224 of the *Guardianship and Administration Act 2000* (Qld), which provides:

> **224 Functions**
>
> (1) A community visitor has inquiry and complaint functions.
>
> (2) The inquiry functions of a community visitor for a visitable site are to inquire into, and report to the chief executive on—
>
> (a) the adequacy of services for the assessment, treatment and support of consumers at the visitable site; and
>
> (b) the appropriateness and standard of services for the accommodation, health and wellbeing of consumers at the visitable site; and
>
> (c) the extent to which consumers at the visitable site receive services in the way least restrictive of their rights; and
>
> (d) the adequacy of information given to consumers at the visitable site about their rights; and
>
> (e) the accessibility and effectiveness of procedures for complaints about services for consumers at the visitable site; and
>
> (f) at the request of the chief executive, another matter about the visitable site or consumers at the visitable site.
>
> (3) The complaint functions of a community visitor for a visitable site are to—
>
> (a) inquire into, and seek to resolve, complaints; and
>
> (b) identify and make appropriate and timely referrals of unresolved complaints to appropriate entities for further investigation or resolution.

21.9 The duty of a community visitor under section 224(2) is to inquire into, and report to the chief executive[875] on, a range of matters in relation to the services provided to consumers at visitable sites, the adequacy of the information given to consumers at visitable sites about their rights, the

875 For this purpose, chief executive is the Director-General of the Department of Justice and Attorney-General. See *Acts Interpretation Act 1954* (Qld) s 33(11)(b).

procedures for complaints about services for consumers at visitable sites, and any other matter about a visitable site or the consumers at that site that may be requested by the chief executive.

21.10 There are two aspects to the complaint function of a community visitor under section 224(3). The first part of the function to inquire into, and to seek to resolve, complaints about the matters mentioned in section 224(2).[876] Section 224 recognises that not all complaints can be resolved by a community visitor. Accordingly, the second part of the complaint function is to identify unresolved complaints and to make appropriate and timely referrals of those complaints to appropriate entities for further investigation or resolution.

21.11 A community visitor for a visitable site must regularly visit the visitable site to perform the functions of a community visitor.[877]

Priority for visiting visitable sites

21.12 The chief executive may decide priorities for visiting particular visitable sites that affect the frequency of visits to a visitable site by a community visitor.[878] The current priority in relation to sites funded and operated by Disability Services Queensland or Queensland Health is to visit consumers who receive 24 hour care, 7 days a week. The schedule of site visits is based on the nature of the sector (mental health, supported accommodation or disability sector) and the vulnerability of the consumers.[879] In 2007–08, community visitors made a total of 5663 visits to 846 visitable sites.[880]

Requesting a visit

21.13 Section 226 of the *Guardianship and Administration Act 2000* (Qld) provides that a consumer at a visitable site, or 'a person for the consumer', may request that a community visitor visit a visitable site. The request may be made in one of two ways — either directly to the chief executive or, alternatively, to a person employed at the visitable site.[881] If the request is made to a person employed at the visitable site, the person must, within three business days after the request is made, inform the chief executive of the request.[882] A community

876 *Guardianship and Administration Act 2000* (Qld) s 222 (definition of 'complaint').

877 *Guardianship and Administration Act 2000* (Qld) s 225(1).

878 *Guardianship and Administration Act 2000* (Qld) s 225(2).

879 Information provided by the Community Visitor Program 6 August 2009.

880 Department of Justice and Attorney-General (Qld), *Annual Report 2007–08* (2008) 31.

881 *Guardianship and Administration Act 2000* (Qld) s 226(1).

882 *Guardianship and Administration Act 2000* (Qld) s 226(2). The maximum penalty for failing to comply with the requirement under s 226(2) is 40 penalty units, that is $4000: *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

visitor for the visitable site must visit the visitable site as soon as practicable if informed of a request to visit.[883]

Powers of community visitors

21.14 Community visitors have a broad range of powers under the *Guardianship and Administration Act 2000* (Qld), including the power to enter visitable sites and require certain persons to answer questions and produce 'visitable site documents'.[884] These powers are set out in section 227 of the Act, which provides:

> **227 Powers**
>
> (1) A community visitor for a visitable site may do all things necessary or convenient to be done to perform the community visitor's functions, including, for example, the following things—
>
> (a) enter the visitable site during normal hours without notice;
>
> (b) with the chief executive's authorisation, enter the visitable site outside normal hours without notice;
>
> (c) require a person in charge of, employed at, or providing services at, the visitable site to answer questions, and produce visitable site documents, relevant to the community visitor's functions;
>
> (d) subject to subsection (2), inspect and take extracts from, or make copies of, any visitable site document;
>
> (e) confer alone with a consumer or person in charge of, employed at, or providing services at, the visitable site;
>
> (f) require a person in charge of, employed at, or providing services at, the visitable site to give the community visitor reasonable help, if it is practicable to give the help, to enable the community visitor to do the things mentioned in paragraphs (a) to (e).
>
> (2) A person who complies with a requirement under subsection (1)(c) or (f) does not incur any liability, either to the consumer or anyone else, because of the compliance.
>
> (3) A person must not fail to comply with a requirement under subsection (1)(c) or (f) unless the person has a reasonable excuse.

---

883 *Guardianship and Administration Act 2000* (Qld) s 226(3).

884 *Guardianship and Administration Act 2000* (Qld) s 222 defines 'visitable site document' to mean:

> (a) a document relating to the visitable site, including the visitable site's records, policies and procedures; or
>
> (b) a document relating to a consumer at the visitable site, including a document in the consumer's personal or medical file, regardless of who owns the file.

Maximum penalty for subsection (3)—40 penalty units.

(4) It is a reasonable excuse for a person to fail to comply with a requirement under subsection (1)(c) or (f) because compliance with the requirement might tend to incriminate the person.

21.15 Section 227(1) authorises a community visitor to enter a visitable site during normal hours without notice — that is, between 8 am and 6 pm[885] — or, with the chief executive's authorisation, to enter a visitable site outside normal hours without notice. The chief executive may authorise a community visitor's entry outside normal hours if he or she considers that the community visitor cannot adequately inquire into a complaint by entering the site during normal hours.[886] In authorising an entry outside normal hours, the chief executive must specify a period of not more than two hours during which the entry is authorised.[887]

21.16 To the greatest extent practicable, a community visitor must seek and take into account the views and wishes of a consumer before:[888]

- asking a person in charge of, employed at, or providing services at, a visitable site a question relevant to a function of the community visitor in relation to the consumer; or
- inspecting, taking extracts from, or making copies of, a visitable site document relevant to a function of the community visitor in relation to the consumer.

21.17 However, regardless of the consumer's views and wishes, the community visitor must act in a way consistent with the consumer's proper care and protection.[889]

Community visitor reports

21.18 Section 230 of the *Guardianship and Administration Act 2000* (Qld) requires a community visitor to prepare a report on each visit to a visitable site and deals with a number of matters in relation to the report. It provides:

885 *Guardianship and Administration Act 2000* (Qld) s 222 (definition of 'normal hours').

886 *Guardianship and Administration Act 2000* (Qld) s 228(1)–(2). The chief executive of the Department of Justice and Attorney-General must include in the Department's Annual Report for a financial year a report on the operations of community visitors during the year, including the number of entries of visitable sites outside normal hours authorised by the chief executive: s 237.

887 *Guardianship and Administration Act 2000* (Qld) s 228(3).

888 *Guardianship and Administration Act 2000* (Qld) s 229(1). A consumer's views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct: s 229(2).

889 *Guardianship and Administration Act 2000* (Qld) s 229(3).

230 Reports by community visitors

(1) As soon as practicable after a visit to a visitable site by a community visitor for the visitable site, the community visitor must—

(a) prepare a report on the visit; and

(b) give a copy of the report to the chief executive.

(2) If the community visitor entered the visitable site outside normal hours, the community visitor must state the authority for the entry.

(3) As soon as practicable after receiving a copy of a report in relation to a visitable site, the chief executive must give a copy of the report to a person in charge of the visitable site.

(4) The chief executive may also give a copy of the report to any of the following—

(a) if the report relates to a complaint—the consumer;

(b) the adult guardian;

(c) the public advocate;

(d) the director of mental health appointed under the *Mental Health Act 2000*;

(e) if a restrictive practice under chapter 5B is being used at the visitable site—

(i) the tribunal; or

(ii) a guardian or administrator for an adult in relation to whom the restrictive practice is used; or

(iii) the chief executive (disability services).

21.19 The chief executive must give a copy of the report to a person in charge of the visitable site,[890] and may give a copy of the report to any of the people or entities mentioned in section 230(4).

Appointment of community visitors

21.20 Community visitors are appointed by the chief executive, and may be appointed on a full-time or part-time basis for a term of up to three years.[891] They are appointed under the *Guardianship and Administration Act 2000* (Qld), rather than under the *Public Service Act 2008* (Qld).[892]

890 *Guardianship and Administration Act 2000* (Qld) s 230(3).

891 *Guardianship and Administration Act 2000* (Qld) ss 231(1)–(2), 232(1).

892 *Guardianship and Administration Act 2000* (Qld) s 231(6).

21.21 A person is eligible for appointment as a community visitor only if the chief executive considers that the person has 'knowledge, experience or skills relevant to the exercise of a community visitor's functions'.[893]

21.22 However, a person may not hold office as a community visitor while:[894]

- the person is a public service employee of the department in which any of the following Acts is administered:
  - the *Disability Services Act 2006* (Qld);
  - the *Health Act 1937* (Qld);
  - the *Mental Health Act 2000* (Qld); or
- the person or the person's spouse has a direct pecuniary interest in any contract with any of those departments; or
- the person or the person's spouse has a direct pecuniary interest in any visitable site.

21.23 In appointing community visitors, the chief executive must take into account the desirability of the community visitors appointed having a range of knowledge, experience or skills relevant to the exercise of the functions of community visitors, reflecting the social and cultural diversity of the general community, and consisting of equal numbers of males and females.[895]

ISSUES FOR CONSIDERATION

Visitable sites

21.24 Because community visitors exercise their functions and powers in relation to visitable sites, the effectiveness of the role of community visitors in investigating allegations of abuse, neglect and exploitation of adults with impaired capacity depends, in part, on the appropriateness of the definition of 'visitable site', the range of places prescribed by regulation as 'visitable sites', and the determination of priorities for visiting particular visitable sites.

21.25 One respondent has suggested that, although community visitors visit patients in the mental health wards of hospitals, they do not visit long-term patients with impaired capacity who are in a general ward of a hospital.[896]

---

893 *Guardianship and Administration Act 2000* (Qld) s 231(4).

894 *Guardianship and Administration Act 2000* (Qld) s 231(4), (7).

895 *Guardianship and Administration Act 2000* (Qld) s 231(5).

896 Submission 77.

21-1 Is the definition of 'visitable site' appropriate?[897]

21-2 Are the places prescribed as 'visitable sites' by the *Guardianship and Administration Regulation 2000* (Qld) appropriate in terms of the places where adults with impaired capacity live and receive services?[898]

21-3 Is the Community Visitor Program's current priority for visiting particular visitable sites appropriate?[899]

Requests for a visit by a community visitor

21.26 Section 226 of the *Guardianship and Administration Act 2000* (Qld) provides that a 'consumer at a visitable site, or a person for the consumer,' may ask for a community visitor to visit the visitable site to perform the functions of a community visitor.[900] It is clear that, if a consumer at a visitable site asks another person to request a visit from a community visitor, that that person is 'a person for the consumer', as the request is being made on behalf of the consumer.

21.27 In many cases, a consumer's impaired capacity may mean that the consumer is not capable of requesting a visit, either personally or through another person. In this situation, a person with a proper interest in the consumer's health and well-being (such as an adult child of the consumer) may wish to request a visit by a community visitor. Although the Commission understands that community visitors act on requests for visits made by anyone who has a concern for a consumer,[901] section 226 could be amended to make it clear that such a person may request a community visit for a consumer. At present, it is not entirely clear that the expression 'a person for the consumer' includes a person who wishes to initiate a visit to the visitable site for the consumer if the person is acting independently of the consumer in requesting the visit.

21.28 There is also a further issue of whether any other person (for example, the Public Advocate) should be able to request that a community visitor visit a visitable site.

---

897 See [21.5]–[21.6] above.

898 The places prescribed as visitable sites under the *Guardianship and Administration Regulation 2000* (Qld) are set out at [21.7] above.

899 See [21.12] above.

900 See [21.13] above.

901 Information provided by the Community Visitor Program 6 August 2009.

21-4 Who, in addition to a consumer at a visitable site, should be able to request that a community visitor visit a visitable site to perform the functions of a community visitor?

Access to a copy of a community visitor report

21.29 Under section 230 of the *Guardianship and Administration Act 2000* (Qld), the only person who is entitled to receive a copy of a community visitor report in relation to a visitable site is a person in charge of the visitable site.[902] Section 230(3) provides that, as soon as practicable after receiving a copy of a report in relation to a visitable site, the chief executive must give a copy of the report to a person in charge of the visitable site.

21.30 Certain other persons or entities may, at the discretion of the chief executive, be given a copy of a community visitor report. Section 230(4) provides that the chief executive *may* give a copy of the report to any of the following:[903]

> (a) if the report relates to a complaint—the consumer;
>
> (b) the adult guardian;
>
> (c) the public advocate;
>
> (d) the director of mental health appointed under the *Mental Health Act 2000*;
>
> (e) if a restrictive practice under chapter 5B is being used at the visitable site—
>
> (i) the tribunal; or
>
> (ii) a guardian or administrator for an adult in relation to whom the restrictive practice is used; or
>
> (iii) the chief executive (disability services).

21.31 Two issues arise for consideration.

21.32 The first issue is whether, in addition to a person in charge of the visitable site, section 230(3) should confer an entitlement to a copy of a community visitor report on any other person. For example, an entitlement to a copy of a community visitor report may well assist the Public Advocate in identifying systemic issues in relation to the provision of services at visitable sites. Similarly, it may assist the director of mental health appointed under the

902 See [21.19] above.

903 *Guardianship and Administration Act 2000* (Qld) s 230(4).

Mental Health Act 2000 (Qld), in the discharge of his or her duties, to have an entitlement to a copy of a community visitor report that relates to a visitable site that is an authorised mental health service under the *Mental Health Act 2000* (Qld).

21.33 The second issue is whether section 230(4) should specify any additional person or persons to whom the chief executive may give a copy of a community visitor report.

21-5 Should section 230(3) of the *Guardianship and Administration Act 2000* (Qld) confer an entitlement to receive a copy of a community visitor report about a visitable site on any person or persons in addition to a person in charge of the visitable site? If so, who else should be entitled to receive a copy of a community visitor report?

21-6 Should section 230(4) of the *Guardianship and Administration Act 2000* (Qld) specify any additional person or persons to whom the chief executive may give a copy of a community visitor report?

Appointment of community visitors

21.34 As explained earlier, a person is eligible for appointment as a community visitor if the chief executive considers that the person has knowledge, experience or skills relevant to the exercise of a community visitor's functions.[904] The *Guardianship and Administration Act 2000* (Qld) does not impose any specific requirements for eligibility. However, it does provide that employment in the department administering the *Disability Services Act 2006* (Qld), the *Health Act 1937* (Qld) or the *Mental Health Act 2000* (Qld) or the holding of certain pecuniary interests will disqualify a person from holding office as a community visitor.[905]

21-7 Are the provisions in the *Guardianship and Administration Act 2000* (Qld) dealing with the appointment of community visitors appropriate?

904 See [21.21] above.

905 See [21.22] above.

Administrative location of the Community Visitor Program within the Department of Justice and Attorney-General

21.35 As mentioned earlier, community visitors are appointed under the *Guardianship and Administration Act 2000* (Qld), rather than under the *Public Service Act 2008* (Qld). However, within the Department of Justice and Attorney-General, the work of community visitors is managed and supported by a number of public servants. The 'Community Visitor Program' is used to refer collectively to the community visitors themselves and to the public servants who manage and support their work.

21.36 Within the departmental structure, the Community Visitor Program is currently located within the Office of the Adult Guardian. The Annual Report of the Adult Guardian for 2007–08 states:[906]

> In March 2008, [the] Director-General of the Department of Justice and Attorney-General … announced the re-alignment of the department's reporting framework. As a result of the re-alignment, the manager of the Community Visitor Program now reports to the Director-General through the Adult Guardian. This re-alignment broadens our sphere of influence for raising awareness of resident issues and effecting the resolution of their concerns.

21.37 This is consistent with the recommendation of this Commission is its original 1996 report. The Commission referred to a number of submissions that had suggested that the proposed community visitor scheme should be under the control of the Public Advocate, rather than under the control of the Adult Guardian.[907] However, the Commission concluded that community visitors were more appropriately located within the Office of the Adult Guardian:[908]

> In the view of the Commission, the aim of establishing a community visitors scheme is to protect the rights and interests of individual residents of residential facilities and to enable action to be taken to redress infringement of those rights and interests. To the extent that the community visitors scheme offers a protective service for individual residents, it is more appropriately located within the responsibility of the Adult Guardian.

21.38 The Commission acknowledged that the work of community visitors in assisting individual residents was likely to reveal patterns that could be used to identify systemic issues for which the Public Advocate is responsible.[909] However, the Commission was not persuaded that it was necessary for the Public Advocate to undertake responsibility for the community visitors scheme in order for the Public Advocate to address those systemic issues. It suggested instead that 'administrative protocols [should] be developed between the Adult Guardian and the Public Advocate so that relevant information obtained from

---

906 Office of the Adult Guardian (Qld), *Adult Guardian Annual Report 07–08* (2008) 49.

907 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 428–9.

908 Ibid 430.

909 Ibid.

the performance of the Adult Guardian's individual protective function is made available to the Public Advocate'.[910]

21.39 The appropriate reporting structure for the Community Visitor Program has been raised again as an issue in this review.

21.40 The Guardianship and Reform Drivers ('GARD') have suggested that '[t]he legislature should again give consideration to the best location of the community visitor scheme for maximum impact in protecting people with impaired capacity'.[911] In GARD's view, 'the community visitors could just as easily fit under the Public Advocate, which could help to resolve some of the issues surrounding the lack of information-compulsion powers held by the Public Advocate'.[912]

21.41 It is also arguable that, in placing the Community Visitor Program within the Office of the Adult Guardian, it creates a potential conflict, for example, where a resident raises a concern with a community visitor about the Adult Guardian.

21-8 What administrative arrangements for the Community Visitor Program will maximise the independence of community visitors and their effectiveness in inquiring into allegations of abuse, neglect and exploitation?

910 Ibid.

911 Submission C24. GARD is an informal alliance of community-based organisations and is comprised 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.

912 Ibid. The issue of the Public Advocate's access to information is considered in Chapter 20 of this Discussion Paper.

Chapter 22

Whistleblower protection

INTRODUCTION

22.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including:[913]

> whether there is a need to provide protection for people who make complaints about the treatment of an adult with impaired capacity.

22.2 There are two situations in which protection may be relevant to a person who makes a complaint about the treatment of an adult with impaired capacity.

22.3 The first situation is where the person who makes the complaint might be exposed to liability of some kind — for example, liability in damages for defamation — as a result of making the complaint.

22.4 The second situation is where the person who makes the complaint is, as a result, subjected to a detriment of some kind — for example, harassment or vilification in the workplace. In this chapter, a detriment to which a person is subjected as a consequence of making a disclosure about the treatment of an adult with impaired capacity is referred to as a reprisal.

---

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

PROTECTION UNDER THE *GUARDIANSHIP AND ADMINISTRATION ACT 2000* (QLD)

Protection from liability for making a disclosure

22.5 Protection from liability for people who make disclosures about the treatment of adults with impaired capacity is important in encouraging them to report instances of abuse; in the absence of such protection there might be reluctance to report concerns about the abuse of adults.

22.6 Section 247 of the *Guardianship and Administration Act 2000* (Qld) provides protection from civil and criminal liability, as well as protection from liability under an administrative process, to a person who discloses certain kinds of information to an 'official':

> **247 Whistleblowers' protection**
>
> (1) A person is not liable, civilly, criminally or under an administrative process, for disclosing to an official information about a person's conduct that breaches this Act or the *Powers of Attorney Act 1998*.
>
> (2) Without limiting subsection (1)—
>
> (a) in a proceeding for defamation the discloser has a defence of absolute privilege for publishing the disclosed information; and
>
> (b) if the discloser would otherwise be required to maintain confidentiality about the disclosed information under an Act, oath, rule of law or practice, the discloser—
>
> (i) does not contravene the Act, oath, rule of law or practice for disclosing the information; and
>
> (ii) is not liable to disciplinary action for disclosing the information.
>
> (3) A person's liability for the person's own conduct is not affected only because the person discloses it to an official.
>
> (4) In this section—
>
> ***official*** means—
>
> (a) the registrar or a member of the tribunal staff; or[914]
>
> (b) the adult guardian, a member of the adult guardian's staff or an adult guardian's delegate for an investigation; or

914 When the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) commences, s 1469 of that Act will amend s 247(4) of the *Guardianship and Administration Act 2000* (Qld) by omitting paragraph (a) of the definition of 'official' and inserting '(a) the principal registrar or a registrar under the QCAT Act or another member of the administrative staff of the registry under that Act; or'.

(c) the public advocate or a member of the public advocate's staff; or

(d) a community visitor. (note added)

22.7 Section 247(1) applies if the information disclosed to an official is about a person's conduct that is in breach of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld). The wording of section 247(1) suggests that the protection will be available only if the conduct *actually* breaches the legislation. This means that a person who suspects wrongdoing by, for example, a guardian, administrator or attorney may not be protected from liability for disclosing information about the person's conduct, however reasonable the suspicion may be, unless the conduct amounts to a breach of the legislation. This is likely to act as a significant disincentive against disclosures of wrongdoing as the person making the disclosure may not be in a position to know in advance whether the conduct actually breaches the legislation; that can be ascertained only after the conduct has been investigated.

Protection from a reprisal

22.8 Although section 247 of the *Guardianship and Administration Act 2000* (Qld) protects a person from civil and criminal liability, and from liability under an administrative process, for making certain disclosures to an official, the Act does not protect a person who makes such a disclosure from being subjected to a reprisal as a result of making the disclosure.

THE POSITION IN OTHER JURISDICTIONS

Protection from liability for making a disclosure

22.9 In the ACT, the *Public Advocate Act 2005* (ACT) includes a provision that protects a person from liability as a result of giving information to the Public Advocate.[915] Section 15 of the *Public Advocate Act 2005* (ACT) provides:

15 Giving of information protected

(1) This section applies if any information is given honestly and without recklessness to the public advocate.

(2) The giving of the information is not—

(a) a breach of confidence; or

(b) a breach of professional etiquette or ethics; or

915 The ACT Public Advocate has similar functions to the Queensland Adult Guardian: see *Public Advocate Act 2005* (ACT) s 10. See also [18.65] above.

(c) a breach of a rule of professional conduct.

(3) Civil or criminal liability is not incurred only because of the giving of the information.

22.10 Because section 15 applies if the information is given 'honestly and without recklessness', the scope of the protection given by that section is wider than that given by the *Guardianship and Administration Act 2000* (Qld).

22.11 The guardianship legislation in the other Australian jurisdictions does not include a provision giving any protection from liability to persons who complain about the treatment of an adult with impaired capacity.

Protection from a reprisal

22.12 As is the case in Queensland, the guardianship legislation in the other Australian jurisdictions does not include any provisions to protect a person who complains about the treatment of an adult with impaired capacity from being subjected to a reprisal for making the complaint.

ISSUES FOR CONSIDERATION

Protection from liability for making a disclosure

The current requirement for an actual breach

22.13 As explained earlier, the protection given by section 247 of the *Guardianship and Administration Act 2000* (Qld) appears to apply only to the disclosure of *actual* breaches of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).[916] While it is important that people are not protected from liability for making baseless complaints, it is also important that the Act provides adequate protection in respect of appropriate disclosures as they may trigger an investigation or other action that is necessary to protect an adult from neglect, exploitation or abuse.

22.14 The requirement under section 247(1) of the *Guardianship and Administration Act 2000* (Qld) of an actual breach of the legislation is a much higher threshold for protection than that which applies under the *Whistleblowers Protection Act 1994* (Qld) to a person who makes a 'public interest disclosure'.[917] A 'public interest disclosure' is a particular type of disclosure that

916 See [22.7] above.

917 A public interest disclosure is defined to mean 'a disclosure of information specified in sections 15 to 20 of the Act made to an appropriate entity and includes all information and help given by the discloser to an appropriate entity': *Whistleblowers Protection Act 1994* (Qld) sch 6.

is defined by reference to the person who makes the disclosure, the type of information disclosed and the entity to which the disclosure is made.[918]

22.15 Section 39 of the *Whistleblowers Protection Act 1994* (Qld) provides, in terms similar to section 247 of the *Guardianship and Administration Act 2000* (Qld), that a person is not liable, civilly, criminally or under an administrative process, for making a public interest disclosure. The making of public interest disclosures is addressed in sections 15 to 20 of the Act. While sections 15 to 18 deal with the making of a public interest disclosure by a public officer about particular conduct,[919] sections 19 and 20 deal with those public interest disclosures that may be made by anybody. Of particular relevance to this review is section 19, which provides:

> **19 Anybody may disclose danger to person with disability or to environment from particular contraventions**
>
> (1) This section applies if anybody has information about—
>
> (a) a substantial and specific danger to the health or safety of a person with a disability;[920] or
>
> (b) the commission of an offence against a provision mentioned in schedule 2, if commission of the offence is or would be a substantial and specific danger to the environment; or
>
> (c) a contravention of a condition imposed under a provision mentioned in schedule 2, if the contravention is or would be a substantial and specific danger to the environment.
>
> (2) The person may make a public interest disclosure of the information. (emphasis added; note added)

22.16 The Act specifies when a person has information about conduct or danger specified in sections 15 to 20 of the Act:[921]

> A person has information about conduct or danger specified in sections 15 to 20 if the person honestly believes on reasonable grounds that the person has information that tends to show the conduct or danger.

22.17 This means that the protection for making a public interest disclosure under section 19 of the *Whistleblowers Protection Act 1994* (Qld) does not depend on a finding that there was, in fact, a substantial and specific danger to the health or safety of a person with a disability. The requirement of an honest belief on reasonable grounds is important in discouraging baseless complaints.

---

918 *Whistleblowers Protection Act 1994* (Qld) s 7(3).

919 *Whistleblowers Protection Act 1994* (Qld) ss 15 (Public officer may disclose official misconduct), 16 (Public officer may disclose maladministration), 17 (Public officer may disclose negligent or improper management affecting public funds), 18 (Public officer may disclose danger to public health or safety or environment).

920 *Whistleblowers Protection Act 1994* (Qld) sch 6 provides that '***disability***' of a person has the same meaning as in the *Disability Services Act 2006* (Qld).

921 *Whistleblowers Protection Act 1994* (Qld) s 14(2).

In addition, the *Whistleblowers Protection Act 1994* (Qld) makes it an indictable offence if a person:[922]

- makes a statement to an appropriate entity intending that it be acted on as a public interest disclosure; and
- in the statement, or in the course of inquiries into the statement, intentionally gives information that is false or misleading in a material particular.

22.18 The narrow protection available under section 247(1) of the *Guardianship and Administration Act 2000* (Qld) also differs from the protection given under similar provisions in other legislation. For example:

- under the *Aged Care Act 1997* (Cth), a person is protected from liability for disclosing a reportable assault if the person 'has reasonable grounds to suspect that the information indicates that a reportable assault has occurred' and 'makes the disclosure in good faith';[923]
- under the *Disability Services Act 2006* (Qld), a person acting on behalf of a funded non-government service provider is protected from liability for giving information to the chief executive if the person acts honestly and on reasonable grounds;[924]
- under the *Medical Practitioners Registration Act 2001* (Qld), a registrant is protected from liability for giving information to police, obtained in his or her professional capacity, that the registrant 'honestly and reasonably believes indicates an indictable offence has taken place';[925]
- a person is protected from liability for disclosing to the Commissioner for Children and Young People 'information that would help the commissioner in assessing or investigating a complaint'.[926]

---

922 *Whistleblowers Protection Act 1994* (Qld) s 56. The maximum penalty under s 56(1) is 167 penalty units (that is, $16 700) or two years imprisonment: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

923 *Aged Care Act 1997* (Cth) s 96.8. That provision applies to disclosures made by approved providers of residential care or staff members of such providers and was inserted into that Act as part of amendments made by the *Aged Care Amendment (Security and Protection) Act 2007* (Cth) to establish a scheme of compulsory reporting of abuse: see Explanatory Memorandum, Aged Care Amendment (Security and Protection) Bill 2007 (Cth) 1. A 'reportable assault' is defined to include unlawful sexual contact, unreasonable use of force or other specified assault inflicted on a person when the person is receiving residential care from approved providers under that Act: s 63-1AA(9).

924 *Disability Services Act 2006* (Qld) s 224.

925 *Medical Practitioners Registration Act 2001* (Qld) s 176(1), (2). Section 176(3) of that Act is in the same terms as the *Guardianship and Administration Act 2000* (Qld) s 247(2). For similarly worded protections see, for example, *Drug Court Act 2000* (Qld) s 39B(2); *Education (Accreditation of Non-State Schools) Act 2001* (Qld) s 171(1).

926 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 162(1). Section 162(2)–(3) of that Act is in the same terms as *Guardianship and Administration Act 2000* (Qld) s 247(2)–(3).

22.19 An issue for consideration is whether section 247(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended so that the protection given by the section to a person who discloses information is not limited to the situation where the information relates to an actual breach of that Act or the *Powers of Attorney Act 1998* (Qld) (or possibly any additional Acts that may be relevant).[927] For example, the protection given by the section could be extended to protect a person who discloses information if:

- the person honestly believes on reasonable grounds that the information tends to show a breach of the relevant legislation;
- the person suspects, on reasonable grounds, that a person has breached the relevant legislation; or
- the information would help in the assessment or investigation of a complaint about a breach of the relevant legislation.

22.20 The wider scope of such protection may encourage people to report instances of abuse and other wrongdoing in relation to adults with impaired capacity. At the same time, the scope of the protection would not be so wide as to encourage frivolous or vexatious complaints.

22-1 Is it appropriate that the protection currently given by section 247(1) of the *Guardianship and Administration Act 2000* (Qld) to a person who discloses information is limited to the disclosure of information that reveals an *actual* breach of the relevant legislation?[928]

22-2 If no to Question 22-1, should section 247(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to extend the availability of the protection given by the section so that it applies to a person who discloses information in a wider range of circumstances, for example:

(a) if the person honestly believes on reasonable grounds that the information tends to show a breach of the relevant legislation;

927 The issue of whether s 247(1) of the *Guardianship and Administration Act 2000* (Qld) should apply to the disclosure of information about a breach, or possible breach, of any other Acts is considered at [22.21]–[22.23] below.

928 In this context, 'relevant legislation' means the *Guardianship and Administration Act 2000* (Qld), the *Powers of Attorney Act 1998* (Qld) and any other Act that may be considered appropriate for inclusion in s 247(1) of the *Guardianship and Administration Act 2000* (Qld). The issue of other Acts is considered at [22.21]–[22.23] below.

(b) if the person suspects, on reasonable grounds, that a person has breached the relevant legislation;

(c) if the information would help in the assessment or investigation of a complaint about a breach of the relevant legislation; or

(d) if some other circumstance applies (and, if so, what circumstance)?

Disclosure about breaches of particular Acts

22.21 The protection given by section 247 of the *Guardianship and Administration Act 2000* (Qld) applies in relation to liability arising from the disclosure of information about conduct that breaches either the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

22.22 The Public Advocate has suggested that, for systems advocacy work, the protection given by section 247 is too narrow and should not be confined to breaches of only those two Acts:[929]

> In relation to systems advocacy work, much broader protections are appropriate. Potentially, whistleblowers will provide information regarding breaches relating to many different systems in addition to the guardianship legislative system. These may include, for example, breaches under the *Mental Health Act 2000* and the *Disability Services Act 2006*.[930] (note added)

22.23 Given the Adult Guardian's statutory function of protecting adults with impaired capacity from neglect, exploitation or abuse,[931] it may be that the reference in section 247(1) to conduct that breaches the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) is also too narrow for that function.

---

929 Correspondence from the Public Advocate dated 24 July 2009.

930 *Disability Services Act 2006* (Qld) s 224 deals with protection from liability for giving information. However, it applies only to the giving of information to the chief executive by a funded non-government service provider.

931 *Guardianship and Administration Act 2000* (Qld) s 174(2)(a). The functions and powers of the Adult Guardian are considered in Chapter 18 of this Discussion Paper.

22-3 Should section 247 of the *Guardianship and Administration Act 2000* (Qld) be amended so that the protection given by that section is not limited to the disclosure of a person's conduct that breaches, or is suspected of breaching, the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld), but applies also to the disclosure of a person's conduct that breaches, or is suspected of breaching, some other Act or Acts (to the extent that the conduct relates to an adult with impaired capacity)?

22-4 If yes to Question 22-3, to which other Act or Acts should section 247 of the *Guardianship and Administration Act 2000* (Qld) refer?

Other disclosures

22.24 A further issue is whether section 247 of the *Guardianship and Administration Act 2000* (Qld) should be amended to give protection from liability for a disclosure of information that does not relate to a breach, or suspected breach, of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) or another specified Act, but that nevertheless relates to the neglect, exploitation or abuse of an adult with impaired capacity. For example, an allegation that an adult is being neglected, exploited or abused might not amount to a breach of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) if the alleged perpetrator is not a guardian, administrator, attorney or statutory health attorney.

22.25 Nevertheless, it may be desirable to give protection from liability to a person who makes such a disclosure because, like the disclosure of breaches or suspected breaches of the guardianship legislation, it has the potential to trigger action that may be needed to protect an adult from neglect, exploitation or abuse.

22.26 Earlier in this chapter, the Commission considered whether the *Guardianship and Administration Act 2000* (Qld) should give protection from liability only for the disclosure of an actual breach of the relevant legislation or whether protection from liability should also be available for the disclosure of a suspected breach of the relevant legislation. In the latter case, the Commission is seeking submissions on how that suspicion should be framed in the legislation.[932] These considerations are also relevant to any amendment of the Act giving protection from liability for a disclosure about the neglect, exploitation or abuse of an adult with impaired capacity. The issues are therefore:

- whether protection from liability should be available only for the disclosure of an actual instance of neglect, exploitation or abuse; and

932 See Question 22-2 above.

- if protection is to be given in respect of a wider range of circumstances, how those circumstances should be framed.

22.27 In considering the scope of this protection, it would seem desirable for it to be consistent with the approach taken in relation to a disclosure of a breach, or suspected breach, of the relevant legislation.

22-5 Should section 247 of the *Guardianship and Administration Act 2000* (Qld) be amended to protect a person from liability for disclosing information to an official if:

(a) the person honestly believes on reasonable grounds that the information tends to show that an adult has been, or is being, neglected, exploited or abused;

(b) the person suspects, on reasonable grounds, that an adult has been, or is being, neglected, exploited or abused;

(c) the information would help in the assessment or investigation of a complaint about the neglect, exploitation or abuse of an adult; or

(d) some other circumstance applies (and, if so, what circumstance)?

Relevant 'officials'

22.28 The protection from liability given by section 247(1) of the *Guardianship and Administration Act 2000* (Qld) applies if the relevant information is disclosed to an 'official'. 'Official' is defined in section 247(4) of the Act:[933]

> (4) In this section—
>
> ***official*** means—
>
> (a) the registrar or a member of the tribunal staff; or
>
> (b) the adult guardian, a member of the adult guardian's staff or an adult guardian's delegate for an investigation; or
>
> (c) the public advocate or a member of the public advocate's staff; or
>
> (d) a community visitor.

933 *Guardianship and Administration Act 2000* (Qld) s 247 is set out in full at [22.6] above.

22.29 Paragraph (d) of the definition refers to 'a community visitor'. Chapter 10 of the *Guardianship and Administration Act 2000* (Qld) provides for the appointment of community visitors, whose statutory purpose is to safeguard the interests of consumers at visitable sites.[934] As explained earlier in this Discussion Paper, the work of community visitors is managed and supported by a number of public servants. The 'Community Visitor Program' is used to refer collectively to the community visitors themselves and to the public servants who manage and support their work.[935] While community visitors are appointed under the *Guardianship and Administration Act 2000* (Qld),[936] the public servants who support and manage their work are appointed under the *Public Service Act 2008* (Qld).

22.30 While a community visitor is an official for the purpose of section 247 of the *Guardianship and Administration Act 2000* (Qld), a public servant employed within the Community Visitor Program is not. In contrast, section 247(4) includes as an official a member of the Adult Guardian's staff and a member of the Public Advocate's staff.

22.31 In practical terms, this means that, if a person contacts the Community Visitor Program to request that a community visitor visit a consumer at a visitable site and, in the course of that request, discloses information about a person's conduct that breaches the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld), section 247(1) will not protect the person from liability as the information is not disclosed to an 'official' within the meaning of section 247.

22.32 This raises the issue of whether the definition of 'official' in section 247(4) of the *Guardianship and Administration Act 2000* (Qld) should be amended to include those public servants who are involved in the administration of the Community Visitor Program.

22.33 Although the *Guardianship and Administration Act 2000* (Qld) generally refers only to community visitors, the term 'relevant person', which is used in sections 249 and 249A of the Act,[937] is defined in section 246 of the Act to include:[938]

---

934 *Guardianship and Administration Act 2000* (Qld) s 223(1). The role of community visitors is considered in Chapter 21 of this Discussion Paper.

935 See [21.35] above.

936 *Guardianship and Administration Act 2000* (Qld) s 231.

937 See *Guardianship and Administration Act 2000* (Qld) ss 249 (Protected use of confidential information), 249A (Prohibited use of confidential information).

938 The definition of 'relevant person' in s 246 of the *Guardianship and Administration Act 2000* (Qld), as well as ss 249 and 249A, were inserted by the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld). That Act implemented the recommendations contained in Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007).

> (f) a community visitor or a public service officer involved in the administration of a program called the community visitor program; …

22-6 Should the definition of 'official' in section 247(4) of the *Guardianship and Administration Act 2000* (Qld) be amended to include 'a public service officer involved in the administration of a program called the community visitor program'?

Protection from a reprisal

22.34 As noted earlier, the *Guardianship and Administration Act 2000* (Qld) does not protect a person who discloses relevant information to an official from being subjected to a reprisal as a result of making that disclosure.[939]

22.35 Although the Commission has not previously sought submissions on the issue of whistleblower protection, the issue has been raised with the Commission as a matter of concern.

22.36 One respondent has commented on the current lack of protection from reprisals. This respondent was employed by a publicly-funded non-government organisation ('NGO') that provided services to adults with impaired capacity. He recounted his experience of reporting to the management of the NGO his suspicion that several of the adults at a particular facility were being abused, and of subsequently reporting his suspicions to the Adult Guardian. He stated that, as a result of raising these concerns, he and other whistleblowers employed by the NGO were harassed and vilified at their workplace.[940] His submission referred to the importance of protecting whistleblowers from reprisals:[941]

> as a general rule, families do not want to bring up the abuse allegations — either due to old age, lack of ability to advocate, or intimidation / worries that [their] child will lose residential care. The majority of allegations (around 80%) come from front line staff who have no protection at all. These people are the intellectually disabled person's 'voice'.

22.37 A similar concern was raised during a Commission forum about the risk of reprisals faced by people who make complaints to a community visitor:[942]

> If it is a worker at the site who has complained and requested a visit, they may be afraid of retribution at work or of losing their job.

---

939 See [22.8] above.

940 Submission 40A.

941 Submission 40B.

942 Submission F24A.

> If it is a parent who has complained, they may be afraid the consumer may lose their place in the facility or suffer retribution.

22.38 This raises the issue of whether, in addition to giving protection from liability for disclosing specified information, the *Guardianship and Administration Act 2000* (Qld) should also address the issue of reprisals. Models for dealing with reprisals are found in the *Whistleblowers Protection Act 1994* (Qld), as well as in a large number of other Queensland Acts. The various provisions are quite similar in their terms.

Whistleblowers Protection Act 1994 (Qld)

22.39 As mentioned earlier in this chapter, the *Whistleblowers Protection Act 1994* (Qld) gives protection from liability to a person who makes a public interest disclosure.[943] In addition, the Act protects a person who makes a public interest disclosure from being subjected to a reprisal, makes it an offence for a public officer to take a reprisal, and creates a remedy for a person who is the subject of a reprisal.

22.40 Sections 41 to 43 of the *Whistleblowers Protection Act 1994* (Qld) provide:

> **41 Reprisal and grounds for reprisal**
>
> (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that, anybody has made, or may make, a public interest disclosure.
>
> (2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.
>
> (3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.
>
> (4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.
>
> (5) For the contravention to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.
>
> **42 Reprisal is an indictable offence**
>
> (1) A public officer who takes a reprisal commits an offence.
>
> Maximum penalty—167 penalty units or 2 years imprisonment.
>
> (2) The offence is an indictable offence.
>
> (3) If a public officer commits the offence, the Criminal Code, sections 7 and 8 apply even though a person other than a public officer may also be taken to have committed the offence because of the application.

943 *Whistleblowers Protection Act 1994* (Qld) s 39.

> **43 Damages entitlement for reprisal**
>
> (1) A reprisal is a tort and a person who takes a reprisal is liable in damages to anyone who suffers detriment as a result.
>
> (2) Any appropriate remedy that may be granted by a court for a tort may be granted by a court for the taking of a reprisal.
>
> (3) If the claim for the damages goes to trial in the Supreme Court or the District Court, it must be decided by a judge sitting without a jury.

22.41 Anyone who takes a reprisal is liable in damages to a person who suffers detriment as a result.[944] However, it is an offence for a person to take a reprisal only if the person who does so is a public officer or, under sections 7 or 8 of the Criminal Code (Qld), the person:[945]

- is a party to an offence committed by a public officer; or
- the person and a public officer form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose.

Other Queensland Acts

22.42 A number of Queensland Acts that deal with matters of public health,[946] public safety,[947] the protection of vulnerable persons[948] or environmental matters[949] also include provisions dealing with reprisals. The provisions in these Acts are similarly worded to the provisions of the *Whistleblowers Protection Act 1994* (Qld) set out above. Generally these Acts provide that:

- a person must not cause a detriment to a person because, or in the belief that, the person has made a complaint to a relevant official or given assistance to a relevant official of a particular kind and that a contravention of this requirement is a 'reprisal'; and

---

944 *Whistleblowers Protection Act 1994* (Qld) s 43(1).

945 *Whistleblowers Protection Act 1994* (Qld) s 42(1), (3).

946 See eg *Ambulance Service Act 1991* (Qld) ss 36X–36Z; *Dental Practitioners Registration Act 2001* (Qld) ss 155–157; *Health Quality and Complaints Commission Act 2006* (Qld) ss 193–195; *Medical Practitioners Registration Act 2001* (Qld) ss 173–175; *Optometrists Registration Act 2001* (Qld) ss 133–135; *Residential Services (Accreditation) Act 2002* (Qld) ss 173–175; *Transplantation and Anatomy Act 1979* (Qld) ss 49A–49C.

947 See eg *Coal Mining Safety and Health Act 1999* (Qld) ss 275AA–275AB; *Explosives Act 1999* (Qld) ss 126A–126B; *Mining and Quarrying Safety and Health Act 1999* (Qld) ss 254A–254B; *Petroleum and Gas (Production and Safety) Act 2004* (Qld) ss 708C–708D; *Transport Operations (Marine Safety) Act 1994* (Qld) ss 202R–202S.

948 See eg *Commission for Children and Young People and Child Guardian Act 2000* (Qld) ss 155–157; *Family Responsibilities Commission Act 2008* (Qld) ss 128–130.

949 *Transport Operations (Marine Pollution) Act 1995* (Qld) ss 128E–128F.

- a person who takes a reprisal commits an offence; and
- a reprisal is a tort and a person who takes a reprisal is liable in damages to any person who suffers detriment as a result.

22.43 By way of example, the *Medical Practitioners Registration Act 2001* (Qld) provides that:

> **173 Reprisal and grounds for reprisals**
>
> (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that—
>
> (a) anybody has given, or may give, information or assistance to the board or an inspector about a person's alleged contravention of division 1 or section 168(1)(a), (2) or (3) or 170(1); or
>
> (b) anybody has given, or may give, evidence to the court in proceedings for an offence against division 1 or section 168(1)(a), (2) or (3) or 170(1).
>
> (2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.
>
> (3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.
>
> (4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.
>
> (5) For the contravention mentioned in subsection (3) to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.
>
> **174 Offence for taking reprisal**
>
> A person who takes a reprisal commits an offence.
>
> Maximum penalty—167 penalty units or 2 years imprisonment.
>
> **175 Damages entitlement for reprisal**
>
> (1) A reprisal is a tort and a person who takes a reprisal is liable in damages to any person who suffers detriment as a result.
>
> (2) Any appropriate remedy that may be granted by a court for a tort may be granted by a court for the taking of a reprisal.
>
> (3) If the claim for damages goes to trial in the Supreme Court or the District Court, it must be decided by a judge sitting without a jury.

22.44 In addition, some Acts provide that it is an offence for a person to make a false statement, or to give information that the person knows is false and

misleading, to a relevant official or particular entity.[950]

22.45 If it is considered desirable for the *Guardianship and Administration Act 2000* (Qld) to deal with the taking of a reprisal against a person because he or she disclosed information to which section 247(1) of the Act applies, the existing provisions in the *Whistleblowers Protection Act 1994* (Qld) and in the other Acts referred to above may provide a suitable model.

22.46 Although the Commission's terms of reference refer to providing 'protection for people who make complaints about the treatment of an adult with impaired capacity', a reprisal that is made as a result of a person's complaint might not necessarily be made against that person. For example, where a parent makes a complaint about the treatment of his or her adult child with impaired capacity, the reprisal could be taken against the child, rather than against the parent. The wording used in section 41(1) of the *Whistleblowers Protection Act 1994* (Qld), which is the same as that used in the other reprisal provisions mentioned above, is wide enough to cover this situation. It does not simply prohibit the taking of a reprisal against a person who made a public interest disclosure; rather it prohibits the taking of a reprisal against a person 'because, or in the belief that, *anybody* had made, or may make, a public interest disclosure'.

22-7 Should the *Guardianship and Administration Act 2000* (Qld) be amended to include a provision, based on section 41 of the *Whistleblowers Protection Act 1994* (Qld), to the following effect:

Reprisal and grounds for reprisal

(1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that, anybody has disclosed, or may disclose, to an official information mentioned in section 247(1).

(2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.

(3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.

950 See eg *Family Responsibilities Commission Act 2008* (Qld) ss 125–126; *Health Quality and Complaints Commission Act 2006* (Qld) ss 191–192; *Transport Operations (Marine Pollution) Act 1995* (Qld) ss 128G–128H; *Transport Operations (Marine Safety) Act 1994* (Qld) ss 202T–202U.

(4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.

(5) For the contravention to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.

22-8 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that a person who takes a reprisal commits an offence?

22-9 Should the *Guardianship and Administration Act 2000* (Qld) be amended to include a provision to the effect of section 43 of the *Whistleblowers Protection Act 1994* (Qld):[951]

(a) to make it a tort for a person to take a reprisal; and

(b) to make a person who takes a reprisal liable in damages to anyone who suffers detriment as a result?

951 *Whistleblowers Protection Act 1994* (Qld) s 43 is set out at [22.40] above.

Chapter 23

Legal proceedings involving adults with impaired capacity

INTRODUCTION

The requirement for a litigation guardian

23.1 In Queensland, a person under a legal incapacity may start or defend a legal proceeding only by a litigation guardian.[952] Unless the *Uniform Civil Procedure Rules 1999* (Qld) provide otherwise, anything required or permitted by the rules to be done by a party may, if the party is a person under a legal incapacity, be done only by the party's litigation guardian.[953]

23.2 The term 'person under a legal incapacity' means:[954]

(a) a person with impaired capacity; or

(b) a young person.

---

952 *Uniform Civil Procedure Rules 1999* (Qld) r 93(1).

953 *Uniform Civil Procedure Rules 1999* (Qld) r 93(2). If a party's litigation guardian is not a solicitor, the litigation guardian may act only by a solicitor — that is, the litigation guardian may not act in person for the party: r 93(3).

954 *Uniform Civil Procedure Rules 1999* (Qld) sch 4; *Supreme Court of Queensland Act 1991* (Qld) sch 2 (definition of 'person under a legal incapacity', para (a)).

23.3 The term 'person with impaired capacity' is in turn defined as follows:[955]

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

23.4 If a defendant is a person under a legal incapacity and does not file a notice of intention to defend within the time limited, the plaintiff may not continue the proceeding unless a person is made litigation guardian of the defendant.[956]

23.5 Further, if a party to a proceeding becomes a person with impaired capacity during the proceeding, a person may take any further step in the proceeding for or against the party only if:[957]

- the court gives the person leave to proceed; and
- the person follows the court's directions on how to proceed.

Persons who may be a litigation guardian

23.6 A person may be a litigation guardian of a person under a legal incapacity if the person:[958]

- is not a person under a legal incapacity; and
- has no interest in the proceeding adverse to the interest in the proceeding of the person under a legal incapacity.

23.7 If a person is authorised by or under an Act to conduct legal proceedings in the name of, or for, a person with impaired capacity, the authorised person is, unless the court orders otherwise, entitled to be the litigation guardian of the person with impaired capacity in any proceeding to which the authorised person's authority extends.[959]

23.8 A corporation, other than the Public Trustee or a trustee company under the *Trustee Companies Act 1968* (Qld), may not be a litigation guardian.[960]

---

955 *Uniform Civil Procedure Rules 1999* (Qld) sch 4; *Supreme Court of Queensland Act 1991* (Qld) sch 2 (definition of 'person with impaired capacity').

956 *Uniform Civil Procedure Rules 1999* (Qld) r 96.

957 *Uniform Civil Procedure Rules 1999* (Qld) r 72(1). This rule also applies if a person becomes bankrupt or dies during a proceeding.

958 *Uniform Civil Procedure Rules 1999* (Qld) r 94(1).

959 *Uniform Civil Procedure Rules 1999* (Qld) r 94(2).

960 *Uniform Civil Procedure Rules 1999* (Qld) r 94(3).

Rules not affected by the *Guardianship and Administration Act 2000* (Qld)

23.9 The *Guardianship and Administration Act 2000* (Qld) provides that it does not affect 'rules of court of the Supreme Court, District Court or Magistrates Courts about a litigation guardian for a person under a legal incapacity'.[961]

Liability of a litigation guardian

23.10 Where a litigation guardian is representing a plaintiff, the litigation guardian is normally personally liable for the costs that may be awarded against the plaintiff.[962] However, where a litigation guardian is acting for a defendant, the litigation guardian is not generally liable for the plaintiff's costs.[963]

23.11 A litigation guardian for a plaintiff or a defendant is primarily liable for the costs of the legal representatives that he or she engages.[964]

23.12 However, a litigation guardian is entitled to be reimbursed, out of the estate of the person whom he or she represents, for the costs and expenses properly incurred,[965] including any costs of the other party for which the litigation guardian may be liable.[966]

Settlement of proceedings

23.13 If a party to a proceeding is a person under a legal incapacity, a settlement or compromise of the proceeding is ineffective unless it is approved by the court or the Public Trustee acting under section 59 of the *Public Trustee Act 1978* (Qld).[967]

23.14 Section 59 of the *Public Trustee Act 1978* (Qld) deals with the approval (or sanction) of proceedings involving a person under a 'legal disability' — that is, a child or, relevantly for this review, a person with impaired capacity for a

---

961 *Guardianship and Administration Act 2000* (Qld) s 239.

962 *Rhodes v Swithenbank* (1889) 22 QBD 577; *NSW Insurance Ministerial Corporation v Abualfoul* (1999) 94 FCR 247, 253–4 (Sackville J); *Farrell v CSL (No 2)* [2004] VSC 551, [3] (Bongiorno J).

963 See R Quick and D Garnsworthy, *Quick on Costs* (Thomson Reuters online service) [4.4440] at 30 September 2009. However, it has been suggested that gross misconduct of the litigation guardian in relation to the conduct of the defence could render a litigation guardian liable for the plaintiff's costs: *Morgan v Morgan* (1865) 12 LT 199.

964 *Hawkes v Cottrell* (1858) 3 H & N 243; 157 ER 462; *Re Flower* (1871) 19 WR 578; *Murray v Kirkpatrick* (1940) WN (NSW) 162, 163 (Williams J); *Stephenson v Geiss* [1998] 1 Qd R 542, 558 (Lee J).

965 *Murray v Kirkpatrick* (1940) WN (NSW) 162, 163 (Williams J); *Stephenson v Geiss* [1998] 1 Qd R 542, 558 (Lee J).

966 *Steeden v Walden* [1910] 2 Ch 393, 400 (Eve J); *Pryor v Hennessy* [1973] VR 221, 222 (Newton J).

967 *Uniform Civil Procedure Rules 1999* (Qld) r 98. See Supreme Court Practice Directions 9 of 2007 and 3 of 2009, which apply if the Supreme Court is asked to sanction the compromise of a plaintiff's claim under s 59 of the *Public Trustee Act 1978* (Qld): <http://www.courts.qld.gov.au/989.htm> at 28 September 2009.

matter within the meaning of the *Guardianship and Administration Act 2000* (Qld). It provides in part:

> **59 Compromise of actions by or on behalf of persons under a legal disability claiming moneys or damages valid only with sanction of court or public trustee**
>
> (1A) In this section—
>
> ***appropriate person***, for a person under a legal disability, means—
>
> (a) an administrator for the person under the *Guardianship and Administration Act 2000*; or
>
> (b) if the person does not have an administrator—an attorney for a financial matter for the person under an enduring power of attorney under the *Powers of Attorney Act 1998*; or
>
> (c) if the person does not have an administrator or an attorney mentioned in paragraph (b)—the public trustee.
>
> ***court*** means a court within whose jurisdiction an amount or damages are claimed by or for a person under a legal disability suing either alone or with others, and includes a judge or magistrate of the court.
>
> ***person under a legal disability*** means—
>
> (a) a child; or
>
> (b) a person with impaired capacity for a matter within the meaning of the *Guardianship and Administration Act 2000*.
>
> ***taxing officer of a court*** means an officer of the court whose duties include the taxation or other assessment of costs in the court.
>
> (1) In any cause or matter in any court in which money or damages is or are claimed by or on behalf of a person under a legal disability suing either alone or in conjunction with other parties, no settlement or compromise or acceptance of money paid into court, whether before, at or after the trial, shall, as regards the claim of such person under a legal disability, be valid without the sanction of a court or the public trustee, and no money or damages recovered or awarded in any such cause or matter in respect of the claims of any such person under a legal disability, whether by verdict, settlement, compromise, payment into court or otherwise, before or at or after the trial, shall be paid to the next friend[968] of the plaintiff or to the plaintiff's solicitor or to any person other than the public trustee unless the court otherwise directs.
>
> (2) Any claim for money or damages by or on behalf of a person under a legal disability claiming either alone or in conjunction with other parties may be settled or compromised out of court before action brought, with

968 Historically, 'next friend' was the term used for a person who represented a plaintiff who was under a legal incapacity, while 'guardian *ad litem*' (literally, litigation guardian) was the term used for a person who represented a defendant who was under a legal incapacity. In most Australian jurisdictions, the term 'litigation guardian' is now used for a person who is acting in either capacity.

> the sanction of a court or the public trustee, but no money or damages agreed to be paid in respect of the claim of any such person, whether by settlement or compromise, shall be paid to any person other than the appropriate person for the person under a legal disability unless by direction of a court upon application made in that behalf.
>
> (3) Every settlement, compromise, or acceptance of money paid into court when sanctioned by a court or the public trustee under this section shall be binding upon the person under a legal disability by or on whose behalf the claim was made.
>
> … (note added)

23.15 Section 59(1) deals with sanction by the court or the Public Trustee of the settlement of a claim after proceedings have been commenced. Section 59(2) deals with sanction by the court or the Public Trustee of the settlement of a claim before any proceedings have been commenced.

THE COURT'S POWER TO APPOINT A LITIGATION GUARDIAN

Background

23.16 Rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) deals with the court's power to appoint or remove a litigation guardian for a person under a legal incapacity.[969] It provides:

> **95 Appointment of litigation guardian**
>
> (1) Unless a person is appointed as a litigation guardian by the court, a person becomes a litigation guardian of a person under a legal incapacity for a proceeding by filing in the registry the person's written consent to be litigation guardian of the party in the proceeding.
>
> (2) If the interests of a party who is a person under a legal incapacity require it, the court may appoint or remove a litigation guardian or substitute another person as litigation guardian.

23.17 The situation may sometimes arise where, in a proceeding before the court, it is apparent that the plaintiff or the defendant is a person under a legal incapacity and that the person therefore needs to have a litigation guardian for the proceeding.

23.18 If the court finds that the plaintiff is a person under a legal incapacity, it may order that no further step be taken in the action until a person files written consent in the registry to be the plaintiff's litigation guardian pursuant to rule 95(1).[970]

---

969 As mentioned earlier, a 'person under a legal incapacity' includes 'a person with impaired capacity': see [23.2] above.

970 See *Jelicic v Salter* [2001] QSC 68, [14] (Mackenzie J); *Fowkes v Lyons* [2005] QSC 7, 5 (Wilson J).

Issues for consideration

23.19 If no-one is willing to be appointed under rule 95(1) of the *Uniform Civil Procedure Rules 1999* (Qld) as a litigation guardian for a person who is under a legal incapacity, the following issues arise for consideration:

- whether the court should be able to appoint a person as a litigation guardian under rule 95(2) without the person's consent; and
- if so, whether the court should be able to appoint any person without his or her consent or whether the court's power to a appoint a person as litigation guardian without his or her consent should be confined to a public official.

Appointment of a person as a litigation guardian without the person's consent

23.20 Rule 95(2) of the *Uniform Civil Procedure Rules 1999* (Qld) is not expressed to require the consent of a person to be appointed as a party's litigation guardian. Arguably, subject to any specific legislative restriction,[971] the court has the power to appoint a person as a party's litigation guardian without the person's consent. If, however, the person does not consent to the appointment, the court might not in the circumstances be satisfied that it would be in the interests of the party under a legal incapacity for the person to be appointed as the party's litigation guardian. In *Deputy Commissioner of Taxation v P*,[972] Hodgson J commented on the rationale for the rule in New South Wales that a person cannot be appointed as a tutor (the equivalent of a litigation guardian for a plaintiff) without the tutor's consent:[973]

> a person made a tutor without his consent might not exercise the necessary diligence in seeking to uphold the interests of the infant. Even assuming that the Court has power to dispense with compliance with that particular rule, I do not think it would be proper for the Court to do so, certainly not in this case.

23.21 In *Fowkes v Lyons*,[974] Wilson J also expressed her reluctance to appoint a litigation guardian who did not consent to the appointment:[975]

> No-one has been found who is willing to act as litigation guardian. Although the Public Trustee might do so, he is unwilling to do so in this case, and I would be loath to appoint someone who did not consent to the appointment.

---

971 See [23.32] below.

972 (1987) 11 NSWLR 200.

973 Ibid 204.

974 [2005] QSC 7. In this case, the Public Trustee was the plaintiff's administrator for all financial matters including legal matters (except for the management of the plaintiff's disability support pension): at 2.

975 Ibid 3–4. In the circumstances, it was not necessary for Wilson J to consider the issue of whether the Public Trustee *could* be appointed as the plaintiff's litigation guardian in the absence of the Public Trustee's consent.

23.22 Further, the appointment of a person as a litigation guardian without that person's consent may have significant implications. As mentioned earlier in this chapter, a litigation guardian is personally liable for the costs that may be awarded against the person he or she is representing, as well as for the costs of the legal representatives engaged by the litigation guardian.[976]

23.23 In the Northern Territory, South Australia and Victoria, the rule dealing with the court's power to appoint a litigation guardian is expressed in similar terms to rule 95(1) of the *Uniform Civil Procedure Rules 1999* (Qld).[977]

23.24 In the ACT[978] and New South Wales,[979] however, it appears that the court may not appoint a person as a litigation guardian (in New South Wales, a 'tutor') unless the person has agreed to be appointed.

23.25 In Tasmania, the court generally requires the consent of a person in order to appoint the person as a litigation guardian.[980]

23.26 In Western Australia, the position is more complex. The *Rules of the Supreme Court 1971* (WA) do not include an express power authorising the court to appoint a next friend, although the court may do so in the exercise of its *parens patriae* jurisdiction.[981] However, the rules require a guardian or administrator who is appointed for a represented person under the *Guardianship and Administration Act 1990* (WA) to act as next friend or guardian *ad litem* of the represented person in any proceedings.[982]

23-1 Should a person's consent generally be required in order for the court to appoint the person as a litigation guardian for a person under a legal incapacity?

976 See [23.10]–[23.11] above.

977 *Supreme Court Rules* (NT) r 15.03(4), (6); *Supreme Court Civil Rules 2006* (SA) r 79(3); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 15.03(4)(a), (6).

978 *Court Procedures Rules 2006* (ACT) rr 276(1)(d), 280(2), (7)(b).

979 *Uniform Civil Procedure Rules 2005* (NSW) r 7.18(1)(a), (5)(b). See also *Deputy Commissioner of Taxation v P* (1987) 11 NSWLR 200, 204 (Hodgson J).

980 *Supreme Court Rules 2000* (Tas) r 295. This rule is considered further at [23.41]–[23.42] below.

981 *Farrell v Allregal Enterprises Pty Ltd (No 2)* [2009] WASC 65, [20]–[27] (Pullin J). This decision is considered at [23.34]–[23.40] below.

982 *Rules of the Supreme Court 1971* (WA) O 70 r 3(3). However, if the guardian or administrator is appointed under a limited order, rather than under a plenary order, he or she is only required to act as the next friend or guardian *ad litem* in 'proceedings of the kind that the limited guardianship or limited administration order authorises that person to conduct': *Farrell v Allregal Enterprises Pty Ltd (No 2)* [2009] WASC 65, [19] (Pullin J).

Appointment of the Public Trustee or Adult Guardian as a litigation guardian if no other person is available

23.27 If no-one is willing to be appointed as the litigation guardian for a person under a legal incapacity and the court does not have the power to appoint a person as a litigation guardian without the person's consent, it may mean that some actions simply cannot be commenced or continued.

23.28 This raises the issue of whether, if no-one is willing to be appointed as a litigation guardian for a person under a legal incapacity, the court should have the power to appoint a public entity or office-holder, such as the Public Trustee or the Adult Guardian, as the person's litigation guardian, even if the public entity or office-holder does not consent to the appointment.

23.29 As explained earlier in this Discussion Paper,[983] the Public Trustee may be appointed as an administrator to exercise power for financial matters for an adult, which, subject to the terms of the appointment, may include making decisions about a legal matter relating to the adult's financial or property matters.[984] Similarly, the Adult Guardian may be appointed as a guardian to exercise power for personal matters for an adult, which, subject to the terms of the appointment, includes making decisions about a legal matter not relating to the adult's financial or property matters.[985]

23.30 Further, the Public Trustee may potentially be suitable to fulfil this role as it already has a number of statutory functions of a special public nature, as well as powers of management in relation to the estates of vulnerable persons.[986] In Chapter 5 of this Discussion Paper, the Commission has raised a similar issue, that is, whether the Tribunal should be able to appoint the Public Trustee as an adult's administrator, without the consent of the Public Trustee, if no other appropriate person is available to be appointed as the adult's administrator.[987]

23.31 A consideration in appointing the Public Trustee or the Adult Guardian as a litigation guardian without consent is the potential liability that the Public Trustee or Adult Guardian would be assuming. In *Re CAC*,[988] the Supreme Court transferred to the Tribunal a proceeding brought against CAC in the Supreme Court to the extent of determining CAC's capacity for that proceeding.[989] The Tribunal referred to the Public Trustee's submission, which

983 See Chapter 4 of this Discussion Paper.

984 *Guardianship and Administration Act 2000* (Qld) sch 2 s 1(p) (definition of 'financial matter').

985 *Guardianship and Administration Act 2000* (Qld) sch 2 s 2(i) (definition of 'personal matter').

986 See *Public Trustee Act 1978* (Qld) pts 5–7.

987 See [5.59]–[5.64] in vol 1 of this Discussion Paper.

988 [2008] QGAAT 45.

989 See [23.52] below.

explained why the Public Trustee did not wish to accept an appointment as CAC's litigation guardian:[990]

> MN told the Tribunal that The Public Trustee of Queensland would not be in a position to accept the role of litigation guardian for CAC in the Supreme Court action. If The Public Trustee of Queensland were to be appointed as administrator for CAC for legal matters, advice would have to be obtained as to the litigation in which CAC is involved. The Public Trustee of Queensland would not accept responsibility for costs in the litigation and would not place corporate funds at risk in becoming involved in the litigation on behalf of CAC, particularly if there was any doubt about the ability to obtain instructions from CAC.

23.32 Although rule 95(2) does not include, as a requirement for appointing a person as a party's litigation guardian, that the person consents to the appointment, that rule needs to be read in light of section 27 of the *Public Trustee Act 1978* (Qld). Section 27(1) provides for the appointment of the Public Trustee in a variety of capacities, including as a 'next friend'. However, section 27(3) requires the consent of the Public Trustee to that appointment unless the *Public Trustee Act 1978* (Qld) or another Act provides otherwise. Section 27 provides:

> **27 Rights and duties to which public trustee may be appointed**
>
> (1) Where any person or corporation may be appointed or act as a trustee, executor, administrator, next friend,[991] guardian, committee, agent, attorney, liquidator, receiver, manager or director or to or in any other office of a fiduciary nature the public trustee may be so appointed or may so act.
>
> (2) Where an official liquidator may be appointed liquidator by a court or judge, such appointment may be made of the public trustee where, in the opinion of the court or judge, there are special reasons for so doing.
>
> (3) Notwithstanding subsections (1) and (2), the public trustee's appointment to any office or capacity shall, except where by this or any other Act it is otherwise provided, be subject to the public trustee consenting thereto.
>
> (4) The public trustee may charge and receive such fees and remuneration as are fixed under this Act, or if not fixed under this Act, as may be allowed by law, for acting in any capacity to which the public trustee may be appointed under this section. (emphasis added; noted added)

23.33 If it is considered desirable for the court to have the power under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) to appoint the Public Trustee as a litigation guardian without the Public Trustee's consent, then it may be necessary to amend section 27 of the *Public Trustee Act 1978* (Qld) so that the requirement in section 27(3) does not apply to the appointment of the Public

990 [2008] QGAAT 45, [44].

991 See n 968 above.

Trustee as a litigation guardian under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld).

23.34 The issue of the appointment of a public entity as a litigation guardian was recently considered by the Supreme Court of Western Australia in *Farrell v Allregal Enterprises Pty Ltd (No 2)*.[992] The question was whether the Court had the power to appoint the Public Trustee or the Public Advocate (the equivalent of the Adult Guardian in Queensland) as next friend[993] to represent Mrs Farrell in three appeals that she had instituted if no other person was willing to be appointed. Both the Public Trustee and the Public Advocate made submissions resisting an order for their appointment, stating that they were too under-funded or under-resourced to be able to take on the role.[994]

23.35 Pullin J held that the *Guardianship and Administration Act 1990* (WA) did not confer power on the Court to appoint the Public Advocate as next friend.[995]

23.36 Pullin J then considered whether the Public Trustee could be appointed as next friend. His Honour referred to section 7(1) of the *Public Trustee Act 1941* (WA), which provides, in similar terms to section 27(1) of the *Public Trustee Act 1978* (Qld), that where a court can appoint a next friend, 'any such appointment may be made of the Public Trustee'.[996] That raised the threshold question of whether the court has the power to appoint a next friend. Although Pullin J considered that there is no express general power in Order 70 of the *Rules of the Supreme Court 1971* (WA) authorising the court to appoint a next friend,[997] his Honour held that the court has the power to appoint a next friend in the exercise of its *parens patriae* jurisdiction.[998]

23.37 Pullin J then considered whether the Public Trustee could be appointed as next friend without its consent. His Honour referred to the 1941 Parliamentary Debates for the original Bill and noted that, although it had originally been proposed that section 7 of the *Public Trustee Act 1941* (WA) should require the consent of the Public Trustee before it could be appointed,

---

992 [2009] WASC 65.

993 Western Australia still maintains the distinction between a next friend and a guardian *ad litem*: see *Rules of the Supreme Court 1971* (WA) O 70.

994 [2009] WASC 65 [2], [41] (Pullin J).

995 Ibid [15]. However, Pullin J noted [at 15] that, if the Public Advocate had been appointed by the State Administrative Tribunal as Mrs Farrell's guardian or administrator and she had then become involved in litigation, O 70 r 3 of the *Rules of the Supreme Court 1971* (WA) had the effect that the Public Advocate should act as guardian *ad litem* or next friend unless someone else was appointed by the court.

996 Ibid [16]–[17].

997 Ibid [20]. However, the *Rules of the Supreme Court 1971* (WA) provide in specific circumstances for the appointment of a next friend or guardian *ad litem* by the court: O 70 rr 3(5)–(6), 5.

998 Ibid [21]–[27], where Pullin J analysed the conferral on the Supreme Court of Western Australia, as a result of s 16(1)(d) of the *Supreme Court Act 1935* (WA), of the *parens patriae* jurisdiction that was exercisable by the Lord Chancellor of England in 1861.

the relevant clause was omitted before the Bill was passed.[999] His Honour held:[1000]

> This deliberate decision to eliminate any requirement that the Public Trustee consent, confirms that s 7 means what it says, namely that the Public Trustee may be appointed without the precondition that it first give consent.

23.38 Pullin J rejected the Public Trustee's submission that 'at common law a citizen does not have a right to present his or her case by counsel or to have his or her case presented at public expense', holding that the court has a duty 'to ensure that incapacitated persons are properly represented in litigation'.[1001]

23.39 It was submitted by the Public Trustee that, if appointed, a condition should be imposed to provide some form of protection to the Public Trustee in relation to the costs for which it could be liable. Pullin J considered that it was not possible to formulate any condition about costs at that time.[1002]

23.40 Given the urgency of the litigation, Pullin J appointed the Public Trustee as next friend for Mrs Farrell's three appeals.[1003]

23.41 In Tasmania, the rules provide for the appointment of a person with the person's consent or, in the alternative, the Director of Public Prosecutions. Rule 295 of the *Supreme Court Rules 2000* (Tas) provides:

> **295 Appointment by Court or judge of litigation guardian**
>
> If a person under disability does not have a litigation guardian, the Court or a judge may appoint as litigation guardian—
>
> (a) an appropriate person, with that person's consent; or
>
> (b) the Director of Public Prosecutions.

23.42 In effect, this makes the Director of Public Prosecutions the litigation guardian of last resort.

---

999 Ibid [30]. In this respect, s 7 of the *Public Trustee Act 1941* (WA) differs from s 27 of the *Public Trustee Act 1978* (Qld). As mentioned above, s 27(3) of the Queensland Act requires the Public Trustee's consent before it can be appointed as a next friend.

1000 Ibid.

1001 Ibid [33].

1002 Ibid [35]. Pullin J considered, however, that at the appropriate time the fact that the Public Trustee had been appointed without its consent was a matter that could be taken into account on the question of costs: at [35].

1003 Ibid [40].

23-2 Should section 27 of the *Public Trustee Act 1978* (Qld) be amended so that section 27(3), which requires the consent of the Public Trustee, does not apply to the appointment of the Public Trustee as a litigation guardian for an adult under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld)?

23-3 Alternatively, or in addition, should the *Guardianship and Administration Act 2000* (Qld) be amended:

(a) to include, as an additional function of the Adult Guardian in section 174, 'acting as the litigation guardian of an adult in a proceeding not relating to the adult's financial or property matters';

(b) to provide that the Adult Guardian may exercise the power under rule 95(1) of the *Uniform Civil Procedure Rules 1999* (Qld) to file a written consent to be the litigation guardian of an adult in a proceeding not relating to the adult's financial or property matters; and

(c) to provide that the court may, under rule 95(2) of the *Uniform Civil Procedure Rules 1999* (Qld), appoint the Adult Guardian, without the Adult Guardian's consent, as the litigation guardian of an adult in a proceeding not relating to the adult's financial or property matters?

THE COURT'S POWER TO REFER THE ISSUE OF AN ADULT'S CAPACITY TO THE TRIBUNAL

Background

23.43 As explained earlier, the *Uniform Civil Procedure Rules 1999* (Qld) provide that, if a person is under a legal incapacity, the person may start or defend a proceeding only by a litigation guardian. Further, if a party to a proceeding is under a legal incapacity, anything required or permitted by the rules to be done by the party may be done only by the party's litigation guardian.[1004]

23.44 In some situations, the court may be satisfied on the basis of the evidence before it that one of the parties to the proceeding before it is a person under a legal incapacity and that the party therefore needs a litigation guardian for the proceeding.[1005] However, the situation may arise where the court has

1004 See [23.1] above.

1005 See eg *Fowkes v Lyons* [2005] QSC 7.

concerns that one of the parties to a proceeding may be an adult with impaired capacity for the proceeding, although there is insufficient evidence for the court to decide the issue. In that situation, the court may consider that it is more appropriate for that issue to be resolved by the Tribunal.

Issues for consideration

23.45 Section 146 of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may make a declaration about the capacity of various persons, including an adult, for a matter. This would include making a declaration about the capacity of an adult to make the decisions required of a litigant in conducting proceedings. Section 146 provides in part:

> **146 Declaration about capacity**
>
> (1) The tribunal may make a declaration about the capacity of an adult, guardian, administrator or attorney for a matter.
>
> (2) The tribunal may do this on its own initiative or on the application of the individual or another interested person.
>
> …

23.46 The Tribunal may make a declaration about an adult's capacity on its own initiative or on application. If the court has concerns about the capacity of a party to conduct a proceeding before it and no-one applies to the Tribunal for a declaration about the party's capacity, the matter can only come before the Tribunal if the court has the power to refer the question of the adult's capacity to the Tribunal.

23.47 Section 241 of the *Guardianship and Administration Act 2000* (Qld) deals with the transfer of proceedings by the Supreme Court to the Tribunal. It provides:

> **241 Transfer of proceeding**
>
> (1) The court may, if it considers it appropriate, transfer a proceeding within the tribunal's jurisdiction to the tribunal.
>
> (2) The tribunal may, if it considers it appropriate, transfer a proceeding within the court's jurisdiction to the court.
>
> (3) The transfer may be ordered on the court's or tribunal's initiative or on the application of an active party to the proceeding.

23.48 The reference to 'court' in section 241 means the Supreme Court.[1006]

1006 *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'court').

23.49 Section 241 is in similar terms to the draft provision recommended in the Commission's original draft report.[1007] The draft provision was one of several provisions recommended by the Commission to facilitate its primary recommendation that the Supreme Court and the Tribunal should exercise concurrent jurisdiction in relation to enduring powers of attorney.[1008]

23.50 Although the purpose of section 241 was to ensure that, in exercising concurrent jurisdiction in relation to enduring powers of attorney, both the Supreme Court and the Tribunal could transfer a proceeding about an enduring power of attorney to the other so that it was heard in the most appropriate forum, the terms of section 241 do not limit the type of proceeding that may be transferred.

23.51 Section 241 has been used by the Supreme Court to transfer to the Tribunal the determination of the question of an adult's capacity.[1009] For example, the Tribunal's decision in *Re MAE*,[1010] which involved an application for a declaration of capacity for an adult, records that the matter was transferred to the Tribunal following an order of the Supreme Court that:[1011]

> Pursuant to section 241 of the *Guardianship and Administration Act 2000* the Applicant be transferred to the Guardianship and Administration Tribunal for the determination of the question of whether or not the Applicant has impaired capacity for conducting the application before the Court.

23.52 The Tribunal's decision in *Re CAC*[1012] also records that the Supreme Court:[1013]

> transferred the proceeding as against CAC to this Tribunal to the extent of determining the question as to whether CAC has capacity for the proceeding and the question as to whether an administrator should be appointed (generally and specifically for the proceeding) for CAC.

1007 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 2, Draft Assisted and Substituted Decision Making Bill 1996 cl 313.

1008 Ibid vol 1, 89. The Commission also recommended (at 89) that the Tribunal should be given the power, either on its own motion or on the application of a participant in either proceeding, to stay a hearing about an enduring power of attorney if a concurrent proceeding has been brought in the Supreme Court. See now *Guardianship and Administration Act 2000* (Qld) s 242, which provides:

> **242 Stay of proceeding concerning an enduring document**
>
> If there is a Supreme Court proceeding, and a tribunal proceeding, about an enduring document or attorneys under an enduring document, other than to the extent necessary for section 243, the tribunal must stay the tribunal proceeding unless the court transfers the Supreme Court proceeding to the tribunal.

1009 Another way to achieve the same result would be for the Supreme Court to stay the proceeding in that court until the adult obtained a declaration of capacity from the Tribunal.

1010 [2008] QGAAT 34.

1011 Ibid [25].

1012 [2008] QGAAT 45.

1013 Ibid [3]. The decision does not mention s 241 of the *Guardianship and Administration Act 2000* (Qld), although that would appear to be the basis for the transfer by the Supreme Court.

23.53 This raises an issue of whether section 241 should be amended to clarify that it applies not only to the transfer of the whole of a proceeding, but also to the transfer of an issue arising in a proceeding — that is, the issue of the capacity of a party.

23.54 A further issue is that section 241(1) applies only to the Supreme Court. The issue of a party's capacity, and the need for a litigation guardian if the party is in fact a person under a legal incapacity, may also arise in a proceeding before the District Court or a Magistrates Court. This raises an issue about whether section 241 should be amended to enable the District Court or a Magistrates Court to refer to the Tribunal a proceeding to the extent of determining the question of the capacity of a party to the proceeding.

23-4 Should section 241 of the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that, for section 241(1), 'proceeding' includes an issue about the capacity of a party to a proceeding before the court?

23-5 Should section 241 of the *Guardianship and Administration Act 2000* (Qld) be amended so that the power to transfer to the Tribunal an issue about the capacity of a party to a proceeding before the court may also be exercised by:

(a) the District Court;

(b) a Magistrates Court?

JURISDICTION OF THE SUPREME COURT AND DISTRICT COURT TO APPOINT A GUARDIAN OR AN ADMINISTRATOR

Background

23.55 Section 245 of the *Guardianship and Administration Act 2000* (Qld) provides that, in certain circumstances, the Supreme Court and the District Court may exercise the powers of the Tribunal under Chapter 3 of the *Guardianship and Administration Act 2000* (Qld) as if it were the Tribunal. Importantly, Chapter 3 confers on the Tribunal the power to appoint a guardian or an administrator for an adult with impaired capacity for a matter.[1014]

23.56 Section 245 provides:

1014 *Guardianship and Administration Act 2000* (Qld) s 12.

245 Settlements or damages awards

(1) This section applies if, in a civil proceeding—

(a) the court sanctions a settlement between another person and an adult or orders an amount to be paid by another person to an adult; and

(b) the court considers the adult is a person with impaired capacity for a matter.

(2) The court may exercise all the powers of the tribunal under chapter 3.

(3) Chapter 3 applies to the court in its exercise of these powers as if the court were the tribunal.

(4) As soon as practicable after a court makes an order under this section, the registrar of the court must give a copy of the order to the tribunal.

(5) In this section—

court means the Supreme Court or the District Court.

settlement includes compromise or acceptance of an amount paid into court.

23.57 Section 245 applies in two situations where the court considers that the adult has impaired capacity for a matter:

- The first situation is where the court sanctions a settlement between another person and an adult.[1015]
- The second situation is where the court orders an amount to be paid by another person to an adult (including where, as part of the settlement of a proceeding, the parties consent to judgment being entered for the adult).[1016]

23.58 Because section 245 enables the court to exercise the powers of the Tribunal under Chapter 3 of the *Guardianship and Administration Act 2000* (Qld), the court may, if it is satisfied that a plaintiff has impaired capacity to manage the proceeds of the settlement or the amount that is ordered to be paid, appoint an administrator to manage those funds. This avoids the need for a separate application to be made to the Tribunal for the appointment of an administrator.

1015 As mentioned earlier in this chapter, if a party to a proceeding is a person under a legal incapacity, a settlement of the proceeding is effective only if it is sanctioned by either the court or the Public Trustee: see [23.13]–[23.15] above.

1016 In *Brown v Stewart* [2007] 1 Qd R 205, 206–7 (Helman J).

Issue for consideration

23.59 Under the *Guardianship and Administration Act 2000* (Qld), an adult's capacity is specific to a particular matter. An adult may have capacity for some matters, but not for other matters. It is possible that an adult may have the capacity to make the decisions required of a litigant (so that any settlement of the proceeding does not need to be sanctioned) and yet have impaired capacity for the decisions involved in managing the proceeds of the litigation.[1017]

23.60 If the court does not sanction the settlement (because sanction is not required), but nevertheless orders that an amount be paid to the adult, the court will have jurisdiction to exercise the Tribunal's power under Chapter 3 of the Act to appoint an administrator.[1018]

23.61 However, if the court does not sanction the settlement and the terms of the settlement do not involve a court order for the payment of an amount to the adult, section 245 will not apply. That was the situation that arose for consideration in *Welland v Payne*.[1019] In that case, the plaintiff had suffered a closed head injury but was capable of giving instructions to conduct the proceedings, including giving instructions to settle his claim for damages.[1020] The proceedings had settled on the basis that the defendant pay the plaintiff a sum of $485 000 by way of damages, plus costs and fund administration fees. Medical evidence suggested that the adult plaintiff did not have the capacity to manage this settlement sum. The plaintiff therefore applied to the court for an order appointing his father-in-law as his administrator for the purpose of managing the settlement sum.[1021]

23.62 Mullins J considered that the court did not have the power to order the appointment of an administrator in these circumstances. In her Honour's view, the proceeding was not one involving the sanction of a settlement between the adult plaintiff and the defendant (the first situation mentioned in section 245(1)(a)).[1022] Nor did the proceeding involve an order by the court for the payment of an amount to the plaintiff (the second situation mentioned in section 245(1)(a)). In the circumstances, Mullins J considered that 'there is no room for the operation' of this section of the *Guardianship and Administration Act 2000* (Qld).[1023] Consequently, her Honour held that:[1024]

1017 *Brown v Stewart* [2007] 1 Qd R 205, 206, 210 (Helman J); *Welland v Payne* [2000] QSC 431, [29] (Mullins J).

1018 *Brown v Stewart* [2007] 1 Qd R 205, 206–7 (Helman J).

1019 [2000] QSC 431.

1020 Ibid [1], [29] (Mullins J).

1021 Ibid [1]–[3].

1022 Ibid [29].

1023 Ibid [28].

1024 Ibid [30].

> If the applicant does have impaired capacity for a financial matter relevant to receiving, investing and managing the [settlement sum], it would be necessary to transfer the application to the Tribunal pursuant to section 241(1) of the GAA or, alternatively, the applicant could make application to the Tribunal for appointment of Mr Cooper as his administrator for the financial matters relevant to receiving, investing and managing the [settlement sum].

23.63 This raises the issue of whether section 245 of the *Guardianship and Administration Act 2000* (Qld) should be amended to apply to a situation such as that which arose in *Welland v Payne*. It may be considered desirable to amend section 245(1)(a) to include the circumstance where an amount is payable under a settlement agreement by another person to an adult, not being a settlement sanctioned by the court. If section 245(1)(a) were amended in that way, the court would have jurisdiction to exercise the power of the Tribunal to appoint an administrator where, in the absence of a court sanction or order, the plaintiff was to receive a settlement sum and the court considered that the plaintiff had impaired capacity to receive, invest and manage that sum.

23-6 Should section 245(1)(a) of the *Guardianship and Administration Act 2000* (Qld) be amended to include the circumstance where an amount is payable under a settlement agreement by another person to an adult, not being a settlement sanctioned by the court?

Chapter 24

Miscellaneous issues

THE REMUNERATION OF PUBLIC GUARDIANSHIP AND ADMINISTRATION SERVICE PROVIDERS

Introduction

24.1 The two public entities that provide guardianship and administration services in Queensland are the Adult Guardian, who may be appointed as an adult's guardian, and the Public Trustee, who may be appointed as an adult's administrator.

24.2 The Adult Guardian does not have any statutory entitlement to charge for the guardianship services provided:

- as a guardian under the *Guardianship and Administration Act 2000* (Qld);
- as an attorney appointed under the *Powers of Attorney Act 1998* (Qld); or

- when the Adult Guardian makes decisions about health matters under sections 42 or 43 of the *Guardianship and Administration Act 2000* (Qld).[1025]

24.3 In contrast, the *Public Trustee Act 1978* (Qld) provides that the Public Trustee may, by notice in the gazette, fix reasonable fees and charges for its services.[1026] When the Public Trustee is appointed as an adult's administrator for financial matters under the *Guardianship and Administration Act 2000* (Qld), the Public Trustee is generally entitled to charge the following:[1027]

- a personal financial administration fee ranging from $922 to $6459, depending on the type of support received by the adult;[1028]
- an asset management fee that varies according to the value of the adult's assets;[1029] and
- a fee of $693 for each real estate property or other place of residence.[1030]

24.4 These fees also apply when the Public Trustee acts as an attorney for financial matters under the *Powers of Attorney Act 1998* (Qld).[1031]

24.5 However, if an attorney's power for a financial matter is suspended under section 195 of the *Guardianship and Administration Act 2000* (Qld) and the Public Trustee acts as the adult's attorney during the period of suspension, the Public Trustee's fee is calculated at the rate of $186 per hour.[1032]

24.6 The Public Trustee's Annual Report for 2007–08 notes that, while the management of the financial affairs of some clients is commercially viable, there are many clients for whom the cost of administration and legal services exceeds their ability to pay. The Annual Report states that the Public Trustee provides

---

1025 These provisions are considered at [18.45]–[18.50] above.

1026 *Public Trustee Act 1978* (Qld) s 17.

1027 *Public Trustee (Fees and Charges Notice) (No 1) 2009* pt 3, published *Queensland Government Gazette*, 12 June 2009 583–609.

1028 *Public Trustee (Fees and Charges Notice) (No 1) 2009* s 13(1)(b), sch 4. The maximum fee of $6459 is payable where the adult is receiving personal financial administration assistance from the Public Trustee and contact with the Public Trustee is more than once per fortnight.

1029 *Public Trustee (Fees and Charges Notice) (No 1) 2009* s 13(2), sch 6. Schedule 6 notes that the 'value of real estate property or other place of residence, motor vehicles, household furniture, effects, chattels and personal jewellery are excluded from the calculation of the value of assets for determining the level of the asset management fee payable'.

1030 *Public Trustee (Fees and Charges Notice) (No 1) 2009* s 13(3), sch 6. However, this fee is not payable if the property is occupied by the adult as his or her principal place of residence: s 14.

1031 *Public Trustee (Fees and Charges Notice) (No 1) 2009* ss 16(a), 17(a).

1032 *Public Trustee (Fees and Charges Notice) (No 1) 2009* ss 16(c), 17(b), sch 15 (definition of 'hourly rate').

significant funding towards managing these commercially uneconomical estates.[1033]

24.7 As far as the Commission is aware, the Queensland position in relation to both the Adult Guardian and the Public Trustee is consistent with the position that applies in the other Australian jurisdictions.

Issues for consideration

The threshold issue

24.8 The fact that the Adult Guardian does not charge for guardianship services, but that the Public Trustee does charge for administration services, raises a fundamental question about whether there are unique features of their respective roles that justify the different approaches.

24.9 The guardianship of an adult involves matters of an inherently personal nature, for example, decisions about where to live and health care decisions. On one view, it may be inappropriate for the state to charge for the provision of these services. In contrast, while there is no doubt that the appointment of an administrator for an adult has an effect on the adult's lifestyle decisions, the decisions of themselves are of a less personal nature. That may be some justification for the more commercial approach that is taken by the *Public Trustee Act 1978* (Qld) in relation to the Public Trustee's entitlement to remuneration.

24.10 On the other hand, if guardianship is seen as a service for which the state should accept responsibility, on the basis that its purpose is to safeguard the interests of a vulnerable group of people,[1034] the same can be said of the appointment of an administrator for an adult. On that basis, there is an argument that both guardianship and administration services should be provided at no cost to the adult.

24-1 As a matter of principle, is it appropriate that:

(a) the Adult Guardian does not charge for services when the Adult Guardian acts as an adult's guardian; and

(b) the Public Trustee does charge for services when it is appointed as an adult's administrator?

1033 The Annual Report notes that, for the year ended 30 June 2008, the cost of providing these services and the cost of managing the estates of prisoners under s 91 of the *Public Trustee Act 1978* (Qld) together totalled $11 900 000: Public Trustee of Queensland, *Annual Report 2007–2008* (2008) 34. (The Annual Report does not provide a separate breakdown of the cost of these two types of services.)

1034 See T Carney, *Law at the Margins: Towards social participation* (1991) 83.

Is a uniform approach possible?

24.11 If a uniform approach is to be adopted, the further issues are whether the Adult Guardian should charge for guardianship services (at least where the adult has the capacity to pay) or whether the Public Trustee, like the Adult Guardian is at present, should be publicly funded to provide administration services at no cost.

24.12 In many cases, the adults for whom the Adult Guardian is appointed as guardian would not have the capacity to pay for the services provided. However, there may be some cases where the adults for whom the Adult Guardian is appointed would have the capacity to pay for those services.

24.13 If the Adult Guardian could charge for guardianship services, those additional resources could be employed in enhancing the level of the service provided by the Office of the Adult Guardian (assuming that the Office of the Adult Guardian continued to be publicly funded at its present level and was able to retain any fees that it received for its guardianship services). On the other hand, the collection of the fees charged would of itself entail administrative costs to the Office, and the fees charged might not necessarily be able to be recovered.

24.14 If the Adult Guardian were to charge for guardianship services, two critical issues would need to be resolved.

24.15 The first issue is the basis on which an adult's capacity to pay would be assessed. For example, an adult might have a valuable home, but might have a limited income. This raises a question about whether an adult's liability to be charged for guardianship services should be assessed on the basis of the adult's assets or income or some combination of both. Consideration could perhaps be given to tying exemption from liability to pay for services to some other financial assessment that already applies to the adult — for example, the receipt of a particular pension or part pension.

24.16 The second issue is the scale of fees that should be charged. In the case of the Public Trustee, the fees charged are to a certain extent based on the level of support that the adult receives from the Public Trustee. However, the Public Trustee is also entitled to charge an asset management fee that is referrable to the value of the adult's assets. While the first of these fees might be an appropriate model for charging for guardianship services, a fee based on the value of the adult's assets would not have any bearing on the extent, or complexity, of the guardianship services provided.

24.17 Alternatively, if the Public Trustee were required to act as an adult's administrator without being entitled to charge, the Public Trustee would need significant public funding to enable it to carry out that role. Unlike the Office of the Adult Guardian, which is publicly funded to provide guardianship services, the Public Trustee does not receive public funding to provide administration services to adults with impaired capacity.

24-2 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Adult Guardian may charge an adult with impaired capacity for the services provided as:

(a) a guardian appointed by the Tribunal; or

(b) an attorney appointed under the adult's enduring power of attorney or advance health directive?

24-3 If yes to Question 24-2:

(a) how should an adult's liability to be charged for these services be assessed; and

(b) what fee structure should apply in relation to the guardianship services provided by the Adult Guardian?

24-4 Alternatively, should the Public Trustee be publicly funded to enable it to act in either of the following capacities without being charging:

(a) as an administrator appointed by the Tribunal; or

(b) an attorney appointed under the adult's enduring power of attorney?

THE REMUNERATION OF TRUSTEE COMPANIES

Introduction

24.18 Section 48 of the *Guardianship and Administration Act 2000* (Qld) deals with the remuneration of professional administrators.[1035] It provides:

> **48 Remuneration of professional administrators**
>
> (1) If an administrator for an adult carries on a business of or including administrations under this Act, the administrator is entitled to remuneration from the adult if the tribunal so orders.
>
> (2) The remuneration may not be more than the commission payable to a trustee company under the *Trustee Companies Act 1968* if the trustee company were administrator for the adult.

1035 Note, s 47 of the *Guardianship and Administration Act 2000* (Qld) provides that a guardian or administrator for an adult is entitled to reimbursement from the adult of the reasonable expenses incurred in acting as guardian or administrator. This provision applies to all guardians and administrators.

> (3) Nothing in this section affects the right of the public trustee or a trustee company to remuneration or commission under another Act.

24.19 Section 48 applies to the remuneration of an administrator for an adult who carries on a business of or including administrations under the *Guardianship and Administration Act 2000* (Qld),[1036] such as a lawyer or an accountant.[1037] Such an administrator may be remunerated in respect of the administration only if the Tribunal so orders.[1038] The effect of section 48(2) is to put 'a ceiling on the remuneration that can be approved by the Tribunal' for the administrator.[1039] The remuneration may not exceed the commission payable to a trustee company under the *Trustee Companies Act 1968* (Qld) if the trustee company were administrator for the adult. The commission that may be charged by a trustee company is regulated by section 41 of the *Trustee Companies Act 1968* (Qld).[1040]

The effect of section 48 on the remuneration of trustee companies

24.20 The effect of section 48 of the *Guardianship and Administration Act 2000* (Qld) on the remuneration of trustee companies was considered in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited*.[1041] Perpetual Trustees Queensland Limited ('Perpetual') was appointed in 2001 as the administrator for an adult with impaired capacity to manage the settlement proceeds from her personal injuries action. In the course of reviewing Perpetual's appointment, the Tribunal identified several questions of law in relation to the construction of section 48 of the *Guardianship and Administration Act 2000* (Qld) and Perpetual's entitlement to remuneration as an administrator. The Tribunal referred those questions to the Supreme Court under section 105A of the Act. The questions concerning Perpetual's remuneration as an administrator were:[1042]

> 2. Whether the Tribunal can authorise under subss (1) and (2) of s 48 of the *GAA* that Perpetual be remunerated in excess of the commission contemplated by s 41(1) of the *Trustee Companies Act 1968* (Qld) (*TCA*).
>
> 3. Whether a litigation guardian appointed for an incapacitated adult pursuant to r 95 of the [*Uniform Civil Procedure Rules 1999* (Qld)] can enter into a binding agreement under s 41(7)(b) of the *TCA* on behalf of

---

1036 *Guardianship and Administration Act 2000* (Qld) s 48(1).

1037 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323, 337 (Mullins J).

1038 *Guardianship and Administration Act 2000* (Qld) s 48(1).

1039 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323, 337 (Mullins J).

1040 *Trustee Companies Act 1968* (Qld) s 41 is set out at [24.23] below.

1041 [2008] 2 Qd R 323.

1042 Ibid 324.

> an incapacitated adult with a trustee company about the amount of remuneration payable to that trustee company in its role as administrator for the adult.
>
> 4. Whether the Tribunal has power to authorise retrospectively remuneration already paid to Perpetual when making an order under s 48(1) of the *GAA*.

24.21 Mullins J observed that section 48(3) of the *Guardianship and Administration Act 2000* (Qld) 'expressly recognises that the remuneration of a trustee company that acts as an administrator under the *GAA* is regulated by another Act (which must be taken to be a reference to the *TCA*)'.[1043] The question to be resolved was:

> whether the effect of s 48 of the *GAA* is to leave the remuneration of a trustee company that is acting as an administrator under the *GAA* to be regulated by the *TCA*, and thereby excludes the operation of ss 48(1) and (2) of the *GAA* when a trustee company is an administrator under the *GAA*.

24.22 Mullins J held that the effect of section 48(3) is to exclude the operation of section 48(1) and (2) when a trustee company or the Public Trustee has been appointed as an administrator under the *GAA*.[1044] In her Honour's view:[1045]

> The proper construction of s 48 of the *GAA* is that it does not apply to the remuneration of the Public Trustee or a trustee company where such an entity is acting as an administrator of an adult under the *GAA*.

24.23 As a result, the remuneration to which Perpetual was entitled was regulated by the *Trustee Companies Act 1968* (Qld). Section 41 of the *Trustee Companies Act 1968* (Qld), which deals with the commission that may be charged by a trustee company, provides in part:[1046]

> **41 Commission chargeable by a trustee company**
>
> (1) In respect of every estate which is, after the commencement of this Act, committed to the administration or management of a trustee company as executor, administrator, trustee, receiver, committee, guardian, liquidator or official liquidator or in any other capacity, the trustee company shall be entitled to receive, in addition to all moneys properly expended by the trustee company and chargeable against the estate, a commission at a rate to be fixed from time to time by the board of directors of the trustee company but not in any case exceeding, after discounting for any GST payable on any supply the commission relates to—

1043 Ibid 338.

1044 Ibid.

1045 Ibid.

1046 In addition to the commission to which a trustee company is entitled under s 41 of the *Trustee Companies Act 1968* (Qld), a trustee company is also entitled under s 45(1) of the Act to charge a fee for carrying out specified services, including the arrangement of insurances and the preparation of income and land tax returns.

(a) $5 for every $100 of the capital value of the estate; and

(b) $6 for every $100 of the income received by the trustee company on account of the estate.

(2) The commission in respect of the capital value of the estate is payable out of moneys, whether capital or income, received by the trustee company and the commission in respect of the income received on account of the estate is payable out of that income.

(3) Subject to this Act—

(a) the commission shall be accepted by the trustee company in full satisfaction of any claim to remuneration for acting as such executor, administrator, trustee, receiver, committee, guardian, liquidator, official liquidator or in any other capacity; and

(b) no other charges beyond such commission and moneys so expended by the trustee company shall be made or allowed.

(4) Where the Court or a Judge is of opinion that the rate of commission charged in respect of any estate is excessive, the Court or Judge may, on the application of any person interested in the estate, review the rate of commission and may, on such review, reduce the rate of commission.

(5) If the administration or management of an estate was committed to a trustee company before 1 July 2000, the commission charged by the trustee company against the estate must not exceed, after discounting for any GST payable on any supply the commission relates to, the amount of the published scale of charges of the trustee company when the administration or management of the estate was committed to the trustee company.

(5A) If the administration or management of an estate was committed to a trustee company on or after 1 July 2000, the commission charged by the trustee company against the estate must not exceed the amount of the published scale of charges of the trustee company when the administration or management of the estate was committed to the trustee company.

(6) Despite subsections (5) and (5A), in the case of income received in respect of any perpetual trust committed to a trustee company (whether before or after the commencement of this Act), the scale of charges published from time to time by the trustee company as being applicable to income of trust estates is applicable to the income received in respect of the trust while that published scale of charges is current.

(7) Nothing in this section shall prevent—

(a) the payment of any commission which a testator in his or her will or a settlor has directed to be paid;

(b) the payment of any commission or fee which has been agreed upon between the trustee company and the parties interested therein; either in addition to or in lieu of the commission provided for by this section.

(8) In this section—

capital value means the gross amount realised for the assets real and personal of the estate in question, without deduction in respect of debts or liabilities secured or unsecured and for this purpose—

(a) the gross amount realised for assets specifically devised or bequeathed is the sum at which the same are assessed for purposes of succession duty or any other duty levied by the State in substitution therefor; and

(b) the gross amount realised for assets distributed in specie or transferred or appropriated to beneficiaries without realisation, whether by or as the result of agreement between beneficiaries or otherwise, is the value put upon the same for the purposes of such distribution in specie, transfer or appropriation.

(9) The commission, which a trustee company is entitled to receive under this section, shall not in any way be affected or diminished by the fact that any other person may, or may not be entitled to, or be allowed, commission in respect of the same estate.

24.24 Under section 41(1) of the *Trustee Companies Act 1968* (Qld), a trustee company that is appointed by the Tribunal as an adult's administrator is entitled to receive a commission at a rate to be fixed from time to time by the board of directors of the trustee company but not in any case exceeding, after discounting for any GST payable on any supply the commission relates to:

- $5 for every $100 of the capital value of the estate; and
- $6 for every $100 of the income received by the trustee company on account of the estate.

24.25 In certain circumstances, a trustee company may be entitled to be remunerated on a different (and higher) basis. Section 41(7)(b) provides that nothing in section 41 prevents 'the payment of any commission or fee which has been agreed upon between the trustee company and the parties interested therein; either in addition to or in lieu of the commission provided for' by section 41.

24.26 The effect of section 41(7) was also considered in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited*.[1047] The issue was whether the adult's brother, as her litigation guardian[1048] in the original personal injuries action, had the authority to enter into a binding agreement with Perpetual under section 41(7)(b) of the *Trustee Companies Act 1968* (Qld) about the amount of the remuneration payable to Perpetual in its role as the adult's administrator.

1047 [2008] 2 Qd R 323.

1048 A person who is under a legal disability may bring or defend legal proceedings only by a litigation guardian: see [23.1] above.

24.27 Mullins J held that the extent of the authority of a litigation guardian under rule 93(2) of the *Uniform Civil Procedure Rules 1999* (Qld) is to do 'anything in a proceeding (including a related enforcement proceeding) required or permitted by these rules to be done by a party'.[1049] Her Honour held that the scope of a litigation guardian's authority did not extend to entering into an agreement under section 41(7)(b) of the *Trustee Companies Act 1968* (Qld) in relation to the commission and fees payable out of settlement proceeds to an adult's administrator:[1050]

> Fees payable to an administrator are expended from the settlement sum after the proceeding has concluded. Even if the litigation guardian enters into the agreement for services with the proposed administrator before the sanction of the settlement, the agreement relates to services to be provided after the settlement has been sanctioned and the proceeding concluded.

24.28 Because Perpetual's remuneration as an administrator was not regulated by section 48 of the *Guardianship and Administration Act 2000* (Qld), it was not necessary for Mullins J to decide whether the Tribunal had the power under section 48(1) retrospectively to authorise the remuneration that had already been paid to Perpetual since its appointment as the adult's administrator in 2001.

24.29 Following the decision in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited*, the Tribunal resumed its hearing in relation to the review of Perpetual's appointment as the adult's administrator.[1051] The Tribunal observed that its role was limited to monitoring the amount of the remuneration charged by a professional administrator:[1052]

> Although the Tribunal cannot regulate or set the remuneration of trustee companies or of the Public Trustee when acting as an administrator under the Act, the Tribunal can monitor the remuneration being charged to ensure that the amount of remuneration charged against the funds of a person with impaired decision making capacity is lawful.

24.30 The Tribunal held that it has no jurisdiction to determine whether a trustee company acting as an administrator was entitled to charge fees in excess of the commission to which a trustee company is entitled under section 41 of the Act:[1053]

> The fees properly charged by law by a trustee company are not a matter that can be regulated by this Tribunal. Only a court can determine whether Perpetual can lawfully charge fees in excess of the statutory fee scheme set down in section 41(7) of the *Trustee Companies Act 1968.*

1049 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323, 339.

1050 Ibid.

1051 See *Re TAD* [2008] QGAAT 76.

1052 Ibid [139].

1053 Ibid [148].

24.31 The Tribunal commented, however, that if the court were to determine that Perpetual could lawfully charge fees in excess of the statutory maximum in section 41(1) of the *Trustee Companies Act 1968* (Qld):[1054]

> then this Tribunal would review its procedures and would no longer monitor ongoing fees charged by trustee companies by comparing the charged fees with the fees permitted in the statutory scheme. Until such a determination is made, the Tribunal considers it is necessary and appropriate to continue the comparison of charged fees to the level of fees allowed by the *Trustee Companies Act 1968*.

Proposed regulation of trustee companies by Commonwealth legislation

24.32 The Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) proposes significant changes to the regulation of trustee companies.[1055] The Bill will insert a new Chapter 5D into the *Corporations Act 2001* (Cth), which implements the transfer of trustee company regulation from the States and Territories to the Commonwealth. The Explanatory Memorandum for the Bill notes that there are ten licensed private trustee companies in Australia, the 'majority of which are licensed and operate in multiple jurisdictions'.[1056] The purpose of the Bill is to create 'a national licensing regime for trustee companies, thereby reducing the regulatory burden on those companies'.[1057]

24.33 Under the Bill, a licensed trustee company will be required to ensure that an up-to-date schedule of the fees that it generally charges for the provision of 'traditional trustee company services':[1058]

- is published at all times on a website maintained by or on behalf of the trustee company; and
- is available free of charge at offices of the trustee company during the usual opening hours of those offices.

1054 Ibid.

1055 The Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) has been read for a third time in the House of Representatives but has not yet been introduced into the Senate.

1056 Explanatory Memorandum, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) 33.

1057 Ibid.

1058 Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) sch 2 cl 9 (proposed new s 601TAA of the *Corporations Act 2001* (Cth)). However, under the consultation draft of the regulations to be made under the *Corporations Act 2001* (Cth), trustee companies will be permitted to state their remuneration, commission or other benefits as a percentage of the income or the capital value of the estate, rather than as a dollar amount: Consultation Draft, Corporations Amendment Regulation 2009 (No) reg 3 items [5], [8] <http://www.treasury.gov.au/documents/1604/PDF/ED_Trustee_Companies_regulations.pdf> at 30 October 2009; Draft Explanatory Statement, Corporations Amendment Regulations 2009 (No) 2 <http://www.treasury.gov.au/documents/1604/PDF/ES_Trustee_Companies_regulations.pdf> at 30 October 2009.

24.34 'Traditional trustee company services' are defined to include 'performing estate management functions', which is further defined to include 'acting as attorney' and 'acting as manager or administrator … of the estate of an individual'.[1059] Accordingly, the proposed amendments will apply to the fees of a trustee company that is appointed by the Tribunal as the administrator of an adult with impaired capacity or by an adult as an attorney under an enduring power of attorney.

24.35 The general approach of the proposed amendments is to deregulate the fees charged for traditional trustee company services,[1060] subject to the requirement in the proposed new section 601TCA that a licensed trustee company must not charge fees in excess of its published schedule of fees.

24.36 The key provisions that will apply to a trustee company that is appointed as an adult's administrator or attorney are:

> **601TAB Disclosure to clients of changed fees**
>
> (1) If, while a licensed trustee company continues to provide a particular traditional trustee company service to a client or clients, the trustee company changes the fees that it will charge for the provision of the service, the trustee company must, within 21 days of the change of fees taking effect, comply with paragraph (a) or (b) in relation to the client or each client:
>
> (a) if the client has requested to be sent copies of changed fees—send the client a copy of the changed fees in accordance with subsection (2); or
>
> (b) in any other case—directly notify the client, in writing, that the changed fees are available on the internet on a specified website maintained by or on behalf of the trustee company.
>
> Note 1: Initial disclosure to a client of the fees that a trustee company will charge for the provision of a trustee company service will generally occur through the provision to the client of a Financial Services Guide under Part 7.7. However, this section is not limited just to situations where there has been an initial disclosure through a Financial Services Guide.
>
> Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).
>
> (2) A copy of changed fees that is sent to a client under paragraph (1)(a) must be:
>
> (a) an electronic copy, if that is what the client has requested; or
>
> (b) a hard copy, in any other case.
>
> (3) If a client to whom a traditional trustee company service is provided is under a legal disability, the following provisions have effect:

1059 Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) sch 2 cl 9 (proposed new s 601RAC(1)(a), (2)(c), (e) of the *Corporations Act 2001* (Cth)).

1060 Explanatory Memorandum, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) 49.

(a) a copy of changed fees required by paragraph (1)(a), or a notice required by paragraph (1)(b), must instead be given to an agent of the client;

(b) a request referred to in paragraph (1)(a) or (2)(a) may instead be made by an agent of the client.

601TBA Charging of fees for the provision of traditional trustee company services

(1) Subject to this Part, a licensed trustee company may charge fees for the provision of traditional trustee company services.

(2) If a provision of this Part limits the fees that a licensed trustee company may charge for the provision of a particular traditional trustee company service, the trustee company must not charge fees for that service in excess of that limit.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Excess fees may also be recovered under section 601XAA.

601TBB Part does not prevent charging of fees as agreed etc.

(1) Nothing in this Part prevents a licensed trustee company from charging:

(a) any fees that a testator, in his or her will, has directed to be paid; or

(b) any fees that have been agreed on in accordance with subsection (2).

(2) An agreement referred to in paragraph (1)(b) that relates to the fees that may be charged by a licensed trustee company for the provision of a particular traditional trustee company service must be between the trustee company and:

(a) subject to paragraph (b) of this subsection—a person or persons who have authority to deal with the trustee company on matters relating to the provision of the service; or

(b) if the regulations prescribe the person or persons with whom the agreement must be made—that person or those persons.

601TCA Fees otherwise than for being the trustee or manager of a charitable trust

(1) This section applies to a particular provision of a traditional trustee company service by a licensed trustee company, unless:

(a) the service consists of being the trustee or manager of a charitable trust (see Division 4); or

(b) the provision of the service started before the commencement of this section.

> (2) The trustee company must not charge fees that are in excess of its schedule of fees that was most recently published as required by section 601TAA before the trustee company started to provide the service.
>
> (3) This section does not limit anything in Division 2.

24.37 Under the proposed section 601TAB, if a licensed trustee company changes its fees, it must, within 21 days, give specified notices to its client. Subsection (3) deals with the notice requirements that apply if the client to whom a traditional trustee company service is provided is under a legal disability. In that situation, the notices must be given to 'an agent of the client'. In relation to guardianship matters, however, the need for a trustee company to give the relevant notices will arise only if the trustee company is the adult's administrator or attorney. In that situation, it is not clear how the amendments can safeguard the adult's interests.

24.38 Under the proposed amendments the court will have the power to review the fees charged by a licensed trustee company and to reduce the fees if it considers that the fees are excessive.[1061] However, that power will not apply to fees that are charged as permitted by the proposed section 601TBB.[1062] That section would apply if a person made an enduring power of attorney appointing a trustee company as the attorney and agreed that the trustee company may charge fees at a higher rate than the published rate.

Extent of continued State regulation of trustee company fees

24.39 The proposed section 601RAE of the *Corporations Act 2001* (Cth) provides that, subject to subsections (3) and (4), the trustee company provisions are intended to apply to the exclusion of specified laws of a State or Territory, including 'laws that regulate the fees that may be charged by companies for the provision of traditional trustee company services, and laws that require the disclosure of such fees'.[1063] Subsection (4) provides:

> (4) The regulations may provide:
>
> (a) that the trustee company provisions are intended to apply to the exclusion of prescribed State or Territory laws, or prescribed provisions of State or Territory laws; or

1061 Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) sch 2 cl 9 (proposed new s 601TEA(1) of the *Corporations Act 2001* (Cth)).

1062 Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) sch 2 cl 9 (proposed new s 601TEA(2) of the *Corporations Act 2001* (Cth)).

1063 Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) sch 2 cl 9 (proposed new s 601RAE(2) of the *Corporations Act 2001* (Cth)). In addition, proposed new s 601RAE(6) provides that pt 1.1A of the *Corporations Act 2001* (Cth) does not apply to the trustee company provisions. That means that the State is not able to pass legislation that, under s 5F of that Act, would exclude the operation of all or part of the *Corporations Act 2001* (Cth).

> (b) that the trustee company provisions are intended not to apply to the exclusion of prescribed State or Territory laws, or prescribed provisions of State or Territory laws.

24.40 The current consultation draft of the regulations to be made under the *Corporations Act 2001* (Cth) and the accompanying Draft Explanatory Statement indicate that it is intended that:[1064]

> matters relating to the role of trustee companies as guardians remain subject to State and Territory laws and tribunals. In their guardianship role, trustee companies will however be subject to Commonwealth regulation in relation to their [Australian Financial Services Licence] conditions, their charging of fees and certain other matters.

24.41 The *Guardianship and Administration Act 2000* (Qld) is listed in schedule 8AB of the consultation draft of the regulations as a State law that would not be excluded by the operation of the proposed 601RAE(4)(b). However, the schedule does not mention the *Powers of Attorney Act 1998* (Qld).

24.42 Although it appears that the effect of the proposed amendments is that the fees charged by trustee companies will be regulated by the *Corporations Act 2001* (Cth), it may still be possible for the State to regulate their fees in relation to guardianship matters. This will be possible if:

- the regulations when made are not in the same terms as the current consultation draft; or
- the State Government makes a request to the Commonwealth Government to pass a further regulation to enable the State Government to displace the provisions of the *Corporations Act 2001* (Cth) to the extent that those provisions regulate the fees of trustee companies when acting as administrators (and perhaps attorneys) under the guardianship legislation and the Commonwealth Government accedes to that request.

24.43 The following discussion of issues arising under the proposed amendments to the *Corporations Act 2001* (Cth) is premised on the potential for Queensland legislation to be able to continue to regulate the fees charged by trustee companies when acting under the guardianship legislation.

1064 Draft Explanatory Statement, Corporations Amendment Regulations 2009 (No) 1 <http://www.treasury.gov.au/documents/1604/PDF/ES_Trustee_Companies_regulations.pdf> at 30 October 2009. See also Consultation Draft, Corporations Amendment Regulation 2009 (No) reg 1 item 1 (Proposed reg 5D.1.02, sch 8AB) <http://www.treasury.gov.au/documents/1604/PDF/ED_Trustee_Companies_regulations.pdf> at 30 October 2009.

Issues for consideration

The appropriate basis for the remuneration of trustee companies

24.44 As noted earlier, the Public Trustee's gazetted notice of fees and charges includes specific provisions in relation to its remuneration when acting as an administrator under the *Guardianship and Administration Act 2000* (Qld) or as an attorney under the *Powers of Attorney Act 1998* (Qld).[1065] In contrast, the commission to which a trustee company is entitled is currently regulated by section 41 of the *Trustee Companies Act 1968* (Qld), which is not specific to a trustee company's role as an administrator but applies when a trustee company is acting in any of the range of capacities in that section. However, as noted above, the remuneration of trustee companies is soon to be regulated by the *Corporations Act 2001* (Cth).

24.45 The Public Advocate has commented generally on the effect of the proposed amendments to the *Corporations Act 2001* (Cth) on adults with impaired capacity:[1066]

> Deregulation of fees may be satisfactory when a client may decide to remove their business from the trustee company following what the person considers is an unreasonable rise in fees, but it cannot be appropriate in circumstances when work is undertaken for a client with impaired capacity.

24.46 The Public Advocate has also commented on the effect of the proposed amendments in relation to a trustee company that is appointed as an attorney under an enduring power of attorney:[1067]

> In respect of enduring attorneys, it is acknowledged that a particular adult with capacity could appoint the trustee company in the knowledge that fees will inevitably change and may intend for the trustee company to act as attorney irrespective of how reasonable or unreasonable the fees from time to time may appear to a person who has capacity. However, it is unlikely that this would be universally so. Most persons appointing an enduring attorney are likely to have regard to the existing fees available at the time when deciding to make the appointment.

24.47 As mentioned earlier, the proposed amendments make provision for a trustee company to notify a client of an intention to increase its fees.[1068] The Public Advocate has criticised this provision.[1069]

1065 See [24.3]–[24.5] above.

1066 Public Advocate (Qld), Submission, *Exposure Draft of Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009* (29 May 2009) 3 <http://www.justice.qld.gov.au/656.htm> at 25 October 2009.

1067 Ibid.

1068 See proposed section 601TAB(3), which is set out at [24.36] above.

1069 Public Advocate (Qld), Submission, *Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 and the consultation draft for the Corporations Amendment Regulations 2009* (30 September 2009) 2 <http://www.justice.qld.gov.au/656.htm> at 25 October 2009.

> section 601TAB(3) … requires a trustee company to notify an 'agent' of the adult with impaired capacity regarding any changes to its fees. 'Agent' does not appear to be defined in the Bill or the current *Corporations Act 2001* (Cth), so it is uncertain who is intended to be an 'agent'. The trustee company providing the notice is effectively an agent, but presumably it was not intended that the trustee company give notice to itself.
>
> This may be problematic where persons for whom the company is administrator or financial attorney do not have another 'agent' formally appointed. The trustee company as an agent may be placed in a conflict situation in Queensland under section 37 of the *Guardianship and Administration Act 2000* (Qld) or section 73 of the *Powers of Attorney Act 1998* (Qld) and it will be unable to independently assess the reasonableness of its fees.

24.48 The Public Advocate has also recommended that schedule 8AB of the consultation draft of the regulations be amended to include a reference to the *Powers of Attorney Act 1998* (Qld).[1070]

24.49 To the extent to which it may still be possible for Queensland legislation to regulate the fees charged by trustee companies when performing a function under the guardianship legislation, the issue is how those fees should be regulated.

24.50 One option is for the Tribunal to be given the power to authorise such remuneration to a trustee company as the Tribunal considers appropriate for the trustee company's services as an administrator. The exercise of this power could be assisted by the inclusion of a scale of remuneration for different matters undertaken by the trustee company.

24.51 Another option is for State legislation to place a cap on the fees that may be charged, as is presently the case under section 41 of the *Trustee Companies Act 1968* (Qld). A disadvantage of that approach, however, is that, unless either the Tribunal or the court has the power to approve fees in excess of the cap, there is the possibility that, where the administration of an adult's finances is especially complex or time-consuming, it may not be possible for the trustee company to be adequately remunerated for its services. That could have the effect of discouraging a trustee company from seeking appointment as an administrator.

24.52 The mechanism for regulating the fees that may be charged by a trustee company when acting as an attorney under an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld) is a more complex issue. If it were necessary for a trustee company to apply to the Tribunal for authorisation, that would entail an application in circumstances when a trustee company, as an attorney, would not normally need to have any contact with the Tribunal.

1070 Ibid 2.

24-5 If it is possible for State legislation to continue to regulate the fees charged by a trustee company when performing a function as an administrator under the *Guardianship and Administration Act 2000* (Qld), should that Act be amended:

(a) to provide that the Tribunal may make an order authorising such remuneration of a trustee company as the Tribunal considers appropriate for the trustee company's services as an administrator;

(b) to include a scale for the remuneration of professional administrators, including trustee companies; or

(c) some other model?

24-6 If it is possible for State legislation to continue to regulate the fees charged by a trustee company when performing a function as an attorney under an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld):

(a) should State legislation regulate the fees that a trustee company may charge in those circumstances; and

(b) if so, what type of model would be appropriate to regulate the fees?

SUBSTITUTE DECISION-MAKERS' RIGHT TO INFORMATION

The law in Queensland

Guardians and administrators

24.53 Section 44 of the *Guardianship and Administrative Act 2000* (Qld) deals with the right of a guardian or an administrator to information to which the adult would have be entitled if he or she had capacity. It gives a guardian or an administrator who has power for a matter a right to all the information that is necessary to make an informed exercise of the power — effectively, to make an informed decision.

24.54 Section 44 provides:

> **44 Right of guardian or administrator to information**
>
> (1) A guardian or administrator who has power for a matter for an adult has a right to all the information the adult would have been entitled to if the adult had capacity and which is necessary to make an informed exercise of the power.

(2) At the guardian's or administrator's request, a person who has custody or control of the information must give the information to the guardian or administrator, unless the person has a reasonable excuse.

(3) If a person who has custody or control of the information does not comply with a request by a guardian or administrator to give information, the tribunal may, on application by the guardian or administrator, order the person to give the information to the guardian or administrator.

(4) If the tribunal orders a person to give information to the guardian or administrator, the person must comply with the order, unless the person has a reasonable excuse.

(5) It is a reasonable excuse for a person to fail to give information because giving the information might tend to incriminate the person.

(6) Subject to subsection (5), this section overrides—

(a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and

(b) any claim of confidentiality or privilege, including a claim based on legal professional privilege.

24.55 A person who has custody or control of the information must, on request by the guardian or administrator, give the information to the guardian or administrator unless he or she has a reasonable excuse.[1071] If the person does not comply with the request, the Tribunal may, on the application of the guardian or administrator, order the person who has custody or control of the requested information to give the information to the guardian or administrator,[1072] and the person must comply with the Tribunal's order unless he or she has a reasonable excuse.[1073]

Attorneys and statutory health attorneys

24.56 Section 81 of the *Powers of Attorney Act 1998* (Qld) deals with the right of an attorney, including a statutory health attorney, to information to which the principal would have been entitled if he or she had capacity. Like section 44 of the *Guardianship and Administration Act 2000* (Qld), it gives an attorney or statutory health attorney for a principal the right to all the information that is necessary to make informed decisions about anything that the attorney is authorised to do.

24.57 Section 81 provides:

1071 *Guardianship and Administration Act 2000* (Qld) s 44(2).

1072 *Guardianship and Administration Act 2000* (Qld) s 44(3).

1073 *Guardianship and Administration Act 2000* (Qld) s 44(5) expressly preserves the privilege against self-incrimination.

81 Right of attorney to information

(1) An attorney[1074] has a right to all the information that the principal would have been entitled to if the principal had capacity and that is necessary to make, for the principal, informed decisions about anything the attorney is authorised to do.

(2) A person who has custody or control of the information must disclose the information to the attorney on request.

(3) This section overrides—

(a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and

(b) for an attorney under an enduring power of attorney—any claim of confidentiality or privilege, including a claim based on legal professional privilege; and

(c) for another attorney—any claim of confidentiality or privilege, excluding a claim based on legal professional privilege. (note added)

24.58 Although section 81 of the *Powers of Attorney Act 1998* (Qld) is similar to section 44 of the *Guardianship and Administration Act 2000* (Qld), section 81 does not make provision for an attorney or statutory health attorney to apply to the Tribunal for an order that the person having custody or control of the information give the information to the attorney or statutory health attorney.

Guardians, attorneys and statutory health attorneys: health information

24.59 Section 76 of the *Guardianship and Administration Act 2000* (Qld) gives a right to certain health information to a guardian, attorney or statutory health attorney[1075] who has power for a health matter for an adult.[1076] At the request of the guardian, attorney or statutory health attorney, the adult's health provider must give the information mentioned in section 76(4).

24.60 Section 76 provides:

76 Health providers to give information

(1) The purpose of this section is to ensure—

(a) a guardian or attorney who has power for a health matter for an adult has all the information necessary to make an informed exercise of the power; and

---

1074 *Powers of Attorney Act 1998* (Qld) s 75 provides that, except where otherwise provided, ch 5, pt 2 of the Act, which includes s 81, applies to an attorney under an enduring document and a statutory health attorney.

1075 *Guardianship and Administration Act 2000* (Qld) s 76(10).

1076 *Guardianship and Administration Act 2000* (Qld) s 76(1)(a), (10).

(b) the tribunal, in deciding whether to consent to special health care for an adult with impaired capacity for a special health matter, has all the information necessary to make an informed decision.

(2) At the guardian's or attorney's request, a health provider who is treating, or has treated, the adult must give information to the guardian or attorney unless the health provider has a reasonable excuse.

(3) At the tribunal's request, a health provider who is treating, or has treated, the adult must give information to the tribunal unless the health provider has a reasonable excuse.

(4) The information to be given by a health provider who is treating, or has treated, the adult includes information about—

(a) the nature of the adult's condition at the time of the treatment; and

(b) the particular form of health care being, or that was, carried out; and

(c) the reasons why the particular form of health care is being, or was, carried out; and

(d) the alternative forms of health care available for the condition at the time of the treatment; and

(e) the general nature and effect of each form of health care at the time of the treatment; and

(f) the nature and extent of short-term, or long-term, significant risks associated with each form of health care; and

(g) for a health provider who is treating the adult—the reasons why it is proposed a particular form of health care should be carried out.

(5) If a health provider does not comply with a request by a guardian or attorney to give information, the tribunal may, on application by the guardian or attorney, order the health provider to give the information to the guardian or attorney.

(6) If the tribunal orders a health provider to give information, the health provider must comply with the order, unless the health provider has a reasonable excuse.

(7) It is a reasonable excuse for a health provider to fail to give information because giving the information might tend to incriminate the health provider.

(8) Subject to subsection (7), this section overrides—

(a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and

(b) any claim of confidentiality or privilege.

(9) This section does not limit—

(a) a guardian's right to information under section 44; or

(b) the tribunal's right to information under section 130; or

(c) an attorney's right to information under the *Powers of Attorney Act 1998*, section 81.

(10) In this section—

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

24.61 Section 76 has a similar structure to section 44 of the *Guardianship and Administration Act 2000* (Qld). Section 76(5) provides that, if a health provider does not comply with a request by a guardian, attorney or statutory health attorney, the Tribunal may, on application by the guardian, attorney or statutory health attorney, order the health provider to give the information. Further, section 76(6) provides that, if the Tribunal orders a health provider to give information, the health provider must comply with the order unless the health provider has a reasonable excuse.[1077]

24.62 Section 76 does not limit a guardian's right to information under section 44 of the Act or an attorney's or statutory health attorney's right to information under section 81 of the *Powers of Attorney Act 1998* (Qld) but gives a right to information in addition to that given by those provisions.[1078]

The law in other jurisdictions

24.63 The legislation in the other Australian jurisdictions deals with the right to information of substitute decision-makers in a much less comprehensive way than the Queensland provisions discussed above. Only three jurisdictions — the ACT, New South Wales and South Australia — have provisions dealing to some extent with this issue.

24.64 In the ACT, an attorney under an enduring power of attorney has a right to all information that the principal would have been entitled to if the principal had decision-making capacity,[1079] although there is not a similar right for a guardian or an administrator. Further, a health professional who is seeking a health attorney's consent to medical treatment for a protected person must give the health attorney certain information.[1080] However, that

1077 Like s 44(5) of the *Guardianship and Administration Act 2000* (Qld), s 76(7) expressly preserves the privilege against self-incrimination.

1078 *Guardianship and Administration Act 2000* (Qld) s 76(9).

1079 *Powers of Attorney Act 2006* (ACT) s 45.

1080 *Guardianship and Management of Property Act 1991* (ACT) s 32G.

requirement is limited to the circumstance where consent is being sought and does not apply more generally.

24.65 In New South Wales, an enduring guardian (the equivalent of an attorney under an enduring power of attorney for personal matters) has, for the purpose of exercising a function that he or she is authorised to exercise, the same right of access to information about the appointor (that is, the principal) that the appointor has.[1081] Further, the legislation provides that nothing in the *Privacy and Personal Information Protection Act 1998* (NSW) prevents a public sector agency from disclosing information about an appointor to an enduring guardian if the agency is satisfied that the disclosure of the information would assist the enduring guardian to exercise his or her functions as an enduring guardian.[1082] However, there is no provision about the right to information of a guardian or financial manager appointed by the Guardianship Tribunal.

24.66 In South Australia, the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) provides that the medical practitioner must explain certain matters to the patient or to the patient's representative.[1083] This may include an attorney under a medical power of attorney.

Issues for consideration

Background

24.67 In its 2007 report on confidentiality, the Commission noted concerns in submissions about substitute decision-makers' ability to obtain information to enable them to act for the adult.[1084] In particular, a submission from the Guardianship and Administration Reform Drivers ('GARD') expressed concern about the apparent lack of enforceability of the right to information.[1085]

24.68 In practice, much of the difficulty appears to have been the perceived conflict between the right of substitute decision-makers to information and federal privacy legislation. This issue was considered by the Australian Law Reform Commission ('ALRC') in its recently completed review of the *Privacy Act 1988* (Cth). The ALRC observed in its Report that the existing privacy

1081 *Guardianship Act 1987* (NSW) s 6E(2A).

1082 *Guardianship Act 1987* (NSW) s 6E(2B).

1083 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 15.

1084 Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [8.530].

1085 Submission C24. GARD is an informal alliance of community-based organisations and is comprised 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.

legislation allows disclosure to formal substitute decision-makers in appropriate circumstances:[1086]

> So long as the extent of the authorisation given by the instrument, appointment or relevant legislation covers matters that are related to the personal information in question, agencies and organisations operating under the *Privacy Act* should recognise these authorisations and allow the person to act as the substitute decision maker for the individual. The substitute decision maker 'stands in the shoes' of the individual, and therefore can provide consent or refuse to provide consent, and have access to information, as if he or she is the individual being represented.

24.69 The ALRC noted, however, that because of misunderstandings about the legislation, this was not always occurring in practice. It therefore recommended that the Office of the Privacy Commissioner develop and publish guidance on the issue:[1087]

> The ALRC recommends that the Office of the Privacy Commissioner (OPC) should develop and publish guidance to assist agencies and organisations to understand the application to the *Privacy Act* of relevant guardianship and administration and power of attorney legislation. The ALRC also recommends that agencies and organisations, that regularly handle personal information about adults with an incapacity, ensure that relevant staff receive training on issues concerning capacity, and in recognising and verifying the authority of third party representatives.

24.70 In the Commission's view, such measures should help to lessen the reluctance of service providers and institutions to provide relevant information to an attorney.

Sanctions for non-compliance with the statutory requirements to give information

24.71 An issue for consideration is whether sections 44 and 76(2) of the *Guardianship and Administration Act 2000* (Qld) and section 81 of the *Powers of Attorney Act 1998* (Qld) are sufficient in their present form or whether the inclusion of a specific penalty would increase compliance with the requirements in those provisions to give certain information.

24.72 The submission from GARD raised concerns about the lack of a penalty in section 44 of the *Guardianship and Administration Act 2000* (Qld), which deals with the right to information of guardians and administrators:[1088]

> Under the Queensland Act it is not an offence for a person who has custody or control of the information not to give the information to the guardian or administrator. The only recourse a guardian or administrator has is to apply to the Tribunal for an order for the person to give the guardian or administrator the

---

1086 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [70.55]. See also [70.60]. As to disclosure to *informal* representatives, see [70.84]–[70.86].

1087 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [70.5]. Also [70.62].

1088 Submission C24.

> information. … GARD considers that the lack of a penalty for non-compliance is a large contributor to the problem.

24.73 Although sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) do not include a specific penalty for a failure to provide the requested information, they nevertheless include a mechanism by which a person who has a right to information under either of those sections may apply to the Tribunal for an order that the person who has custody or control of the information, or the adult's health provider, give the information to the person who requested it. Both provisions also state that, if the Tribunal makes such an order, the person with the information or the health provider must comply with the order unless he or she has a reasonable excuse.

24.74 Section 143 of the *Guardianship and Administration Act 2000* (Qld), which deals with contempt of the Tribunal, provides:

> **143 Contempt of tribunal**
>
> A person must not, without reasonable excuse—
>
> (a) insult a tribunal member in relation to the performance of the member's functions as a tribunal member; or
>
> (b) interrupt a tribunal proceeding; or
>
> (c) create a disturbance, or take part in creating or continuing a disturbance, in or near a place the tribunal is sitting; or
>
> (d) disobey a lawful order or direction of the tribunal; or
>
> (e) do anything that would, if the tribunal were a court of record, be a contempt of court.
>
> Maximum penalty—100 penalty units.

24.75 Arguably, the failure to comply with an order made by the Tribunal under section 44 or 76 of the *Guardianship and Administration Act 2000* (Qld) would constitute a breach of section 143(d), and possibly of section 143(e), for which there is a maximum penalty of $10 000.[1089] When QCAT commences operation, section 143 of the *Guardianship and Administration Act 2000* (Qld) will be repealed.[1090] However, a failure to comply with a Tribunal order to give information would appear to be a breach section 213 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), for which there is also a maximum penalty of $10 000.[1091]

1089 See *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

1090 *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1461, which has not yet commenced.

1091 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 213(1) provides:

24.76 However, as mentioned earlier, section 81 of the *Powers of Attorney Act 1998* (Qld) does not include a mechanism by which an attorney or a statutory health attorney may apply to the Tribunal for an order that the person with custody or control of the information give the information. In this respect, it would seem desirable for it to be consistent with sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld).

24.77 There may also be an argument that, in terms of securing compliance with the requirements of sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) and section 81 of the *Powers of Attorney Act 1998* (Qld), a penalty in the actual provision would be more effective than a penalty in a separate provision that deals generally with non-compliance with Tribunal orders.

24-7 Are there any difficulties with a substitute decision-maker's right to information under sections 44 or 76 of the *Guardianship and Administration Act 2000* (Qld) or section 81 of the *Powers of Attorney Act 1998* (Qld)? If so, how could those difficulties be addressed?

24-8 Should section 81 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that:

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

(b) if the Tribunal orders a person to give information to the attorney, the person must comply with the order unless the person has a reasonable excuse; and

(c) it is a reasonable excuse for a person to fail to give information because giving the information might tend to incriminate the person?

---

213 Contravening decision

(1) A person must not, without reasonable excuse, contravene a decision of the tribunal.

Note—

See also section 218 (Contempt of tribunal).

'Decision, of the Tribunal' is defined in sch 3 of the Act to include 'an order made or direction given by the tribunal'.

24-9 Should the failure to give information in accordance with sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) or section 81 of the *Powers of Attorney Act 1998* (Qld) be an offence against the particular Act?

Education

24.78 Another issue to consider is whether the difficulties faced by substitute decision-makers in accessing information could be improved by education. For example, it may be appropriate for the approved form for making an enduring power of attorney to include a statement about the attorney's legislative right to information. Seeing such a statement on the authorising instrument might encourage disclosure by persons who might not otherwise be aware of the attorney's right to information. A similar statement could be included on a Tribunal order appointing a guardian or an administrator.

24-10 Should:

(a) the order appointing a guardian or administrator include a statement about the guardian's or administrator's right to information; or

(b) the approved form for making an enduring power of attorney include a statement about the attorney's right to information?

Informal decision-makers

24.79 Although sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) and section 81 of the *Powers of Attorney Act 1998* (Qld) give particular rights to information to guardians, administrators, attorneys and statutory health attorneys, the guardianship legislation does not give a right to information to informal decision-makers.

24.80 In some circumstances, an informal decision-maker for an adult may be denied access to information necessary for making a decision about the adult because the informal decision-maker has no formal standing. In such a case, the informal decision-maker may need to apply to the Tribunal for formal appointment as the adult's guardian or administrator.

24.81 The conferral of a right to receive information may assist an informal decision-maker for an adult to make informed and appropriate decisions for the adult. On the other hand, it may be difficult for a third party to determine whether an informal decision-maker is entitled to receive information. Access to and disclosure of information, and in particular, health or financial information,

by third parties may also be limited by privacy, confidentiality and other legal constraints.

24.82 Although the Commission has not previously sought submissions on access to information by informal decision-makers, it has received a number of submissions during the course of this review that have expressed concern about the difficulties faced by informal decision-makers in gaining access to information to assist them in performing their role.[1092] The submission from GARD raised a concern that, in some circumstances, informal decision-makers, who require access to information about an adult, may have little option but to apply for guardianship or administration for an adult.[1093]

> There are many instances where informal decision-makers do not require guardianship to assist a person with incapacity but simply require access to information. In the current regime they are forced to bring guardianship applications simply to obtain documentation. A simpler process for establishing entitlement to documents needs to be established.

24.83 GARD suggested that 'section 44 of the *Guardianship and Administration Act 2000* (Qld) should be expanded to provide for entitlements to information for informal decision-makers upon application to the Tribunal'.[1094] If the legislation required a third party to give information to an informal decision-maker if the Tribunal made an order to that effect, but did not otherwise confer a right to information on an informal decision-maker, that might create more certainty for third parties. It would also ensure that the adult's privacy was not unnecessarily eroded.

24-11 In practice, do informal decision-makers have difficulties in gaining access to information to assist them in performing their role?

24-12 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that an informal decision-maker may apply to the Tribunal for an order that a person with the custody or control of information give that information to the informal decision-maker?

1092 Submission C24, C40A, C52, C107, C120, CF2.

1093 Submission C24.

1094 Ibid.

TRAINING AND SUPPORT FOR GUARDIANS, ADMINISTRATORS AND ATTORNEYS

Background

24.84 Guardians and administrators are required to satisfy certain requirements under the *Guardianship and Administration Act 2000* (Qld) when exercising power for a matter for an adult. For example, a guardian or an administrator must exercise his or her power honestly and diligently,[1095] must apply the General Principles contained in the legislation (and the Health Care Principle, if appropriate),[1096] and, if he or she is an administrator, must submit a management plan[1097] and avoid conflict transactions.[1098] Failure to satisfy the statutory requirements may have significant consequences for both the adult and the person appointed to make decisions on his or her behalf. In some circumstances, it may compromise the adult's basic human rights, personal well-being and financial position.[1099] If a guardian or an administrator breaches a relevant duty, he or she may be liable to a monetary penalty[1100] or a claim for compensation.[1101] The Tribunal is also empowered to remove a guardian or administrator if he or she does not comply with the statutory requirements.[1102]

24.85 Attorneys appointed under enduring documents are also subject to similar requirements. An attorney must exercise his or her power honestly and with reasonable diligence,[1103] must avoid conflict transactions,[1104] and must apply the General Principles and, for a health matter, the Health Care Principle.[1105]

1095 *Guardianship and Administration Act 2000* (Qld) s 35.

1096 *Guardianship and Administration Act 2000* (Qld) s 34.

1097 *Guardianship and Administration Act 2000* (Qld) s 20.

1098 *Guardianship and Administration Act 2000* (Qld) s 37(1). See [6.19] in vol 1 of this Discussion Paper as to what constitutes a conflict transaction. For other functions and powers of administrators, see also *Guardianship and Administration Act 2000* (Qld) ch 4 pt 2.

1099 A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' 8(1) (2006) *The Journal of Adult Protection* 20, 25.

1100 *Guardianship and Administration Act 2000* (Qld) ss 35 (Act honestly with reasonable diligence), 36 (Act as required by terms of tribunal order), 49 (Keep records), 50 (Keep property separate).

1101 *Guardianship and Administration Act 2000* (Qld) s 59.

1102 *Guardianship and Administration Act 2000* (Qld) s 31.

1103 *Powers of Attorney Act 1998* (Qld) s 66(1).

1104 *Powers of Attorney Act 1998* (Qld) s 73.

1105 *Powers of Attorney Act 1998* (Qld) s 76.

Issue for consideration

24.86 In some circumstances, an individual who seeks to be appointed as a guardian or an administrator may not have the requisite knowledge or skills to make appropriate decisions for the adult. Knowledge of the relevant statutory requirements is essential to minimise the risk of inappropriate substitute decision-making. In order to safeguard the interests of the adult and to assist guardians and administrators in carrying out their functions properly, it is important to ensure that sufficient training and support is available to guardians or administrators about their respective roles and responsibilities under the Act.

24.87 The Adult Guardian has a statutory function to provide education, general information and advice to the community about the operation of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).[1106] The aim of community education amongst other things is to increase understanding of the laws on substitute decision-making.[1107]

24.88 The Adult Guardian, Community Visitor Program, Public Advocate and the Guardianship and Administration Tribunal, together with the Public Trustee, regularly present free forums to explain their individual roles and functions under the guardianship system. These individual agencies also conduct separate public information sessions for the community.[1108]

24.89 In addition, the Tribunal publishes various documents that set out general information about guardianship and administration. These documents are available on its website and in hard copy.[1109] In particular, when an administration order is made, the Tribunal gives an explanation to the appointee about the roles and responsibilities of a private administrator. The Tribunal also provides an information sheet about these matters to the appointee.[1110]

1106 *Guardianship and Administration Act 2000* (Qld) s 174(2)(h).

1107 During the 2007–08, financial year, the Office of the Adult Guardian conducted 130 presentations in metropolitan and regional areas in Queensland, with a total of 3200 people attending. These presentations included presentations to hospital staff, aged care facility staff, service providers, and carer and community groups: Office of the Adult Guardian, *Adult Guardian Annual Report 07–08* (2008) 45.

1108 During the 2007–08 financial year, registry staff and Tribunal members provided information sessions and talks on various aspects of the Tribunal on approximately 42 occasions including talks to community organisations, mental health organisations, disability organisations, aged care organisations, on-site information sessions for proposed and appointed administrators: Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 52.

1109 See, for example, Guardianship and Administration Tribunal, Guardianship, <http://www.gaat.qld.gov.au/334.htm> 14 October 2009; Guardianship and Administration Tribunal, Administration, <http://www.gaat.qld.gov.au/336.htm> 14 October 2009; Guardianship and Administration Tribunal, Information Pack for Proposed Administrators, <http://www.gaat.qld.gov.au/323.htm> 14 October 2009.

1110 Guardianship and Administration Tribunal Information Sheet. Summary of your roles and responsibilities as a private administrator (Information Sheet, February 2009).

24-13 Are proposed and appointed guardians and administrators given adequate information and support in relation to their roles and responsibilities under the Queensland guardianship system? If not, how could the delivery of these services be improved?

24-14 Are attorneys appointed under enduring documents given adequate information and support in relation to their roles and responsibilities under the Queensland guardianship system? If not, how could the delivery of these services be improved?

PROFESSIONAL DEVELOPMENT AND TRAINING

Introduction

24.90 The provision of professional development and training for Tribunal members and staff of the guardianship agencies is important in ensuring that they have current knowledge of new developments in relevant disciplines, are aware of emerging issues, and maintain the skill levels necessary to perform their roles.

24.91 The *Guardianship and Administration Act 2000* (Qld) provides that the President of the Tribunal has a duty to 'to ensure tribunal members are adequately and appropriately trained to enable the tribunal to perform its functions effectively and efficiently'.[1111] When QCAT commences, that provision will be replaced by section 173 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), which provides:

> **173 Directions for president's function about training**
>
> (1) The president may direct all members or adjudicators, a class of members or adjudicators, or a particular member or adjudicator, to participate in—
>
> (a) particular professional development; or
>
> (b) particular continuing education or training activity.
>
> (2) The direction must be in writing.
>
> (3) A person to whom a direction is given under subsection (1) must comply with the direction unless the person has a reasonable excuse.
>
> *Notes—*

1111 *Guardianship and Administration Act 2000* (Qld) s 89. This provision will be omitted by s 1445 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld).

1 Under section 188, a senior or ordinary member may be removed from office if the member contravenes this subsection.

2 Under section 203, an adjudicator may be removed from office if the adjudicator contravenes this subsection.

24.92 The 2007–08 Annual Report for the Guardianship and Administration Tribunal outlines the training and professional development undertaken by both staff and Tribunal members.[1112] The 2007–08 Annual Report for the Office of the Adult Guardian also notes that, during the reporting period, training was provided to staff on a broad range of topics,[1113] as does the 2007–08 Annual Report for the Public Trustee.[1114]

Issue for consideration

24.93 In its submission, GARD commented that there 'is a clear need for staff within the guardianship regime to have a significant consciousness of how their personal values and assumptions influence the way they understand, appreciate and relate to people with disability'.[1115] It therefore recommended that:

> All staff and members employed to make decisions within the guardianship regime (such as staff in the Office of the Adult Guardian, the Tribunal and the Public Trustee) should be required to undertake regular training and awareness programs to improve their knowledge of the various models of disability and heighten their awareness of the real impacts of these models on the lives of people with disability.

24.94 Although GARD regarded it as commendable that section 89 is included in the *Guardianship and Administration Act 2000* (Qld) and that Tribunal members undertake training, it considered that Tribunal members sometimes lack an appreciation of matters such as:

- the stress that carers are placed under;
- the intrusion that service providers can place on family life;
- the requirements of procedural fairness;
- the effect that separation of and isolation from family can have on an impaired adult; and
- the risk of gratuitous concurrence when the Tribunal is dealing with an adult with impaired capacity.

1112 Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 14–15.

1113 Office of the Adult Guardian, *Adult Guardian Annual Report 07–08* (2008) 44.

1114 The Public Trustee of Queensland, *Annual Report 2007–2008* (2008) 26.

1115 Submission C24.

24.95 GARD recommended that Tribunal members should receive comprehensive training in relation to these issues and 'specifically in relation to the impact of a decision-making disability on a person'.[1116]

24.96 GARD also recommended that staff of the Adult Guardian and the Tribunal should receive regular training about 'domestic and family violence legislation and risk issues'. It considered that this was essential to increase the safety of people with impaired capacity in their family and informal care relationships.[1117]

24-15 Are there particular matters in relation to which:

(a) Tribunal members;

(b) staff of the Office of the Adult Guardian; or

(c) staff of the Public Trust Office;

should receive professional development and training?

1116 Ibid.

1117 Ibid.

Appendix 1

Terms of reference

A review of the law in relation to the General Principles, the scope of substituted-decision-making, the role of the support network, adequacy of investigative powers, health and special health matters, and other miscellaneous matters, under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*.

The terms of reference require the Queensland Law Reform Commission to have regard to—

- the need to ensure that the General Principles continue to provide an appropriate balance of relevant factors to protect the interests of an adult with impaired capacity;
- the need to ensure that the powers of guardians, administrators and other officers or bodies established by the legislation are sufficiently extensive to protect the interests of an adult with impaired capacity;
- the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts;
- the need to ensure that adults are not deprived of necessary health care because they have impaired capacity;
- the need to ensure that adults with impaired capacity receive only treatment that is necessary and appropriate to maintain or promote their health or wellbeing, or that is in their best interests;
- the need to ensure that the confidentiality provisions that apply to the proceedings and decisions of the Guardianship and Administration Tribunal and other decisions under the Guardianship and Administration Act strike the appropriate balance between protecting the privacy of persons affected by the Tribunal's proceedings and decisions and promoting accountability of the Tribunal;
- the fact that some parents of a person with impaired capacity (whether or not an adult), may wish to make a binding direction, appointing a guardian or administrator for a matter for the adult, that applies if the parents are no longer alive or are no longer capable of exercising a power for a relevant matter for the adult;

and refer to the Commission for review pursuant to section 10 of the *Law Reform Commission Act 1968*—

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

- the General Principles;

- the scope of personal matters and financial matters and of the powers of guardians and administrators;
- the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation;
- the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework;
- the processes for review of decisions;
- consent to special medical research or experimental health care; and
- the law relating to advance health directives and enduring powers of attorney; and
- the scope of the decision-making power of statutory health attorneys; and
- the ability of an adult with impaired capacity to object to receiving medical treatment; and
- the law relating to the withholding and withdrawal of life-sustaining measures;

(b) the confidentiality provisions of the Guardianship and Administration Act 2000;

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

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

The Commission is to provide a report to the Attorney-General and Minister for Justice on the confidentiality provisions by June 2007, and a report on all other matters by the 31 December 2009.

Appendix 2

Reference Group

The Reference Group is chaired by the Honourable Justice Roslyn Atkinson, Chairperson of the Queensland Law Reform Commission. The membership of the Reference Group as at October 2009 is:

Ms Pam Bridges, Residential Care Manager, Aged Care Queensland Inc

Ms Lisa Brindle, President, Queensland Parents for People with a Disability

Mrs Pat Cartwright, Manager, Community Visitor Program

Mr Jeff Cheverton, Executive Director, Queensland Alliance

Dr Wendy Corfield, Principal Advisor, Clinical Policy Unit, Queensland Health

Ms Debra Cottrell, Executive Director, Carers Queensland

Mr Mark Crofton, Official Solicitor to the Public Trustee of Queensland

Ms Jennifer Cullen, Chief Executive Officer, Brain Injury Association of Queensland

Dr Chris Davis, Director, Geriatric Medicine and Rehabilitation, The Prince Charles Hospital (nominee of Australian Medical Association (Queensland))

Ms Margaret Deane, Chief Executive Officer, Queensland Aged and Disability Advocacy Inc

Ms Susan Gardiner, President, Guardianship and Administration Tribunal

Ms Marianne Gevers, Vice-President, Alzheimer's Australia (Qld) Inc

Ms Michelle Howard, Public Advocate

Ms Susan Masotti, Senior Legal Officer, Strategic Policy, Department of Justice and Attorney-General

Ms Glenda Newick, Director, Legal Policy, Policy and Performance, Disability HACC Community Mental Health, Department of Communities

Ms Dianne Pendergast, Adult Guardian

Mr Richard Rutkin, Queensland Health

Ms Vera Somerwil, National Seniors

Mr Ken Wade, Systems Legal Advocacy, Queensland Advocacy Inc

Professor Lindy Willmott, Faculty of Law, QUT

Ms Alison Wolff, Manager, Community Advocacy and Support Unit, Endeavour Foundation (nominee of ACROD)

A representative, Queensland Civil and Administrative Tribunal