



## Health and Disabilities Committee

### Queensland Law Reform Commission Recommendations on Guardianship Laws Inquiry

The terms of reference for this inquiry require the committee to examine and report on specific recommendations made by the Queensland Law Reform Commission (QLRC) in its report *Review of Queensland's Guardianship Laws*. The QLRC recommendations that form the committee's terms of reference are available below and on the committee's website at [www.parliament.qld.gov.au/hdc](http://www.parliament.qld.gov.au/hdc), under 'current inquiries'.

The full QLRC report and recommendations are available on the QLRC website at [www.qlrc.qld.gov.au/Publications.htm](http://www qlrc.qld.gov.au/Publications.htm).

The Queensland Government's initial response to other QLRC recommendations was tabled in the Legislative Assembly on 11 October 2011, and available on the Tabled Papers website at [www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2011/5311T5556.pdf](http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2011/5311T5556.pdf).

### QLRC Recommendations

#### Chapter 9 – Advance Health Directives

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

###### Recommendation 9-3

Section 36 of the *Powers of Attorney Act 1998* (Qld) should be amended in the following respects:<sup>1</sup>

...

- (b) new subsections should be inserted in section 36 to provide that:
  - (i) a direction in an advance health directive does not operate if:
    - (A) the direction is uncertain; or
    - (B) circumstances, including advances in medical science, have changed to the extent that the adult, if he or she had known of the change in circumstances, would have considered that the terms of the direction are inappropriate;
  - (ii) a direction in an advance health directive is not uncertain if its meaning can be ascertained by consultation with:
    - (A) an attorney appointed under the advance health directive; or
    - (B) if an attorney is not appointed under the advance health directive, but the advance health directive names an attorney for health matters appointed under the adult's enduring power of attorney — the named attorney.

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<sup>1</sup> Only part (b) of the QLRC recommendation is within the committee's terms of reference.

## **Notification of advance health directives**

### Recommendation 9-11

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

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

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

### Recommendation 9-18

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

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

- (c) section 103(3) should be amended so that the requirement to consult applies in relation to:
  - (i) an attorney appointed under the advance health directive; or
  - (ii) if an attorney is not appointed under the advance health directive, but the advance health directive names an attorney for health matters appointed under the adult's enduring power of attorney — the named attorney.

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

Recommendation 9-26

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

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

Recommendation 9-27

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

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

Recommendation 9-28

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

**Chapter 11 — The withholding and withdrawal of life-sustaining measures**

**The definition of 'health care'**

Recommendation 11-1

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

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

### Recommendation 11-2

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

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

### Recommendation 11-3

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

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

### Recommendation 11-4

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

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

### Recommendation 11-5

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

Referral of health care decision to the adult guardian

(1) In this section:

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

- (a) a health provider who is treating, or has at any time treated, the adult;
- (b) a person in charge of a health care facility where the adult is being, or has at any time been, treated; or
- (c) an interested person.

(2) This section applies if—

- (a) a guardian or attorney for a health matter for an adult—
  - (i) refuses to make a decision about the health matter for the adult; or
  - (ii) makes a decision about the health matter for the adult; and
- (b) a relevant person believes, on reasonable grounds, that the decision is not in accordance with the general principles and the health care principle.

(3) The relevant person may tell the adult guardian about the decision and explain why the relevant person believes the decision is not in accordance with the general principles and the health care principle.

*Editor’s notes*

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

(4) In this section—

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

#### Recommendation 11-6

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

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

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

(b) omitting the section heading for section 66A and inserting a section heading that better reflects the effect of the provision, such as 'When consent to withholding or withdrawal of life-sustaining measure does not operate';

(c) inserting a new provision to the effect that if, under section 66A(2), a substitute decision-maker's consent to the withholding or withdrawal of a life-sustaining measure for the adult does not operate:

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

(ii) the Adult Guardian (if the Adult Guardian is the adult's substitute decision-maker) must take the steps specified in Recommendation 11-6(g);

to resolve the disagreement about the withholding or withdrawal of the life-sustaining measure;

(d) inserting a new provision to the effect that, if the adult's substitute decision-maker is not the Adult Guardian:

(i) the adult's health provider must, within two days of forming the relevant view under section 66A(2) about the substitute decision-maker's consent, refer to the Adult Guardian the decision whether to withhold or withdraw the life-sustaining measure for the adult; and

(ii) despite section 66A(2), if the adult's health provider does not refer the decision to the Adult Guardian within that time, the substitute decision-maker's consent to the withholding or withdrawal of the life-sustaining measure becomes operative;

(e) inserting a new provision, based in part on section 43(2)(a)–(b),(d) and (3) of the Act, to the effect that:

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

(2) The adult guardian must advise the tribunal in writing of the following details:

(a) the name of the adult;

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

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

(3) In this section—

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

(f) inserting, in the provision that gives effect to Recommendation 11-6(d), a note that refers to the provision proposed by Recommendation 11-6(e), which requires the Adult Guardian to decide whether to withhold or withdraw a life-sustaining measure;

- (g) inserting a new provision to the effect that, if the Adult Guardian is the adult's substitute decision-maker:
  - (i) the Adult Guardian must apply to the Tribunal for a declaration that the withholding or withdrawal of the life-sustaining measure for the adult is a valid exercise of the Adult Guardian's power; and
  - (ii) despite section 66A(2), if the Tribunal makes such a declaration, the Adult Guardian's consent to the withholding or withdrawal of the life-sustaining measure becomes operative.

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

#### Recommendation 11-7

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

#### Recommendation 11-8

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

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

#### Recommendation 11-9

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

#### Recommendation 11-10

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

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

- (1) Generally, the consent of an adult's guardian or attorney to the withholding or withdrawal of a life-sustaining measure for the adult does not operate if the health provider knows, or ought reasonably to know, the adult objects to the withholding or withdrawal of the measure.
- (2) If an adult objects to the withholding or withdrawal of a life-sustaining measure—
  - (a) the adult guardian may consent to the withholding or withdrawal of a life-sustaining measure for the adult; and
  - (b) the adult guardian's consent is effective despite the adult's objection.
- (3) The adult guardian may exercise power under subsection (2) whether or not the adult guardian is the adult's guardian or attorney.
- (3) In this section—

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

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

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

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

#### Recommendation 11-15

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

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

#### Recommendation 11-16

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

## **Chapter 12 – The effect of an adult’s objection to health care**

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

#### Recommendation 12-6

Section 63(1)(b)(i) of the *Guardianship and Administration Act 2000*(Qld) should be amended by adding the words ‘and it is not reasonably practicable to get consent from a person who may give it under this Act or the *Powers of Attorney Act 1998* (Qld)’.

#### Recommendation 12-7

Section 63(2) of the *Powers of Attorney Act 1998* (Qld) should be amended to add, as a further limitation on carrying out the health care mentioned in section 63(1)(b)(i), that the health care may not be carried out without consent if the health provider knows that, at a time when the adult had capacity to make decisions about the health care, he or she refused the health care.

#### Recommendation 12-8

Section 63(3) of the *Guardianship and Administration Act 2000* (Qld) should be amended to add, as further limitations on carrying out the health care mentioned in section 63(1)(b)(ii), that the health care may not be carried out without consent if the health provider knows that:

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

## **Chapter 16 – Enduring powers of attorney**

### **Registration**

#### Recommendation 16-15

The *Powers of Attorney Act 1998* (Qld) should not be amended to require that all enduring powers of attorney be registered.

## **Chapter 28 – Legal proceedings involving adults with impaired capacity**

### **The appointment of a litigation guardian**

#### Recommendation 28-1

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

#### Recommendation 28-2

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

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

## **Chapter 29 – Remuneration**

### **The remuneration of the Adult Guardian**

#### Recommendation 29-1

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

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