# Executive Summary

## INTRODUCTION

[1] This Executive Summary gives an overview of the principal recommendations made in this Report.

[2] Each chapter of the Report sets out, at the end of the chapter, all of the recommendations made throughout the particular chapter. In addition, a complete set of the recommendations made in all four volumes of the Report is included in the Summary of Recommendations, immediately following this Executive Summary.

[3] A reference in this summary to the 'guardianship legislation' is a reference to the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).

## CHAPTER 4 — THE GENERAL PRINCIPLES

[4] The Commission has recommended (Rec 4-1) that the General Principles be redrafted:

- to reflect more closely the relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities* ('the Convention'); and
- to provide a more logical structure and avoid duplication within the General Principles.

[5] The Report includes redrafted General Principles (Recs 4-3 to 4-6), which:

- incorporate the principles referred to in article 3(a)–(g) of the Convention by providing (in new General Principle 2(2)) that the principles on which an adult's human rights and fundamental freedoms are based, and which should inform the way in which they are taken into account, include:

    (a) respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons;

    (b) non-discrimination;

    (c) full and effective participation and inclusion in society;

    (d) respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity;

    (e) equality of opportunity;

(f) accessibility; and

(g) equality between men and women.

- omit the current General Principle 7(5), and instead require that, among other things, a person or other entity in performing a function or exercising a power under the Act, or under an enduring document, must do so:
  - in a way that promotes and safeguards the adult's rights, interests and opportunities; and
  - in the way least restrictive of the adult's rights, interests and opportunities;
- provide greater guidance to substitute decision-makers by providing a more structured approach to decision-making.

[6] The second of the matters mentioned in the preceding paragraph represents a fundamental change from the current General Principle 7(5), which represents a 'best interests' approach to decision-making. Under the redrafted General Principles, it is the adult's rights, interests and opportunities that are to be promoted and safeguarded. The reference to an adult's 'rights, interests and opportunities' necessarily takes into account the principles set out in the new General Principle 2(2). This gives the General Principles a strong human rights focus, and breaks completely with the 'best interests' approach reflected in the current General Principle 7(5).

[7] The Commission has also recommended (Rec 4-2) that section 11 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that a person making a decision for an adult on an informal basis must apply the General Principles.

## CHAPTER 5 — THE HEALTH CARE PRINCIPLE

[8] The Commission has recommended that the guardianship legislation should continue to include a separate Health Care Principle. The Commission has recommended (Rec 5-1) that the Health Care Principle be redrafted:

- to reflect more closely the relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities*;
- to avoid duplicating matters dealt with by the General Principles; and
- to provide guidance about the application of the General Principles in the context of health care.

[9] The Report includes a redrafted Health Care Principle (Rec 5-2), which:

- requires the General Principles to be applied;
- elaborates on the application of General Principle 2 by providing that, in applying that principle:
  - the principle of non-discrimination requires, among other things, that all adults be offered appropriate health care, including preventative health care, without regard to a particular adult's capacity; and
  - any consent to, or refusal of, health care for an adult must take into account the principles of respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons; and
- elaborates on the application of General Principles 7 and 8 by providing that, in applying those principles, a number of specified matters in relation to the health care must be taken into account; and
- elaborates on the application of the General Principle that requires the principle of substituted judgment to be used.

[10] Because section 12(5) of the Health Care Principle in the *Guardianship and Administration Act 2000* (Qld) applies only in relation to special health care, the Commission has recommended (Rec 5-4) that it be omitted from the Health Care Principle in the *Guardianship and Administration Act 2000* (Qld) and relocated to Part 3 of Chapter 5 of that Act, which deals with consent to special health care.

## CHAPTER 6 — THE SCOPE OF MATTERS

[11] With two exceptions, the Commission has recommended (Rec 6-1) that the definitions of the different types of matters be retained without amendment.

[12] The first exception relates to the definition of 'personal matter'. To assist in clarifying the scope of the definition of 'personal matter', the Commission has recommended (Rec 6-2) that the definition of 'personal matter' be amended to include, as additional examples of a personal matter:

- contact with, or access visits to, the adult; and
- advocacy relating to the care and welfare of the adult.

[13] The second exception relates to the definition of 'special personal matter'. The Commission is of the view that a decision to enter a plea on a criminal charge is properly characterised as a type of special personal matter because it is so inherently personal that it would be inappropriate to appoint another person to make that decision on behalf of an adult. Accordingly, the Commission has recommended (Rec 6-3) that the definition of 'special personal matter' be amended to include 'entering a plea on a criminal charge'.

## CHAPTER 7 — DECISION-MAKING CAPACITY

### The presumption of capacity

[14] The guardianship legislation provides that a person or other entity who performs a function or exercises a power under the legislation for a matter in relation to an adult with impaired capacity for the matter must apply the General Principles. One of those General Principles is that an adult is presumed to have capacity for a matter.

[15] The guardianship legislation does not provide any specific guidance about how the presumption of capacity is to be applied by a person or an entity, particularly if the Tribunal or the Supreme Court (when it exercises jurisdiction under the legislation) has previously made a formal determination that the adult has impaired capacity for a matter.

[16] To clarify how the presumption of capacity is to be applied by a person or entity under the guardianship legislation, the Commission has recommended (Recs 7-1 to 7-3) that the following approach be reflected in the legislation.

[17] First, whenever the Tribunal or the Supreme Court makes a determination about an adult's capacity for a matter, the Tribunal or the Court must apply the presumption of capacity. This approach reflects the decision in *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] 2 Qd R 402. If the Tribunal or the Court has determined that an adult does not have capacity for a specific matter or type of matter, that determination will not displace the presumption that the adult has capacity in relation to other matters.

[18] Secondly, if the Tribunal or the Supreme Court has appointed a guardian or an administrator for an adult for a matter, the guardian or administrator is not required to apply the presumption that the adult has capacity for that matter.

[19] Thirdly, if the Tribunal or the Supreme Court has made a declaration that the adult has impaired capacity for a matter and no further declaration about the adult's capacity for that matter has been made, another person or entity who performs a function or exercises a power under the guardianship legislation is entitled to rely on the finding that the presumption that the adult has capacity for that matter has been rebutted.

[20] Finally, the Commission has also recommended (Rec 7-4) that the guardianship legislation should continue to require that, if the Tribunal or the Supreme Court has not made a formal determination that the adult has impaired capacity for a matter, the person or entity must apply the presumption that the adult has capacity for that matter.

### The approach to defining capacity

[21] The Commission considered three approaches that are commonly used to define decision-making capacity — the functional, status and outcome approaches. The Commission is of the view that the current approach to defining capacity under the guardianship legislation — the functional approach — is appropriate and should be retained (Rec 7-7).

### The definition of 'capacity'

[22] The guardianship legislation defines 'capacity, for a person, for a matter' to mean 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.

[23] The Commission is generally of the view that the current definition of 'capacity' is appropriate and has recommended (Rec 7-8) that the definition be retained. However, in order to provide greater clarity about the third limb of the definition — the capacity to communicate decisions in some way — the Commission has recommended (Rec 7-9) that the definition be amended to include a reference to examples of the ways in which a person may communicate his or her decisions.

### Guidelines for assessing capacity

[24] To ensure a consistent and best practice approach to capacity assessments, the Commission has recommended (Recs 7-11 to 7-16) that the Minister responsible for administering the guardianship legislation prepare and issue guidelines for making capacity assessments by way of subordinate legislation. The purpose of such guidelines is to provide practical guidance, in the form of information and advice about assessing capacity under the guardianship legislation, to the range of persons who may be required to assess an adult's capacity. These guidelines should also include examples of best practice.

## CHAPTER 8 — CAPACITY TO MAKE AN ENDURING DOCUMENT

### The statutory test for capacity to make an enduring document

[25] Sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) set out the test of capacity for making an enduring document under that Act. The current test is subject to some uncertainty in relation to the level of understanding that the principal is required to have when making an enduring document. In order to clarify this issue, the Commission has recommended (Recs 8-1 to 8-4) that:

- the current list of the matters in section 41(2) of the *Powers of Attorney Act 1998* (Qld) that the principal must understand to make an enduring power of attorney should continue to be expressed as an inclusive list;

- section 42(1) of the *Powers of Attorney Act 1998* (Qld) be amended to provide, amongst other things, that a principal has the capacity necessary to make an advance health directive, to the extent it does not give power to an attorney, only if the principal understands the nature and effect of the advance health directive; and

- section 42(1) of the *Powers of Attorney Act 1998* (Qld) be amended so that the current list of matters that a principal must understand to make an advance health directive is inclusive rather than exhaustive.

[26] The Commission has also recommended (Rec 8-7) that the *Powers of Attorney Act 1998* (Qld) be amended to provide that the general definition of 'capacity' in Schedule 3 of the Act does not apply to sections 41 and 42 of the Act. However, as an additional safeguard for the principal, the Commission has recommended (Recs 8-5, 8-6) that the second limb of the general definition of 'capacity' — the capacity to freely and voluntarily make decisions about the matter — should be incorporated into the test of capacity for making an enduring document in those sections.

### Witnessing the principal's capacity to make an enduring document

[27] To address the concerns raised in the submissions about the incidence of enduring powers of attorney executed in circumstances where the principal has questionable or impaired capacity, the Commission has made a number of recommendations (Recs 8-8 to 8-11) to strengthen the requirements for witnessing an enduring document. These include amending the definition of 'eligible witness' in the *Powers of Attorney Act 1998* (Qld) to omit the reference to a commissioner for declarations (Rec 8-8). The effect of this proposed amendment is to ensure that enduring documents are witnessed only by a person who is a justice of the peace (magistrates court), a justice of the peace (qualified), a notary public or a lawyer.

[28] The Commission has also recommended (Rec 8-13) that the witnessing sections of the approved forms for making an enduring document should be amended to refer to the guidelines developed by the Adult Guardian, the Queensland Law Society and the Justices of the Peace Branch of the Department of Justice and Attorney-General, and to recommend their use in witnessing the document.

## CHAPTER 9 — ADVANCE HEALTH DIRECTIVES

### Eligibility for appointment as an attorney under an advance health directive

[29] The Commission has recommended (Rec 9-1) that section 29(2) of the *Powers of Attorney Act 1998* (Qld) be amended so that a person is not eligible for appointment as an attorney under an advance health directive if the person is a

service provider for a residential service where the principal is a resident. This will ensure consistency with the requirements in section 29(1) in relation to eligibility for appointment as an attorney under an enduring power of attorney.

[30] The Commission has also recommended (Rec 9-2) that section 29(2)(b) of the *Powers of Attorney Act 1998* (Qld) be omitted so that the Public Trustee is no longer eligible to be appointed as an attorney under an advance health directive. This recommendation is consistent with the approach taken under the *Guardianship and Administration Act 2000* (Qld), which provides that the Public Trustee is eligible for appointment as an administrator, but not as a guardian. It also reflects the Public Trustee's own practice in this regard.

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

[31] The Commission considers that some circumstances are so significant that they go to the heart of whether a direction in an advance health directive should be operative, and should not simply provide a ground of defence for a health provider who does not comply with the direction. The Commission has therefore recommended (Rec 9-3(b)(i)) that section 36 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that a direction in an advance health directive does not operate if:

- the direction is uncertain; or
- 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.

[32] At common law, a competent adult cannot ordinarily compel the provision of health care that has not been offered: *R (Burke) v General Medical Council* [2006] QB 273. To avoid the uncertainty about the effect of sections 65(2) and 66(2) of the *Guardianship and Administration Act 2000* (Qld) on section 36(1)(b) of *Powers of Attorney Act 1998* (Qld), the Commission has recommended that:

- section 36(1)(b) of the *Powers of Attorney Act 1998* (Qld) be amended to ensure that a direction cannot be more effective than a direction made by a competent adult would be (Rec 9-3(a));
- section 65 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that section 65(2) is subject to section 36 of the *Powers of Attorney Act 1998* (Qld) (Rec 9-19); and
- section 66 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that section 66(2) is subject to section 36 of the *Powers of Attorney Act 1998* (Qld) (9-20).

[33] The recommended amendment of section 36 allows the common law regarding the effect of a competent adult's demand for treatment to determine whether a direction in an advance health directive *requiring* health care will be effective.

### The approved form for an advance health directive

[34] The Commission has recommended (Recs 9-5, 9-6) that section 44 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that an advance health directive made after the commencement of that amendment must be made in the approved form. The Commission considers that a requirement to use the approved form is the most effective way of ensuring that the important information contained in the form is brought to the attention of a person making an advance health directive.

[35] The Commission has also recommended (Recs 9-7, 9-8) that the approved form for an advance health directive be redrafted, and that this process should take into account a number of specified matters, including the effect of the Commission's recommendations in relation to the withholding and withdrawal of life-sustaining measures.

### Proof of a copy of an advance health directive

[36] The Commission has recommended (Rec 9-9) that section 45(2) and (3) of the *Powers of Attorney Act 1998* (Qld) be omitted and replaced by a new provision to reduce the likelihood of inadvertent non-compliance with the section.

### Notification of advance health directives

[37] The Commission has not recommended the establishment of a register for advance health directives. This is principally because it is anticipated that advance health directives will be able to be scanned and stored electronically with an adult's medical records as part of the nationally consistent electronic health system that is presently being developed.

[38] However, the Commission has recommended (Rec 9-11) that the *Guardianship and Administration Act 2000* (Qld) be amended to include new provisions that require:

- a person in charge of a health care facility to make enquiries about whether a person receiving care at a health care facility has an advance health directive or an enduring power of attorney dealing with health matters, and to take specified steps if the person has such a document; and

- a person, including a health provider, who 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, to tell the person in charge of the health care facility.

### Recognition of advance health directives made in other jurisdictions

[39] The Commission has recommended (Rec 9-12) that section 40 of the *Powers of Attorney Act 1998* (Qld) be retained in its present terms. In addition, the Commission has recommended (Rec 9-14) that the *Powers of Attorney Act 1998*

(Qld) be amended to clarify that it does not matter whether an advance health directive made under the *Powers of Attorney Act 1998* (Qld) is made in or outside Queensland.

### Protection of health providers

[40] The Commission has made recommendations (Recs 9-15, 9-16) in relation to the protection of a health provider who in acts in reliance on:

- a revoked advance health directive; or
- a direction that is inoperative.

[41] The Commission has also recommended (Rec 9-17) that the protection given by section 102 of the *Powers of Attorney Act 1998* (Qld) to a health provider who does not know that an adult has an advance health directive be limited to a health provider who is acting in good faith.

[42] The Commission has also recommended (Rec 9-18) the amendment of section 103 of the *Powers of Attorney Act 1998* (Qld) so that a health provider who does not act in accordance with an advance health directive will no longer be protected from liability for non-compliance on the basis that he or she has reasonable grounds to believe that a direction in the advance health directive is inconsistent with good medical practice. The Commission considers that the inclusion of this ground in section 103 seriously undermines an adult's right to self-determination.

### Removal of an attorney or changing or revoking an advance health directive

[43] The Commission has recommended (Rec 9-21(a)) that section 116(a)–(b) of the *Powers of Attorney Act 1998* (Qld), in so far as those provisions apply to an attorney appointed under an enduring power of attorney, be amended so that the section does not empower the Supreme Court (or the Tribunal by operation of section 109A) to appoint an attorney to replace an attorney who has been removed, or to give a power that has been removed from an attorney to another attorney or to a new attorney

[44] The Commission considers that, where the need for the appointment of a substitute decision-maker arises from the removal of an attorney under an advance health directive, it is more appropriate for the appointment to be made under the *Guardianship and Administration Act 2000* (Qld), which specifically regulates the appointment of substitute decision-makers and the review of those appointments.

[45] However, a majority of the Commission has recommended (Rec 9-22) that section 116(c) and (d) of the *Powers of Attorney Act 1998* (Qld), in so far as those provisions apply to an advance health directive, be retained. These provisions, among other things, enable the Supreme Court and the Tribunal to change the terms of an advance health directive or to revoke an advance health directive. The majority considers that this power could be necessary to rectify an advance health directive that omitted material words. As it is not possible to predict all of the

circumstances in which these powers could be needed, the majority considers that their omission could leave the Tribunal or the Supreme Court without the necessary power to deal with a particular situation.

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

[46] There is presently some ambiguity about whether sections 65 and 66 of the *Guardianship and Administration Act 2000* (Qld) have the effect that what would otherwise be recognised at common law as being an effective consent to, or refusal of, health care will not be effective.

[47] The Commission considers it important that the guardianship legislation does not affect what would otherwise be recognised at common law as an effective consent to, or refusal of, health care. The continued operation of the common law in this area is especially important in supporting the role that advance care planning plays in the care of adults who have a terminal illness by ensuring that decisions made at a time when they are competent will continue to be effective even if they reach the stage that they no longer have the capacity to make decisions about their health care.

[48] The Commission has therefore recommended that:

- Chapter 5 of the *Guardianship and Administration Act 2000* (Qld) be amended to include a new provision to the effect 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 (Rec 9-25); and

- section 39 of the *Powers of Attorney Act 1998* (Qld) be amended 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 (Rec 9-27).

## CHAPTER 10 — STATUTORY HEALTH ATTORNEYS

[49] Section 63 of the *Powers of Attorney Act 1998* (Qld) provides that an adult's statutory health attorney is the first person who is readily available and culturally appropriate to exercise power for the matter in the listed order of the adult's spouse (if the relationship between the adult and the spouse is close and continuing), a person who has the care of the adult, and a close friend or relation of the adult. If no-one in that list is readily available and culturally appropriate, the Adult Guardian is the statutory health attorney.

[50] The Commission is generally of the view that, subject to some minor modifications (Recs 10-1 to 10-4), the current list, and order of priority, of persons who may be recognised as an adult's statutory health attorney is appropriate.

[51] One of the modifications recommended by the Commission relates to the definition of 'relation' that applies for the purposes of section 63. The definition, which is also referable to other provisions of the Act, includes persons who, for various reasons, may not be appropriate to make health care decisions for an adult. To ensure that the definition of 'relation' used in section 63 reflects a broad range of family and other close personal relationships and cultural considerations, the Commission has recommended (Rec 10-4) that a new definition of 'relation' be applied for the purposes of section 63.

[52] As an additional safeguard against potential conflicts of interest and abuse, the Commission has also made recommendations (Rec 10-5) in relation to the restrictions imposed under the Act on the persons who may be recognised as a statutory health attorney. These include the amendment of section 63 to clarify that a person who is the adult's health provider or a service provider for a residential service where the adult resides will not be recognised as the adult's statutory health attorney.

## CHAPTER 11 — THE WITHHOLDING AND WITHDRAWAL OF LIFE-SUSTAINING MEASURES

### The definition of 'health care'

[53] Section 5(2) of the definition of 'health care' in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and schedule 2 of the *Powers of Attorney Act 1998* (Qld) provides that health care includes the withholding or withdrawal of a life-sustaining measure 'if the commencement or continuation of the measure would be inconsistent with good medical practice'.

[54] The Commission does not consider it appropriate to impose, by way of a definition, this kind of limitation. Accordingly, the Commission has recommended (Rec 11-1) that the definition of 'health care' 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'

[55] The definition of 'life-sustaining measure' in section 5A of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and schedule 2 of the *Powers of Attorney Act 1998* (Qld) provides, in section 5A(3), that a blood transfusion is not a life-sustaining measure. The purpose of excluding a blood transfusion appears to have been to avoid the application of the various provisions of the guardianship legislation that apply specifically to life-sustaining measures, in particular, the limitations imposed by section 36(2) of the *Powers of Attorney Act 1998* (Qld) on the operation of a direction to withhold or withdraw a life-sustaining measure.

[56] In the Commission's view, the more principled and transparent approach is for any concern about the application of section 36(2) to a direction refusing a blood transfusion to be addressed in the specific context of that provision, rather than by excluding blood transfusions from the definition of life-sustaining measure.

Accordingly, the Commission has recommended (Rec 11-2) that section 5A(3) of the definition of 'life-sustaining measure' in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be omitted.

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

[57] Section 36(2) of the *Powers of Attorney Act 1998* (Qld) provides that a direction in an advance health directive to withhold or withdraw a life-sustaining measure cannot operate unless:

- the adult's medical condition falls within one of four categories, the first one being that the adult has a condition that is incurable or irreversible and as a result of which, in the opinion of a doctor treating the adult and another doctor, the adult may reasonably be expected to die within one year (section 36(2)(a)); and

- for a direction to withhold or withdraw artificial nutrition or artificial hydration — the commencement or continuation of the measure would be inconsistent with good medical practice (section 36(2)(b)); and

- the adult has no reasonable prospect of regaining capacity for health matters (section 36(2)(c)).

[58] The Commission considers that section 36(2) is an unjustified limitation on an adult's autonomy, and that better safeguards are provided by:

- the recommendation in Chapter 9 that a direction in an advance health directive does not operate if the direction is uncertain or 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;

- the provisions of the Act that deal with capacity to make an advance health directive and the execution requirements for making an advance health directive, together with the recommendations in Chapter 8 about those matters; and

- the recommendation in Chapter 9 that an advance health directive must be made in the approved form.

[59] In view of those safeguards, the Commission has recommended (Rec 11-3) that section 36(2) of the *Powers of Attorney Act 1998* (Qld) be omitted.

### Consent to the withholding or withdrawal of a life-sustaining measure by an adult's substitute decision-maker

[60] Section 66A of the *Guardianship and Administration Act 2000* (Qld) provides that a consent to the withholding or withdrawal of a life-sustaining measure for an adult does not operate unless the commencement or continuation of the measure would be inconsistent with good medical practice. The Commission considers that section 66A is unsatisfactory because:

- it effectively reposes in the adult's health provider the decision about whether a substitute decision-maker's consent to the withholding or withdrawal of a life-sustaining measure may operate; and
- the section introduces a requirement that does not form part of the redrafted Health Care Principle recommended in Chapter 5 (or of the current Health Care Principle).

[61] A majority of the Commission has therefore recommended (Rec 11-4) that section 66A of the *Guardianship and Administration Act 2000* (Qld) be omitted. In their view, the effect of the section, in preventing a substitute decision-maker's consent from operating, is too absolute. Further, given the Adult Guardian's power under section 43 of the Act, they consider that section 66A cannot be justified in terms of the need to safeguard the adult's interests.

[62] However, the Commission has recommended (Rec 11-5) a new provision dealing with the circumstances in which a health provider or certain other persons may refer a decision about a health matter to the Adult Guardian. The recommended provision is of general application, and is not limited to decisions about the withholding or withdrawal of a life-sustaining measure.

### The effect of the consent requirements where the life-sustaining measure is 'medically futile'

[63] The Commission has recommended that the guardianship legislation 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. The effect of this recommendation is that, although ordinarily there will still be a requirement to obtain consent in order to withhold a life-sustaining measure, it will not be necessary to obtain consent in circumstances where the commencement of the measure would not be consistent with good medical practice.

[64] However, a majority of the Commission is concerned that, once the measure is in place, a change to the adult's treatment regime that will, in all likelihood, result in the adult's death should not occur without consent — whether from the adult's substitute decision-maker, the Adult Guardian or the Tribunal. Accordingly, these members have not recommended a similar definition of 'withdrawal of a life-sustaining measure'.

### The effect of an adult's objection to the commencement, or continuation, of a life-sustaining measure

[65] The Commission considers that section 67 of the *Guardianship and Administration Act 2000* (Qld) and the provision proposed by Recommendation 12-1 deal appropriately with the effect of an adult's objection to the commencement or continuation of a life-sustaining measure in non-urgent circumstances.

[66] The Commission also considers that, subject to the amendments to section 63 of the Act recommended in Chapter 12, that section deals appropriately with the effect of an adult's objection to the commencement or continuation of a life-sustaining measure in urgent circumstances.

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

[67] The Commission considers that section 67 (and, in particular, section 67(2)(b)) of the *Guardianship and Administration Act 2000* (Qld) does not deal appropriately with the effect of an adult's objection to the withholding or withdrawal of a life-sustaining measure in non-urgent circumstances. Given that the adult's death is the likely result of withholding or withdrawing the measure, it is not appropriate to frame a test for overriding an adult's objection based on whether the 'health care' — in this case, the withholding or withdrawal of the life-sustaining measure — is likely to cause the adult 'no distress' or 'temporary distress that is outweighed by the benefit to the adult of the proposed health care'.

[68] The Commission has therefore recommended that:

- section 67 of the *Guardianship and Administration Act 2000* (Qld) be amended so that it does not apply to an adult's objection to the withholding or withdrawal of a life-sustaining measure (Rec 11-9); and

- the *Guardianship and Administration Act 2000* (Qld) be amended so that, generally, if an adult objects to the withholding or withdrawal of a life-sustaining measure, an adult's substitute decision-maker cannot override the adult's objection; the recommended provision instead confers on the Adult Guardian the power to override the adult's objection (Rec 11-10).

[69] The Commission considers it appropriate that section 63A of the *Guardianship and Administration Act 2000* (Qld), which applies in situations of urgency, has the effect that a life-sustaining measure may not be withheld or withdrawn without consent.

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

[70] The Report outlines the current uncertainty about whether a health provider who withholds or withdraws a life-sustaining measure in accordance with the guardianship legislation may nevertheless be criminally responsible for the adult's death.

[71] To remove that uncertainty, the Commission has recommended that the Criminal Code (Qld) 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:

- 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;
- is authorised by the *Guardianship and Administration Act 2000* (Qld), the *Powers of Attorney Act 1998* (Qld) or another Act; or
- is authorised by an order of the Supreme Court.

## CHAPTER 12 — THE EFFECT OF AN ADULT'S OBJECTION TO HEALTH CARE

### Health matters other than life-sustaining measures

[72] The Commission is generally of the view that section 67(1)–(2) of the *Guardianship and Administration Act 2000* (Qld) deals appropriately with the effect of an adult's objection to health care other than special health care or the withholding or withdrawal of a life-sustaining measure.

[73] The Commission recognises, however, that there may be some circumstances in which it should be possible for an adult's objection to health care to be overridden even though the requirements of section 67(2) are not satisfied. To ensure that it is not necessary for an application to be made to the Supreme Court in these circumstances to authorise the health care, but also to ensure that an adult's objection is not too readily discounted by the adult's substitute decision-maker, the Commission has recommended (Recs 12-1, 12-2(a)) that the *Guardianship and Administration Act 2000* (Qld) be amended to enable the Tribunal to confer on an adult's substitute decision-maker the authority to exercise power for a health matter despite the adult's objection and to give an effective consent to the health care.

### Special health matters: Sterilisation and termination of pregnancy

[74] The Commission has recommended (Rec 12-3) that sections 70 (Sterilisation) and 71 (Termination of pregnancy) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, in deciding whether to consent to the health care, the Tribunal must take into account any objection by the adult and any other matter relevant to the decision.

[75] The Commission has also recommended (Rec 12-2(b)) that section 67 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Tribunal may consent to the sterilisation of an adult or the termination of an adult's pregnancy, despite the adult's objection, if the Tribunal was constituted by, or included, a judicial member.

[76] The Commission has also made recommendations (Recs 12-4, 12-5) about ancillary matters relating to the hearing of an application for the sterilisation of an adult or the termination of an adult's pregnancy.

### Objection to urgent health care

[77] The Commission has made recommendations in relation to section 63 of the *Guardianship and Administration Act 2000* (Qld), which deals with the circumstances in which health care may be carried out urgently without consent.

[78] In relation to section 63(1)(b)(i), which deals with health care to meet imminent risk to the adult's life or health, the Commission has recommended (Rec 12-6) that the subparagraph be amended to add 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*'. This change will make section 63(1)(b)(i) consistent with section 63(1)(b)(ii), and ensure that, where practicable, health care is carried out with the consent of a person who has the appropriate authority.

[79] The Commission has recommended (Recs 12-7, 12-8) that section 63(2) and (3) be amended so that health care may not be carried out without consent under the authority of section 63 if the health provider knows that:

- the adult objects to the health care in an advance health directive (this exception currently only applies to health care mentioned in section 63(1)(b)(i)); or
- at a time when the adult had capacity to make decisions about the health care, he or she refused the health care.

## CHAPTER 13 — CONSENT TO PARTICIPATION IN MEDICAL RESEARCH

### Consent mechanisms for participation in special medical research or experimental health care

[80] The Commission has recommended (Rec 13-1) that section 72 of the *Guardianship and Administration Act 2000* (Qld), which provides that the Tribunal may consent to an adult's participation in special medical research or experimental health care, be retained.

[81] In addition, to provide greater flexibility, the Commission has recommended (Rec 13-2) that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, in specified circumstances, the Tribunal may approve special medical research or experimental health care (as it can for clinical research). This will avoid the need for multiple applications to be made to the Tribunal for its consent for the participation of each adult in the research.

[82] The Commission has also recommended (Rec 13-7(a)) that section 7(d) of the definition of 'special health care' in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be

amended so that special medical research or experimental health care that has been approved in accordance with the provision that gives effect to Recommendation 13-2 does not constitute 'special health care'. This change will ensure that, where the Tribunal has approved the special medical research or experimental health care, consent can be given by an adult's substitute decision-maker.

### Consent mechanisms for participation in clinical research

[83] The Commission has recommended (Rec 13-4) that section 13(3)–(5) of schedule 2 of the *Guardianship and Administration Act 2000* (Qld), which sets out the circumstances in which the Tribunal may approve clinical research (as distinct from matters of definition), be omitted from the schedule and relocated to the body of the Act.

[84] Further, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to include a provision to the general effect of section 45AB(1) of the *Guardianship Act 1987* (NSW) so that the Tribunal may order that consent for an adult's participation in clinical research be given by an adult's substitute decision-maker (which generally reflects the current approach) or that the Tribunal may itself consent to an adult's participation in the clinical research.

[85] Because the Tribunal will have the power not simply to approve clinical research, but also to consent to an adult's participation in it, the Commission has recommended (Rec 13-7(b)) that the definition of 'special health care' in section 7 of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) be amended to include, as a further category of special health care, approved clinical research (unless the Tribunal has ordered that consent for an adult's participation in the clinical research may be given by the adult's substitute decision-maker).

## CHAPTER 14 — THE APPOINTMENT OF GUARDIANS AND ADMINISTRATORS

### The grounds for the appointment of a guardian or an administrator

[86] Section 12 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to make an order appointing a guardian or an administrator for an adult. It provides that the Tribunal may make an order to appoint a guardian or an administrator for an adult only if it is satisfied that each of the three grounds set out in section 12(1) is established.

[87] First, the Tribunal must consider whether the adult has impaired capacity for the matter. In deciding this question, the Tribunal must apply the presumption of capacity which can be displaced only if, in applying the functional test of capacity provided under the Act, the Tribunal is satisfied that the adult does not have capacity for the matter. Only if the adult has impaired capacity for the matter will the Tribunal then consider the second and third grounds in section 12(1) and whether, applying the least restrictive principle, the adult's needs can be addressed in any other way than the appointment of a guardian or an administrator. Section

12 therefore sets a high threshold for enlivening the Tribunal's jurisdiction to make an appointment order.

[88] The Commission is of the view that the grounds for the appointment of a guardian or an administrator under section 12 of the *Guardianship and Administration Act 2000* (Qld) are appropriate and has therefore recommended (Rec 14-1) that they be retained.

**Consent to an appointment**

[89] The Commission has recommended that:

- generally, a person cannot be appointed as a guardian or an administrator unless he or she consents to the appointment (Rec 14-5);
- because the requirement for consent to an appointment is a substantive one, it should be located in the *Guardianship and Administration Act 2000* (Qld) rather than in the QCAT Rules (as is presently the case) (Rec 14-5); and
- the requirement for consent to an appointment should not apply to the Adult Guardian or the Public Trustee (Recs 14-6 to 14-7).

[90] The last of these recommendations will ensure that the Adult Guardian and the Public Trustee are always available for appointment, particularly if there is no other appropriate person available for appointment.

[91] To the extent that the implementation of the Commission's recommendations in relation to the removal of the general requirement for consent to an appointment may have resource implications for the Adult Guardian and the Public Trustee, the Commission has recommended (Rec 14-8) that, if necessary, the Adult Guardian and the Public Trustee should be given funding to satisfy their statutory obligations in this regard.

**Appropriateness considerations for appointment**

[92] The Commission is of the view that the list of appropriateness considerations in section 15(1) of the *Guardianship and Administration Act 2000* (Qld) are all relevant considerations for the Tribunal to take into account when deciding whether a person is suitable for appointment as an adult's guardian or administrator.

[93] Although family conflict is not specifically mentioned in section 15, the Tribunal has generally dealt with the existence of family conflict as a relevant factor in its consideration of the appropriateness of a proposed appointee. An adverse finding about the appropriateness of a family member for appointment, based on the existence of family conflict, may result in the appointment of the Adult Guardian or the Public Trustee. In this regard, the Commission noted that there was a perception, among some respondents, that the appointment of the Adult Guardian or the Public Trustee is sometimes too readily made in situations of family conflict.

[94] The Commission is of the view that, while the existence of family conflict is a relevant issue in the appointment process, that fact, by itself, should not prevent a family member who is an otherwise appropriate appointee from being appointed as an adult's guardian or administrator. Accordingly, the Commission has recommended (Rec 14-9) that section 15 of the Act be amended to include a new subsection to the effect that the fact that a person who is a family member of the adult is in conflict with another family member does not, of itself, mean that the person is not appropriate for appointment as a guardian or an administrator for the adult. For the purposes of this proposed new provision, a family member of the adult should be defined in terms of the new definition of 'relation', which the Commission has proposed should apply in relation to section 63 of the *Powers of Attorney Act 1998* (Qld).

**The effect of family conflict**

[95] The Commission has recommended (Rec 14-10) that the Tribunal should ensure that family members who are involved in guardianship proceedings are provided with sufficient information about the possible outcomes of proceedings involving family conflict and the options available for resolving or managing family conflict before, during and after a guardianship proceeding. The Tribunal should also ensure that guardianship proceedings which involve family conflict are identified at an early stage in the proceedings and assessed for their suitability for referral to dispute resolution. In this regard, the Commission has noted that, in some instances, family members may make a greater effort to resolve their differences if, either before or at an early stage of proceedings, they are made aware of the possibility that the existence of family conflict may result in the appointment of the Adult Guardian or the Public Trustee. This is especially important where the parties involved have the potential to resolve or manage their dispute in a way that results in a better outcome in terms of meeting the needs of the adult.

[96] The Commission has also recommended (Rec 14-11) that, in the context of a dispute between the adult's family members or between an adult's family member and a service provider for an adult, the Tribunal should ensure that the adult's family members who are not already active parties to the application are informed about the option of making their own application for appointment. Such a step may facilitate the appointment of a family member in circumstances where the Tribunal may otherwise appoint the Adult Guardian or the Public Trustee or both because there is no other appropriate applicant seeking appointment.

**The appointment of the Adult Guardian and the Public Trustee**

[97] The Commission is generally of the view that the test for the appointment of the Adult Guardian in section 14(2) is appropriate. The Commission has recommended (14-13) that a similar test apply to the appointment of the Public Trustee as administrator. It has also recommended (Recs 14-14, 14-15) that a similar test apply in relation to both the Adult Guardian and the Public Trustee on the review of an appointment.

## CHAPTER 15 — THE POWERS AND DUTIES OF GUARDIANS AND ADMINISTRATORS

[98] The Commission is generally of the view that that the scope of powers that may be conferred on a guardian or an administrator under the *Guardianship and Administration Act 2000* (Qld) is appropriate.

[99] However, in order to give greater recognition under the Act to the rights and interests of adults who have fluctuating capacity, the Commission has recommended that:

- the Act be amended to provide that, when making an order to appoint a guardian or an administrator (an 'appointee') for an adult who has fluctuating capacity, the Tribunal may limit the exercise of the appointee's powers to periods when the adult has impaired capacity (Rec 15-1); and

- if the Tribunal has made an appointment order which stipulates that an appointee's power for a matter depends on the adult having impaired capacity for the matter, the guardian or administrator must apply the presumption of capacity when exercising power for the adult (Rec 15-2).

## CHAPTER 16 — ENDURING POWERS OF ATTORNEY

[100] In this Chapter, the Commission has made a range of recommendations to help prevent abuse in the creation of enduring powers of attorney and the improper use of enduring powers of attorney. These include:

- legislative measures to exclude a person from being eligible to be an attorney if the person has been a paid carer for the principal within the previous three years or convicted on indictment for an offence involving personal violence or dishonesty in the previous 10 years (Recs 16-1 to 16-6);

- the redrafting of the approved forms for an enduring power of attorney to more clearly explain the key features of an enduring power of attorney and the role, powers and duties of an attorney (Recs 16-11 to 16-13); and

- the inclusion of information in the approved forms for an enduring power of attorney to explain that the principal may elect to nominate particular persons who must be notified of the activation of the power of attorney (Rec 16-16).

[101] The Commission has also made recommendations to help address the issue of abuse of enduring powers of attorney in Chapter 8, which deals with the capacity to make an enduring document, and in Chapter 17, which deals with conflict transactions. In Chapter 30, the Commission has also emphasised the importance of giving attorneys adequate support and training to assist them in fulfilling their role, and in educating the wider community about the use and operation of enduring powers of attorney.

[102] In formulating these recommendations, the Commission has been mindful that the abuse of enduring powers of attorney is a serious problem, but ideally, it should not be remedied in ways that make the scheme for enduring powers of attorney more complicated or costly.

[103] Consistent with that policy approach, the Commission has recommended (Rec 16-15) that the *Powers of Attorney Act 1998* (Qld) not be amended to require that all enduring powers of attorney be registered. While a registration system may assist in verifying the existence and formal validity of an enduring power of attorney, there are likely to be limitations on the extent to which a registration system can ensure the essential validity of a registered instrument. In particular, a registration system cannot necessarily detect fraud or abuse. There are also likely to be limitations on the extent to which a registration system can adequately record the status of an enduring instrument. In addition, a registration system is likely to have significant privacy and resource implications and to add an additional layer of formality, complexity and expense to the process of making an enduring power of attorney. The Commission has serious concerns that these issues could inevitably discourage some adults from making an enduring power of attorney. The Commission has therefore concluded that the burdens of a mandatory registration system would likely outweigh its benefits.

[104] The Commission has also recommended (Recs 16-16, 16-25) that the *Powers of Attorney Act 1998* (Qld) not be amended to include a mandatory requirement for notification or for the auditing of accounts, as these measures are also likely to increase the complexity and costs of the scheme for enduring powers of attorney.

[105] The Commission has also made a recommendation (Rec 16-14) in relation to the requirements for proving an enduring power of attorney which is consistent with the recommendations it has made about those matters in relation to advance health directives. It has also recommended (Recs 16-22 to 16-24) some minor amendments to the legislative scheme for the recognition of enduring powers of attorney made in another jurisdiction.

[106] To give greater recognition to the principal's autonomy, the Commission has recommended (Recs 16-18, 16-19) that section 116 of the *Powers of Attorney Act 1998* (Qld) be amended to enable the Supreme Court or the Tribunal to remove an attorney only if it considers that the attorney is no longer competent to act in that position. The Commission has also recommended (Rec 16-20) that, in so far as section 116(a) and (b) apply to an attorney appointed under enduring powers of attorney, those provisions be amended so that:

- section 116(a) does not empower the court to appoint a new attorney or to replace a new attorney who has been removed; and

- section 116(b) does not empower the court to give a power that has been removed from an attorney to another attorney or to a new attorney.

## CHAPTER 17 — CONFLICT TRANSACTIONS

[107] The guardianship legislation imposes a duty on attorneys and administrators to avoid conflict transactions.

[108] To address the problem of financial abuse by attorneys and administrators, the Commission has made a series of recommendations to clarify:

- the scope of the duty to avoid a conflict transaction and to ensure that the legislation deals appropriately with the types of conflict situations which commonly arise, particularly in family situations (Recs 17-1, 17-3 to 17-11);
- the power of the Tribunal or the Supreme Court to authorise or ratify a conflict transaction (Recs 17-13, 17-14); and
- that a principal, who has capacity, may also authorise (or ratify) a conflict transaction retrospectively (Rec 17-2).

[109] Among other things, these recommendations are designed to make it clear that an attorney or an administrator must not enter into a conflict transaction unless the conflict transaction has been authorised prospectively.

[110] The Commission has also recommended (Rec 17-17) that the legislative remedies available for non-compliance with an attorney's or an administrator's duties under the guardianship legislation be expanded so that the Tribunal or the Supreme Court has power to order an attorney or an administrator, who has made a profit as a result of his or her failure to comply with the Act in the exercise of a power for a financial matter for an adult, to disgorge that profit in favour of the adult.

[111] The Commission has also recommended (Rec 17-18) that the Criminal Code (Qld) be amended to provide for an increased penalty for an attorney who commits fraud against his or her principal. It has also recommended (Rec 17-19) that consideration be given, as a matter of priority, to the development of a new criminal offence dealing with the financial abuse and exploitation of vulnerable persons.

## CHAPTER 18 — BINDING DIRECTION BY A PARENT FOR THE APPOINTMENT OF A GUARDIAN OR AN ADMINISTRATOR

[112] The terms of reference for this review specifically required the Commission to consider whether there are circumstances in which the *Guardianship and Administration Act 2000* (Qld) should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.

[113] Although the Commission is sympathetic to the position of parents who are concerned to have greater control in relation to future decision-making for their children, the Commission has recommended (Rec 18-1) that the *Guardianship and*

*Administration Act 2000* (Qld) not be amended to enable parents to make binding directions appointing guardians or administrators for their adult children.

[114] The Commission considers that the interests of adults with impaired capacity require that appointments continue to be made only by the Tribunal and, where section 245 applies, by the Supreme Court or the District Court. This is necessary to ensure that appointments are made with all the legislative safeguards provided by the *Guardianship and Administration Act 2000* (Qld) — in particular, that appropriate consideration is given to the presumption of capacity, the need for the appointment, the appropriateness of the appointee, and the terms and duration of the appointment.

[115] However, to ensure that parents are aware of the Tribunal's power to appoint successive guardians and administrators, the Commission has recommended (Rec 18-2) that, if a parent applies for appointment as the guardian or administrator for his or her adult child, the Tribunal should inform the parent of the Tribunal's power under section 14(4)(e) of the *Guardianship and Administration Act 2000* (Qld) to appoint successive appointees for a matter.

## CHAPTER 19 — RESTRICTIVE PRACTICES

[116] The Commission considers it highly unsatisfactory that the lawfulness of using a restrictive practice in relation to an adult with an intellectual or cognitive disability, and the requirements for the lawful use of such a practice, depend on whether the restrictive practice is being used by a disability service provider who receives funding from the Department of Communities.

[117] The current two-tiered system for regulating the use of restrictive practices means that not all adults with an intellectual or cognitive disability are equally protected from the improper use of those practices. Adults who are outside the scope of the restrictive practices legislation are arguably at greater risk of being arbitrarily deprived of their liberty and of being subjected to abuse in the form of the unlawful use of restrictive practices.

[118] The Commission considers it important that the scheme that has been specifically developed as the most appropriate way to regulate the use of restrictive practices be extended, and become a scheme of general application so that the rights and interests of *all* adults are adequately safeguarded.

[119] The Commission has therefore recommended (Recs 19-1, 19-2) that:

- Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) be amended so that the provisions that currently apply to the use of restrictive practices by a 'funded service provider' apply to all service providers who provide disability services, regardless of the source of their funding or whether they in fact receive funding;

- the current provisions of the restrictive practices legislation, including the requirements for the assessment of the adult and the development of a

positive behaviour support plan, be extended and adapted, as necessary, to regulate the use of restrictive practices by individuals acting in a private capacity, such as family members who care for an adult with an intellectual or cognitive disability; and

- the task of extending the legislation, as recommended above, be undertaken jointly by the Department of Communities and the Department of Justice and Attorney-General.

[120] The Report also examines a number of issues that have been raised during the review about the regulation of the use of antilibidinal drugs in relation to adults who are subject to the restrictive practices legislation and in relation to adults who are outside the scope of that scheme. The Commission is of the view that there should be a single legislative approach for regulating the use of antilibidinal drugs, and that the manner in which their use is regulated should not depend on the source of funding for disability services that are provided to the adult.

[121] Given that the use of antilibidinal drugs as a form of behavioural control was not specifically addressed when the restrictive practices legislation was being developed, the Commission has recommended (Rec 19-3) that the reviews that are required to be undertaken by sections 233 and 233A of the *Disability Services Act 2006* (Qld) should consider:

- whether, and if so how, Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) should regulate the use of antilibidinal drugs (including whether it is appropriate for antilibidinal drugs to constitute 'chemical restraint' under the restrictive practices legislation or whether their use should require Tribunal approval); and

- whether antilibidinal drugs, when administered as a form of behavioural control, should constitute a category of 'special health care' under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).

## CHAPTER 20 — THE TRIBUNAL'S FUNCTIONS AND POWERS

### The power to give advice, directions and recommendations

[122] For the sake of clarity, the Commission has recommended (Rec 20-1) that section 138 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide expressly that the Tribunal may give directions to a decision-maker about the exercise of his or her powers, including directions about how a matter for which a guardian, administrator or attorney is appointed should be decided. For consistency, it has also recommended (Rec 20-2) that a similar amendment be made to section 138AA of the Act, which deals with directions to a former attorney.

### The power to make an interim order

[123] Section 129 of the *Guardianship and Administration Act 2000* (Qld), which empowers the Tribunal to make an interim order in a guardianship proceeding, does not expressly require that the Tribunal must be satisfied that there is evidence capable of showing that the adult has impaired capacity before it can make the order.

[124] The Commission has recommended (Rec 20-3) that section 129(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Tribunal must be satisfied that there is evidence capable of showing that the adult has impaired capacity before it can make an interim order.

### The power to issue a warrant to enter a place and remove an adult

[125] The current grounds on which the Tribunal may issue an entry and removal warrant under section 149 of the *Guardianship and Administration Act 2000* (Qld) are that the Tribunal 'is satisfied 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'.

[126] The Commission has recommended (Rec 20-5) that the grounds be expanded to include the circumstance in which an adult who has impaired capacity is being unlawfully detained against his or her will.

### A new power to issue a warrant to enter a place for the purpose of assessing the adult's circumstances

[127] The role of the Adult Guardian is to protect the rights and interests of adults with impaired capacity. If the Adult Guardian is unable to obtain sufficient information about an adult's circumstances, the Adult Guardian may be unable to exercise his or her powers to apply for orders or take other action to protect the adult that may actually be warranted.

[128] To overcome this difficulty, the Commission has recommended (Rec 20-6) that the *Guardianship and Administration Act 2000* (Qld) be amended to enable the Adult Guardian to apply to the Tribunal for the issue of a warrant authorising the Adult Guardian and, if necessary, other specified persons, to enter a place for the purpose of assessing the adult's circumstances; and to empower the Tribunal, in limited circumstances, to issue such a warrant.

[129] Because the development of a legislative mechanism for the issue of an entry and assessment warrant raises evidential and privacy issues, the Commission has recommended (Recs 20-6 to 20-12) the inclusion of various safeguards in the proposed mechanism to ensure that such a warrant is issued only when necessary and appropriate in the circumstances and to protect the rights and interests of the adult and any other person who is an owner or an occupier of the property in respect of which the warrant is issued.

### The power to make an order to give effect to a guardian's decision

[130] A guardian for an adult may sometimes be unable to implement his or her decision for the adult as a result of the adult's reluctance to comply with the decision, or obstructive behaviour on the part a person associated with the adult. To address this issue, the Commission has recommended (Recs 20-13 to 20-18) that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Tribunal, on application by an adult's guardian, may, in limited circumstances, make an order to give effect to a decision made by the guardian for the adult.

## CHAPTER 21 — TRIBUNAL PROCEEDINGS

### The application form

[131] The Commission has recommended (Rec 21-1) that the approved form for making an application for the appointment of a guardian or an administrator or for the review of an appointment should:

- be reworded to reflect more clearly the legislative requirement that the applicant must provide information about the members of the adult's family and any primary carer of the adult, regardless of whether or not the applicant perceives for himself or herself that the person may have an interest in the application; and

- require the applicant to state, if relevant, that he or she does not have actual knowledge of any other persons who may have an interest in the application.

### The definition of 'interested person'

[132] The Commission has recommended (Rec 21-2) that the definition of 'interested person' for an adult under the guardianship legislation be amended to refer to 'a person who has a sufficient and genuine concern for the rights and interests of the adult'.

### Notification of an application and the hearing of an application

[133] The Commission has recommended (Rec 21-3) that the notice of an application made under the *Guardianship and Administration Act 2000* (Qld) and the notice of the hearing of an application should include information about the possible outcomes of the application. In relation to an application for appointment or for the review of an appointment, that information should include:

- the names of any proposed appointees;

- the circumstances in which the Adult Guardian or the Public Trustee may be appointed;

- information that a person other than the person who is proposed for appointment in the application may be appointed; and

- what steps the person who has been notified of the application should take if he or she wishes to make an application for appointment.

[134] The Commission has also recommended (Rec 21-4) that information about how the adult concerned in an application may request further information about the application from the Tribunal should also be given to the adult in conjunction with a copy of the application.

[135] The Commission has also made recommendations (Recs 21-5, 21-6) about the circumstances in which the Tribunal is not required to give notice of an application or notice of the hearing of an application to the adult concerned.

## Legal and other representation

### *The right of the adult to representation*

[136] Currently, section 124 of the *Guardianship and Administration Act 2000* (Qld) entitles the adult concerned in a guardianship proceeding to be represented if given leave by the Tribunal. Given that guardianship proceedings not only concern an adult's fundamental rights and interests but may also have serious consequences for the adult, the Commission has recommended (Rec 21-7) that section 124 be amended to provide expressly that, in a guardianship proceeding, the adult concerned in the proceeding is entitled to be represented without the need to be given leave by the Tribunal. Such an amendment is consistent with section 43(2)(b)(i) of the QCAT Act, which gives a person with impaired capacity an automatic right to representation.

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

[137] Section 124 of the *Guardianship and Administration Act 2000* (Qld) also entitles an active party to a guardianship proceeding, who is not the adult concerned in the proceeding, to be represented if given leave by the Tribunal. However, the Tribunal's exercise of discretion is subject to section 43 of the QCAT Act, the main objective of which is to have parties represent themselves unless the interests of justice require otherwise.

[138] The Commission is of the view that the presumption in section 43(1) of the QCAT Act, that the parties should represent themselves unless the interests of justice require otherwise, is not appropriate to apply in guardianship proceedings. This is because, within the framework of the Tribunal's broad jurisdiction, the guardianship jurisdiction has special characteristics which set it apart from the other jurisdictions and which warrant a different policy approach to the representation of an active party (other than the adult concerned) in guardianship proceedings.

[139] Accordingly, the Commission has recommended (Rec 21-8) that section 124 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, despite section 43(1)–(3) of the QCAT Act, an active party, other than the adult

concerned, may be represented by a lawyer or agent, unless the Tribunal considers it is appropriate in the circumstances for that person not to be represented.

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

[140] The Commission is of the view that section 125 of the *Guardianship and Administration Act 2000* (Qld) does not give sufficient guidance about the role of the separate representative for an adult in a guardianship proceeding. Accordingly, the Commission has recommended (Rec 21-9) that section 125 be amended to clarify that the role of a separate representative for an adult in a guardianship proceeding is to:

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

**Access to documents**

[141] The Commission has made recommendations (Recs 21-10 to 21-14) to clarify the entitlement of both an active party in a guardianship proceeding and a non-party to access a document in the Tribunal files and to obtain a copy of the document. These recommendations deal with these entitlements at different stages of an application — before, during and after the hearing of an application. They are designed to reflect the principle of open justice and the sensitive nature of guardianship proceedings.

**Special witness provisions**

[142] To ensure that the Tribunal has a wide range of powers to make orders to facilitate the giving of evidence by vulnerable witnesses in Tribunal proceedings, the Commission has recommended (Rec 21-15) that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the special witness provisions under section 99 of the QCAT Act also apply to proceedings under the *Guardianship and Administration Act 2000* (Qld) (subject to the operation of the provisions for making a closure order or an adult evidence order under the *Guardianship and Administration Act 2000* (Qld)).

**Decisions and reasons**

[143] Given the complexity of the guardianship legislation and the desirability of providing transparent and sufficient reasons for decisions in guardianship proceedings, the Commission has recommended (Rec 21-16) that the QCAT Rules be amended to require that the written reasons for a decision, made in a proceeding in relation to an application made under the *Guardianship and Administration Act 2000* (Qld), must set out the principles of law applied by the

Tribunal in the proceeding and the way in which the Tribunal applied the principles of law to the facts.

## CHAPTER 22 — APPEALS, REOPENING AND REVIEW

### Appealing a Tribunal decision

[144] The Commission considers that the QCAT Act provides an appropriate mechanism for appealing against a Tribunal decision made in a proceeding under the *Guardianship and Administration Act 2000* (Qld) (Rec 22-1).

### Reopening a proceeding by a party

[145] The QCAT Act reflects a policy decision to allow a reopening in certain circumstances where the party's remedy might otherwise be an appeal. Given that approach within the legislation, the Commission has recommended (Rec 22-2) that the definition of 'reopening ground' in section 137 of the QCAT Act be amended to include, for a proceeding under the *Guardianship and Administration Act 2000* (Qld), that because significant new evidence has arisen that was not reasonably available when the proceeding was first heard and decided:

- the adult concerned would suffer substantial injustice if the proceeding was not reopened; or
- the needs of the adult would not be adequately met, or the adult's interests would not be adequately protected, if the proceeding was not reopened.

### Reopening a proceeding by a non-party

[146] Although a person mentioned in section 119(a)–(f) of the *Guardianship and Administration Act 2000* (Qld) is automatically an active party for a guardianship proceeding, a family member of an adult or a primary carer for an adult becomes an active party for a proceeding only if he or she is joined as a party to the proceeding by the Tribunal under section 119(g) of the Act. It is therefore important that there is a reopening ground that is available to such a person if he or she is not given notice of the hearing of a guardianship proceeding and, as a result, does not have the opportunity to become an active party.

[147] The Commission has therefore recommended (Rec 22-3) that the QCAT Act be amended so that, for the hearing of a proceeding under the *Guardianship and Administration Act 2000* (Qld), a member of the adult's family or any primary carer of the adult may apply for a reopening of the proceeding if the Tribunal did not give the person notice of the hearing under section 118(1) of the *Guardianship and Administration Act 2000* (Qld).

### Review of the appointment of a guardian or an administrator

[148] The Commission has recommended (Rec 22-4) that section 28(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that an initial appointment of a guardian or an administrator must be reviewed within two years of the order making the appointment. Other appointments should continue to be reviewed at least every five years.

[149] The Commission considers that an appointment of the Public Trustee or a trustee company as an administrator should be subject to the same review mechanisms as any other administrator, including the requirement for periodic review. Accordingly, the Commission has recommended that section 28(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to omit the words '(other than the public trustee or a trustee company under the *Trustee Companies Act 1968*)'.

[150] The Commission has also recommended (Rec 22-6) that the *Guardianship and Administration Act 2000* (Qld) be amended to set out the grounds on which an application may be made for the review of the appointment of a guardian (including a guardian for a restrictive practice matter) or an administrator. Those grounds should be the grounds set out in paragraph 4 of QCAT Practice Direction No 8 of 2010, namely:

- new and relevant information has become available since the hearing;
- a relevant change in circumstances has occurred since the hearing; or
- relevant information that was not presented to the Tribunal at the hearing has become available.

## CHAPTER 23 — THE ADULT GUARDIAN

### The Adult Guardian's functions

[151] The Commission is generally of the view that the Adult Guardian's functions, as set out in section 174 of the *Guardianship and Administration Act 2000* (Qld), are appropriate and do not require amendment. However, the Commission has recommended (Rec 23-2) that section 174(3) be amended to clarify that the requirement for the Adult Guardian to apply the Health Care Principle applies only if the Adult Guardian is performing a function or exercising a power in relation to a health matter.

### The Adult Guardian's powers

[152] The Commission is generally of the view that the Adult Guardian's powers under the *Guardianship and Administration Act 2000* (Qld) are appropriate. However, the Commission has recommended that:

- section 43 of the *Guardianship and Administration Act 2000* (Qld) be amended so that the Adult Guardian's power to make a decision about a health matter for an adult applies if the refusal of the adult's substitute decision-maker to make a decision, or the decision, is contrary to the *General Principles or* the Health Care Principle (Rec 23-4);

- section 177(4) of the *Guardianship and Administration Act 2000* (Qld) be amended to widen the categories of persons to whom the Adult Guardian may delegate the power to make day-to-day personal decisions for an adult (Rec 23-5); and

- section 183 of the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that the Adult Guardian's right to information includes the power to require an agency to disclose personal information about an individual (Rec 23-6).

[153] The Commission considers that, in some situations, it may be desirable for the Adult Guardian to be able to investigate a complaint or an allegation even though the adult has died. Accordingly, the Commission has recommended that:

- to avoid any doubt about the breadth of the investigative power conferred by section 180 of the *Guardianship and Administration Act 2000* (Qld), section 180 should be amended to provide that the Adult Guardian's power to investigate a complaint or an allegation is not limited by the death of the adult (Rec 23-7); and

- section 182 of the *Guardianship and Administration Act 2000* (Qld) should be amended so that, notwithstanding the death of an adult, the Adult Guardian has the power to investigate the conduct of a person who *was* the adult's attorney with power for financial matters or who *was* the adult's administrator (Rec 23-8).

[154] The Commission has recommended (Rec 23-9) that the Adult Guardian retain the power under section 195 of the *Guardianship and Administration Act 2000* (Qld) to suspend all or some of an attorney's power under an enduring document. However, the Commission has recommended (Rec 23-10) that the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that, if the Adult Guardian has suspended the power of an attorney, the suspension may not be extended by a further exercise of the Adult Guardian's power to suspend.

**External review of the Adult Guardian's decisions for an adult**

[155] To foster public confidence in the guardianship system and to ensure that the mechanisms for reviewing the decisions of the Adult Guardian are as effective and transparent as possible, the Commission has made a number of recommendations to provide that decisions of the Adult Guardian are subject to QCAT's review jurisdiction.

[156] The Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be amended to provide that:

- a decision of the Adult Guardian under either Act about a personal matter for an adult is a reviewable decision for the purposes of the QCAT Act (Recs 23-11, 23-12);

- an application for the review of a reviewable decision may be made by the adult who is the subject of the decision or by an interested person (Rec 23-13).

[157] Because of the special nature of the guardianship system, the Commission has made several recommendations to change the provisions that would otherwise apply to the hearing of these applications. These include recommendations that:

- section 157 of the QCAT Act, which requires written notice of a decision to be given to each person who may apply for the review of a reviewable decision, should not apply to a reviewable decision of the Adult Guardian (Rec 23-14);

- different provisions should apply in relation to the notice that is given of an application and of the hearing of an application for the review of a reviewable decision of the Adult Guardian (Recs 23-15, 23-16); and

- different confidentiality and related provisions should apply in relation to an application for the review of a reviewable decision of the Adult Guardian and to the hearing of that application (Rec 23-17).

## CHAPTER 24 — THE FUNCTION OF SYSTEMIC ADVOCACY

[158] With a view to maintaining an independent systemic advocacy function once the Public Advocate's functions are transferred to the Adult Guardian, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that:

- the Adult Guardian's Annual Report must include information about the systemic advocacy that has been undertaken during the year; the expenditure on systemic advocacy; and the number of staff who were engaged in undertaking systemic advocacy (Rec 24-1); and

- the Adult Guardian may, at any time, prepare a report to the Minister on a systemic issue and the Minister must table a copy of the report in the Legislative Assembly within five sitting days after receiving the report (Rec 24-2); and

- within five years of the commencement of the provisions transferring the Public Advocate's functions and powers to the Adult Guardian, the Minister must review the systemic advocacy function of the Adult Guardian to ascertain whether an independent systemic advocacy role has been

maintained, and the Minister must table a report about the review in the Legislative Assembly as soon as practicable, but within one year after the end of the five year period (Rec 24-3).

[159] The Commission has also recommended (Rec 24-5) that the *Guardianship and Administration Act 2000* (Qld) be amended to give the Adult Guardian, as systems advocate, the power to give a notice to an agency, or a person who has the custody or control of information or documents, requiring the agency or person to give the Adult Guardian information and access to documents about:

- a system being monitored or reviewed by the Adult Guardian;
- arrangements for a class of individuals; and
- policies and procedures that apply within an agency, service or facility.

[160] The provision conferring these powers on the Adult Guardian should:

- generally be modelled on section 183 of the *Guardianship and Administration Act 2000* (Qld) (Rec 26-6(a));
- provide that the Adult Guardian's power to require information or access to documents includes the power to require (Rec 26-6(b)):
  - personal information about an adult if the provision of that information is necessary to comply with the Adult Guardian's notice; and
  - statistical information held by an agency or person; and
- provide that the maximum penalty for non-compliance is 100 penalty units (Rec 24-7).

## CHAPTER 25 — THE PUBLIC TRUSTEE

### The Public Trustee's powers as an administrator or attorney

[161] The Commission has recommended (Rec 25-1) that the Public Trustee's powers under the guardianship legislation as an administrator or attorney are generally appropriate.

[162] The Commission has recommended, however, that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be amended to enable the Public Trustee:

- to delegate power under the Act for a financial matter to an appropriately qualified member of the Public Trust Office's staff (Rec 25-2); and
- to delegate the power to make day-to-day decisions about a financial matter for an adult to a person outside the Public Trust Office, similar to the Adult

Guardian's power to delegate day-to-day decisions under section 177(4) of the *Guardianship and Administration Act 2000* (Qld) (Recs 23-3 to 23-5).

### External review of the Public Trustee decisions for an adult

[163] To foster public confidence in the guardianship system and to ensure that the mechanisms for reviewing the decisions of the Public Trustee are as effective and transparent as possible, the Commission has made a number of recommendations to provide that decisions of the Public Trustee are subject to QCAT's review jurisdiction.

[164] The Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be amended to provide that:

- a decision of the Public Trustee under either Act about a financial matter for an adult is a reviewable decision for the purposes of the QCAT Act (Recs 25-6, 25-7);
- the charging of fees and costs by the Public Trustee is not a 'reviewable decision' of the Public Trustee (Rec 25-8); and
- an application for the review of a reviewable decision may be made by the adult who is the subject of the decision or by an interested person (Rec 25-9).

[165] The Commission has also recommended (Recs 25-10 to 25-13) that, in recognition of the special nature of the guardianship jurisdiction, modifications similar to those outlined at [157] above should apply to an application for the review of a reviewable decision of the Public Trustee and the hearing of that application.

## CHAPTER 26 — COMMUNITY VISITORS

### Visitable sites

[166] The Commission considers that the definition of 'visitable site' in section 222 of the *Guardianship and Administration Act 2000* (Qld) is appropriate and does not require amendment (Rec 26-1).

[167] However, the Commission has recommended (Rec 26-2) that the places prescribed as 'visitable sites' by schedule 2 of the *Guardianship and Administration Regulation 2000* (Qld) be widened to enable community visitors to visit relevant consumers living in residential services conducted in premises that are registered under the *Residential Services (Accreditation) Act 2002* (Qld), regardless of the level of accreditation of the service.

### Requesting a visit to a visitable site

[168] The Commission has recommended (Rec 26-4) that section 226(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that, in addition to a consumer at a visitable site and 'a person for the consumer', each of the following may ask that a community visitor visit a visitable site:

- a consumer's guardian, administrator, attorney or statutory health attorney;
- an interested person for a consumer;
- the Adult Guardian;
- an advocacy organisation.

### Community visitor reports

[169] The Commission has made recommendations to widen the categories of persons who are entitled to receive a copy of a community visitor report.

[170] The Commission has recommended (Rec 26-5) that section 230(3) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, if a report has been prepared in relation to a visit that was requested by a person or organisation under section 226 of the *Guardianship and Administration Act 2000* (Qld) (as amended in accordance with Rec 26-4), the chief executive must give a copy of the report to the person or organisation that requested the visit.

[171] The Commission has also recommended (Rec 26-6) that section 230(4) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the chief executive must, on request, give a copy of a report to the persons mentioned in that section, which should be expanded to include:

- a consumer's guardian, administrator, attorney or statutory health attorney; and
- an interested person for a consumer.

[172] Because of the widening of the categories of persons who will be entitled to receive a copy of a community visitor report, the Commission has recommended (Rec 26-7) that the *Guardianship and Administration Act 2000* (Qld) be amended to require the chief executive, before giving a copy of a report to a consumer, a consumer's guardian, administrator, attorney or statutory health attorney, an interested person for the consumer, or an advocacy organisation, to remove the personal information of any other consumer that is included in the report. However, the chief executive is not required to remove the personal information if he or she is satisfied on reasonable grounds that the disclosure of the personal information is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of the relevant consumer.

### Appointment of community visitors

[173] The Commission has made minor recommendations to amend section 231(5) of the *Guardianship and Administration Act 2000* (Qld) in order to express the provision dealing with the appointment of community visitors in more inclusive and contemporary terms (Rec 26-8).

### Location of the Community Visitor Program

[174] The Commission has recommended (Rec 26-9) that the Community Visitor Program is appropriately located within the Office of the Adult Guardian.

[175] To provide greater transparency about issues that might be raised with community visitors about the guardianship services of the Adult Guardian, the Commission has recommended (Rec 26-10) that:

- information about certain matters relating to referrals by community visitors to the Office of the Adult Guardian must be reported in the Annual Report of the Department of Justice ; and

- if a matter is referred by a community visitor to the Adult Guardian, the chief executive must give the Tribunal a copy of the community visitor's referral and the Adult Guardian's response.

## CHAPTER 27 — WHISTLEBLOWER PROTECTION

### Protection from liability for making a disclosure

[176] Section 247 of the *Guardianship and Administration Act 2000* (Qld) currently applies to a disclosure made to an official that reveals a breach of the guardianship legislation. However, whether a breach has in fact occurred is a matter that, in most cases, will not be known at the time a disclosure is made, but only after an allegation has been investigated.

[177] The Commission has therefore recommended (Rec 27-1) that section 247 be amended to protect a person from disclosing information to an official if:

- the person honestly believes on reasonable grounds that the person has information that tends to show that another person has breached the guardianship legislation or that an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse; or

- the information would help in the assessment or investigation of a complaint that another person has breached the guardianship legislation or that an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse; or

- without limiting the preceding two grounds, the disclosure is made in accordance with the section that gives effect to Recommendation 11-5,

which provides that, if a health provider or another specified person believes, on reasonable grounds, that a decision made by an adult's guardian or attorney about a health matter is not in accordance with the General Principles and the Health Care Principle, the health provider or other specified person may tell the Adult Guardian about the matter.

[178] Although the definition of 'official' in section 247(4) of the *Guardianship and Administration Act 2000* (Qld) refers to a community visitor, it does not refer to the staff of the Community Visitor Program. For consistency with the way in which the definition deals with the staff of the Adult Guardian and the Public Advocate, the Commission has recommended (Rec 27-2) that the definition of 'official' be amended to refer to 'a public service officer involved in the administration of a program called the community visitor program'.

### Protection from a reprisal

[179] In some situations, the real disincentive against making a disclosure may not be the person's potential liability for the disclosure (for which the person may well have a defence of qualified privilege), but the risk that the person making the disclosure or some other person, such as the adult with impaired capacity, will be subjected to a reprisal as a result of the making of the disclosure.

[180] Section 247 of the *Guardianship and Administration Act 2000* (Qld) does not protect a person who makes such a disclosure from being subjected to a reprisal as a result of making the disclosure; nor does it protect an adult with impaired capacity from being subjected to a reprisal as a result of a disclosure made by another person.

[181] The Commission has therefore recommended (Recs 27-3 to 27-5) that the *Guardianship and Administration Act 2000* (Qld) be amended to include provisions, modelled on sections 41 to 43 of the *Whistleblowers Protection Act 1994* (Qld):

- making it an indictable offence for a person to take a reprisal against a person because, or in the belief that, anybody has made, or may make a disclosure under section 247(1) of the *Guardianship and Administration Act 2000* (Qld); and

- providing that a person who takes a reprisal commits a tort for which the person may be liable in damages.

## CHAPTER 28 — LEGAL PROCEEDINGS INVOLVING ADULTS WITH IMPAIRED CAPACITY

[182] The Commission has made recommendations about a number of issues that arise when adults with impaired capacity are involved in legal proceedings.

## Appointment of a litigation guardian

[183] Because of the burdens and potential liability involved in acting as a person's litigation guardian, the Commission has recommended (Rec 28-2(a)) that rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) be amended to clarify that, generally, the court may appoint a person as a litigation guardian for a person under a legal incapacity only if the person consents to being appointed.

[184] However, the Commission is concerned that, if an adult is under a legal incapacity and no-one is willing to be appointed as the adult's litigation guardian, it effectively means that, if the adult is the plaintiff, the proceeding cannot continue and, if the adult is the defendant, the plaintiff is not able to seek to have his or her rights vindicated.

[185] The Commission has therefore recommended (Recs 28-1 and 28-2(b)) that:

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

- rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) be amended to provide that, despite the requirement that a person's consent is generally required in order to be appointed as the litigation guardian of a person under a legal incapacity, the court may appoint:

  - the Public Trustee, without the Public Trustee's consent, as litigation guardian for an adult in a proceeding that relates to the adult's financial or property matters;

  - the Adult Guardian, without the Adult Guardian's consent, as litigation guardian for an adult in a proceeding that does not relate to the adult's financial or property matters.

[186] To create greater certainty for the Public Trustee and the Adult Guardian (and other litigation guardians) in terms of their liability for costs, and to ensure that the court's power to award costs are sufficiently wide, the Commission has recommended (Rec 28-4) that the *Uniform Civil Procedure Rules 1999* (Qld) be amended to include new rules to the effect that:

- a litigation guardian for a defendant or respondent is not liable for any costs in a proceeding unless the costs are incurred because of the litigation guardian's negligence or misconduct; and

- if a party to a proceeding has a litigation guardian for a proceeding and the court considers it in the interests of justice, the court may order that all or part of the party's costs of the proceeding be borne by another party to the proceeding.

### The test for impaired capacity for a litigant

[187] The Commission has made recommendations to ensure that the test for determining whether an adult has impaired capacity for a proceeding is referable to the particular proceeding in which the adult is a party (and not proceedings generally), and takes account of whether or not the adult is, or will be, legally represented in the proceeding (Recs 28-5, 28-6).

### The court's power to transfer the issue of an adult's capacity to the Tribunal

[188] The Commission considers that the most appropriate body to appoint a litigation guardian for an adult is the court in which the relevant proceeding has been, or is to be, brought, and that the courts should therefore continue to have exclusive jurisdiction to appoint a litigation guardian.

[189] However, the Commission considers it desirable to enable the Tribunal to make an assessment of an adult's capacity for a proceeding. The Commission has therefore recommended (Rec 28-8) that section 241 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that:

- the court's power under section 241(1) to transfer a 'proceeding' to the Tribunal includes power to transfer to the Tribunal the issue of the capacity of a party to the proceeding; and

- to provide that the power to transfer the issue of party's capacity may be exercised not only by the Supreme Court, but also by the District Court or a Magistrates Court.

[190] The Commission has also recommended (Recs 28-7, 28-9) that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, if a court transfers to the Tribunal the issue of whether an adult is a person under a legal incapacity within the meaning of the *Uniform Civil Procedure Rules 1999* (Qld):

- the Tribunal may make a declaration about the person's capacity, and the court is entitled to rely on the Tribunal's declaration; and

- the Tribunal may make a finding about who would be appropriate to be appointed as the adult's litigation guardian, and the Tribunal's finding is evidence about the appropriateness of the person to be appointed as the adult's litigation guardian.

### Jurisdiction of the Supreme Court and District Court to exercise the power of the Tribunal to appoint an administrator

[191] At present, if a settlement has not been sanctioned by the court, and the court has not ordered that an amount be paid by a person to an adult, the court does not have the power under section 245 of the *Guardianship and Administration Act 2000* (Qld) to appoint an administrator for the adult to receive and manage the settlement proceeds.

[192] The Commission considers that section 245 does not adequately protect the interests of the parties (including the adult). It has therefore recommended (Rec 28-10) that section 245(1) be amended so that the section also applies if:

- in settlement of a civil proceeding, an amount is to be paid by another person to an adult; and
- the court considers that the adult is a person with impaired capacity to receive and manage that amount.

## CHAPTER 29 — REMUNERATION

### Remuneration of the Adult Guardian

[193] The Commission has recommended (Rec 29-1) that the *Guardianship and Administration Act 2000* (Qld) should not be amended to enable the Adult Guardian to charge for acting as an adult's guardian or attorney, for exercising power under sections 42 or 43 of the Act, or for acting as an attorney under section 196 of the Act during the suspension of an enduring power of attorney for personal matters.

### Remuneration of the Public Trustee

[194] The Commission has recommended (Rec 29-2) that the Public Trustee should continue to be entitled to charge for administration services provided under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

### Remuneration of trustee companies if State regulation becomes possible

[195] The Commission has made several recommendations that are intended to apply if, despite the amendments made to the *Corporations Act 2001* (Cth) by the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth), it becomes possible in the future for State legislation to regulate the remuneration of a trustee company that is acting as an adult's administrator under the *Guardianship and Administration Act 2000* (Qld) or as an adult's attorney for financial matters under an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld).

[196] The Commission has recommended that:

- section 48 of the *Guardianship and Administration Act 2000* (Qld) be amended to enable the Tribunal to order that a trustee company that is appointed as an adult's administrator (including one that was appointed before the commencement of the provision amending section 48) is entitled, subject to section 48(2), to such remuneration from the adult as the Tribunal orders (Rec 29-4);

- section 245 of the *Guardianship and Administration Act 2000* (Qld) be amended to enable the court to authorise the remuneration of a trustee company that the court appoints as an adult's administrator (Rec 29-5); and

- the remuneration of a trustee company that is acting as an adult's attorney under an enduring power of attorney be regulated by a provision to the effect of the repealed section 41 of the *Trustee Companies Act 1968* (Qld) (Rec 29-6).

## CHAPTER 30 — MISCELLANEOUS ISSUES

### Contracts entered into by adults with impaired capacity

[197] The submissions raised two issues in relation to contracts entered into by adults with impaired capacity. The first issue related to the fact that the application of the general law governing contractual capacity may cause considerable hardship where an adult with impaired capacity has entered into a disadvantageous contract. The second related to the power of an administrator to avoid a contract entered into by an adult with impaired capacity on the adult's behalf. In response to these issues, the Commission has recommended (Recs 30-1 to 30-5) that the *Guardianship and Administration Act 2000* (Qld) be amended to include a new provision to deal with the power of an adult who has impaired capacity to enter into a transaction in relation to his or her property and the consequences of the entry into the transaction by the adult.

[198] The proposed new contractual capacity provision is intended to apply to all adults who have impaired capacity and not be limited to adults for whom an administrator has been appointed. The provision:

- overrides the general rule, recently confirmed in *Bergmann v DAW* [2010] QCA 143 that, if an adult has impaired capacity for a matter and is subject to an administration order under the *Guardianship and Administration Act 2000* (Qld), the adult cannot validly enter into any transactions in respect of that matter while the order is in force; and

- shifts the onus of proof that ordinarily applies under the general law governing contractual capacity in relation to an adult who has impaired capacity for a matter (but who does not have an administrator appointed to exercise power for the matter) in favour of the adult and ensures that a contract between the adult and another person that is not made for adequate consideration may be avoided by the adult or by specified persons on behalf of the adult.

[199] Accordingly, the Commission has recommended that the proposed new contractual capacity provision provide that:

- if the adult enters into a contract or makes a disposition with, or in favour of, another person, without the leave of the Tribunal or the Court, the contract or disposition is voidable by:

  - the adult; or
  - an administrator appointed for the adult; or
  - an attorney appointed by the adult under an enduring power of attorney to exercise power for the adult for a financial matter to which the transaction relates during a period when the adult has impaired capacity;

- nothing in this provision affects any contract or disposition entered into or made by the adult if the other party to the contract or disposition proves that he or she acted in good faith and for adequate consideration and was not aware or could not have reasonably been aware that the adult had impaired capacity for the transaction; and
- nothing in this provision affects any contract for necessaries entered into by the adult.

**The Tribunal's jurisdiction to make a declaration about an adult's capacity to enter into a contract**

[200] To remove any doubt that the Supreme, District or Magistrates Court has express power to refer the issue of whether a person has capacity to enter into a contract to the Tribunal for a declaration, the Commission has recommended (Rec 30-6) that section 241(1) of the *Guardianship and Administration Act 2000* (Qld) be amended:

- to clarify that, for section 241(1), a 'proceeding' includes part of a proceeding, and includes but is not limited to, an issue about whether a person had capacity to enter into a contract; and
- to ensure that the power to transfer the issue of a party's capacity to enter into a contract may be exercised not only by the Supreme Court, but also by the District Court or a Magistrates Court.

[201] To clarify that the operation of section 147 is not limited to a subsequent proceeding but also extends to another proceeding that is already on foot, the Commission has recommended (Rec 30-7) that section 147 of the *Guardianship and Administration Act 2000* (Qld) be amended to refer to 'another' proceeding rather than to a 'subsequent' proceeding.

**Substitute decision-makers' right to information**

[202] To facilitate access to information by an attorney, the Commission has recommended (Recs 30-8 to 30-12) that section 81 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that:

- if a person who has custody or control of information does not comply with a request by an attorney to give information, the Tribunal may, on application by the attorney, order the person to give the information to the attorney;

- if the Tribunal orders a person to give information to the attorney, the person must comply with the order unless the person has a reasonable excuse; and

- it is a reasonable excuse for a person to fail to give information because giving the information might tend to incriminate the person.

[203] The Commission has also made recommendations (Recs 30-9 to 30-11) in relation to sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) and section 81 of the *Powers of Attorney Act 1998* (Qld) to ensure that the right to information conferred on a substitute decision-maker by these provisions:

- is no greater or no less than the adult's right; and

- includes a right to require the disclosure by an agency of personal information about the adult for whom the decision-maker is authorised to make decisions.

### Informal decision-makers' access to information

[204] To facilitate access to information by an adult's informal decision-maker, the Commission has recommended (Recs 30-13, 30-14) that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that an informal decision-maker may apply to the Tribunal for an order that a person with the custody or control of information give that information to the informal decision-maker. The Commission has also recommended (Recs 30-13, 30-14) that the proposed new provision also be subject to similar limitations to those described in [203] above.

### Use of confidential information: informal decision-makers and other persons

[205] The Commission is of the view that, in terms of the disclosure of confidential information, people who will have access to confidential information by reason of the Commission's recommendations about the right of informal decision-makers to information and about the right of certain persons to be given a copy of a community visitor report should be subject to the same requirements as people who receive confidential information by virtue of being a guardian, administrator, attorney or statutory health attorney.

[206] The Commission has therefore recommended (Rec 30-18) that the definition of 'relevant person' in section 246 of the *Guardianship and Administration Act 2000* (Qld) be amended to include:

- a person who obtains confidential information because of an order made under the provision that gives effect to Recommendations 30-13 to 30-17; and

- an interested person or advocacy organisation that receives a copy of a community visitor report under the amendments recommended in Chapter 26 in relation to section 230(3) or (4) of the *Guardianship and Administration Act 2000* (Qld).

[207] The Commission has also recommended (Rec 30-19) that section 249(3) of the *Guardianship and Administration Act 2000* (Qld) be amended to include an additional paragraph to ensure that a person who obtains confidential information because of an order made under the provision that gives effect to Recommendations 30-13 to 30-17 may use the confidential information for the purpose of making decisions on an informal basis for the adult.

### The definition of 'support network' for an adult

[208] The Commission considers it is important that the definition of 'support network' for an adult is sufficiently flexible to capture a diverse range of family and other supportive relationships for the adult. Accordingly, it has recommended (Rec 30-20) that the definition be retained in its present form, and should not, as suggested by one respondent, be limited to family members who have a close and continuing relationship with the adult and a personal interest in the adult's welfare.

### Community education and awareness

[209] The Commission has recommended (Rec 30-21) the provision of ongoing, publicly-funded and comprehensive community education programs about key aspects of the guardianship system. These programs should be widely available, easily accessible, and targeted to meet the specific needs of individuals and organisations in the general community.