The Public Trustee

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14 December 2011

The Chair,
Health & Disabilities Committee,
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Sub #9

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11.1.4.3

Dear Ms Lindy Nelson-Carr

Thank you for your letter of 17 November 2011 inviting submissions in response to the Health & Disabilities Committee Issues paper issued in November 2011.

I **attach** my submissions in respect of two areas discussed in that Issues paper:-

- The proposal in respect of registration of enduring powers of attorney,
- The proposal that the Public Trustee be appointed litigation guardian without its consent by order of the court.

I have explained in the submission attached that whilst the other matters are of great importance my office does not directly in the ordinary course involve itself in those issues and so therefore I have not made a submission in respect of them.

I appreciate the opportunity to provide a submission and am more than happy to provide the Committee with whatever assistance my office can provide.

Peter Carne
Public Trustee of Queensland

The Public Trustee

PUBLIC TRUSTEE'S SUBMISSION

HEALTH & DISABILITIES COMMITTEE

QUEENSLAND LAW REFORM RECOMMENDATIONS ON GUARDIANSHIP LAWS ENQUIRY

DECEMBER 2011

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1. **The Public Trustee's Submission – Scope:** The Public Trustee makes this submission to the Health & Disabilities Committee ("Committee") of the Queensland Parliament in response to the Committee's call for public submissions into aspects of Queensland's Guardianship Laws.

The Committee published an issues paper in November 2011 in respect of some reforms commended by the Queensland Law Reform Commission in its review of Queensland Guardianship Laws.

The Public Trustee seeks to make submissions (only) in respect of:-

- 6.1 Registration of an Enduring Powers of Attorney
- 6.2 Appointment of Litigation Guardian

The Public Trustee, whilst vitally interested in all matters pertaining to adults with a disability did not during the course of the Queensland Law Reform Commission Report make submissions in respect of advance health directives, the right to consent or refuse treatment, decisions to withhold or withdraw life sustaining measures or objections by an adult to health care (the other matters in the Queensland Law Reform Commission ("QLRC") Report referred by the legislative assembly to the Committee).

The Public Trustee does not make submissions to the committee on those matters largely because they are outside the direct experience and ordinary work of the Public Trust Office.

2. **Registration of an Enduring Power of Attorney:**

2.1 **QLRC Recommendation 16-15**: The Committee in its issues paper of November 2011 has referred for comment the issue of the possibility of registration of enduring powers of attorney asking "is it appropriate that registration of enduring powers of attorney is not required".

The QLRC recommended against a system of registration amongst other reasons because:-

- Such system may be limited in its capacity to ensure validity of an enduring power of attorney.
- There were some privacy concerns.
- There would be costs involved in the system and increased complexity which might not encourage adults to make such documents.

The Public Trustee in his submission to the QLRC of February 2010 offered some tentative views on a registration system – and the relevant parts of the Public Trustee's submission are attached for the Committee's benefit.

Briefly the Public Trustee offered that:-

- Purpose: The issue which attends is the purpose for which a register would be introduced. A register should not in the Public Trustee's view determine the validity of the document.
- Usefulness: A register may facilitate attorneys acting upon the instrument in circumstances where there has been difficulty in the past in having, particularly institutions, accept powers of attorney as valid forms of authority.

Importantly a register might serve to prevent financial abuse.

2.2 **Victorian Law Reform Commission**: The Public Trustee adds only to the submissions made to the QLRC by drawing the Committee's attention to a Victorian Law Reform Commission ("VLRC") consultation paper on guardianship – Consultation Paper 10 issued in February 2011.

The VLRC offered a tentative view that it was supportive of an online registration scheme which included notification of interested parties when an enduring power of attorney is activated (part 8.127 of the VLRC Consultation paper). Relevantly the VLRC attended to the following work:-

- **Other jurisdictions**: The VLRC noted that other jurisdictions do have registration systems.

  The Northern Territory has mandatory registration for enduring powers of attorney and Tasmania obliges registration for both the general and enduring powers of attorney.

  In the absence of registration in Tasmania the VLRC observed an enduring power of attorney is of no legal effect.

  Importantly the VLRC also considered the position in England and Wales where registration is also mandatory. Registration sits with the Public Guardian, there can be a search of the contents of the power and certain individuals must be notified upon registration.

  The notification provisions serve to allow certain individuals to object to registration but also a broader purpose, to ensure that others involved in the adult's life can become active in scrutinising the conduct of the attorneys.

- **Registration**: The VLRC has tentatively favoured an online registration scheme which includes notification of interested parties when the enduring power of attorney is activated.

The VLRC offered the view that "an online registration system would be more effective than a paper based register because it is more readily searchable ... provides 24 hour access, which is likely to be required by hospitals and it is readily updateable" (paragraph 8.142).

The VLRC offered that there were certain advantages of such a system:-

- it could provide safeguards to ensure that current and valid powers are registered
- it could reduce the potential for abuse of vulnerable people
- it would give the donor of the power (the principal) the appointee and third parties increased security
- it could provide protection against the existence of multiple appointments to different people (see paragraph 8.143)

- **The merit of notification**: The VLRC offered that certain individuals could be notified when a power of attorney is activated including the donor of the power (the adult) unless notification is impractical, public bodies such as the Public Trustee and people nominated by the donor of the power.

  It was suggested that such notification might provide "safeguards against an unscrupulous attorney. If the donor has lost capacity, it provides added protection to the donor by alerting concerned parties that the attorney is now actively using the power." (paragraph 8.148).

  In England and Wales prudential steps are taken by public officials when a power of attorney is activated.

2.3 **The Public Trustee's view**: The Public Trustee's view remains that a registration system has merit but needs to be balanced against the cost and complexity involved. It remains of interest that there exists two systems of prudential oversight for substitute decision makers for adults with an incapacity.

If a person is appointed an administrator or guardian QCAT pursuant to the *Guardianship and Administration Act 2000* maintains oversight by way of reviews of the substitute decision makers conduct.

An attorney however appointed under an enduring power of attorney is not subject to any prudential oversight although attorneys, administrators and guardians effectively operate under the same legal obligations.

3. Appointment of a Litigation Guardian

3.1 **QLRC recommendations 28-1 and 28-2**: The QLRC recommended (28-1 and 28-2) that the court ought have power to compel the Public Trustee to act as litigation guardian for adults with an incapacity.

The QLRC recommended that:

- The *Public Trustee Act 1978* (s.27) be amended so that the Public Trustee's consent is not required where the Public Trustee is appointed litigation guardian pursuant to the Uniform Civil Procedure Rules ("UCPR").
- The Uniform Civil Procedure Rules be amended to allow a court to appoint the Public Trustee as litigation guardian for an adult with impaired capacity for a proceeding that relates to the adult's financial or property matters.
- The Uniform Civil Procedure Rules be amended to provide that a litigation guardian acting for a defendant is not liable for costs unless the litigation guardian has acted negligently or with misconduct.
- The Uniform Civil Procedure Rules be amended to give discretion to the court "in the interests of justice" to make orders as to costs.

The Committee in its issues paper of November 2011 has asked:-

- Should the courts have the ability to appoint without consent the Public Trustee as litigation guardian "of last resort".
- What are the main costs and benefits of the appointment of the Public Trustee as litigation guardian?
- Should the court be able to appoint another person as a litigation guardian without their consent?

3.2 **The Public Trustee's position**: The Public Trustee's position is broadly set out in the Public Trustee's submission to the QLRC and for the convenience of the Committee the Public Trustee's submissions of February 2010 to the QLRC are attached.

In short the Public Trustee contended the Public Trustee's right to consent to the appointment to the role of litigation guardian (as exists in respect of all functions to which the Public Trustee might be appointed) should be retained and that in the alternate there should be legislative amendment to permit an administrator to litigate on behalf of an adult with an incapacity.

The Public Trustee offers for the Committee's consideration an alternate (to that of the QLRC) proposal:-

- **Role of Administrator**: That the *Guardianship and Administration Act 2000* and the UCPR be amended to permit an administrator (for financial matters) and a guardian (for personal matters) to litigate in that role without the need for a litigation guardian to be appointed.

  The role of a litigation guardian might remain but as currently exists in Tasmania, Victoria and South Australia the *Guardianship and Administration Act 2000* might be amended so that any administrator could defend or sue for an adult with impaired capacity without the need to consent to act as a litigation guardian.

  This power would be consistent with the present scheme under the *Guardianship and Administration Act 2000* and would obviate many of the concerns that the Public Trustee holds in respect of the QLRC's recommendations.

- **Caveated**: If the Public Trustee's preferred position – discussed above – is not accepted the capacity of the courts to appoint the Public Trustee as a litigation guardian should be caveated with the following legislative obligations:-

  - The appointment of the Public Trustee be explicitly one of "last resort"
  - The circumstances of the adult concerned (who lacks capacity) be referred to the Queensland Civil & Administrative Tribunal pursuant to the (amended) s.241 of the *Guardianship and Administration Act 2000* for the appointment of an administrator (recommendations 28-8 and 28-9 of the QLRC Report).
  - Where the Public Trustee is appointed litigation guardian either in the capacity as plaintiff / applicant or defendant / respondent the Public Trustee is not liable for any costs in the proceedings (an amended, expanded approach beyond that recommended by the QLRC in 28-4(a)).

3.3 **The concern of the Queensland Law Reform Commission**: The Queensland Law Reform Commission in its report set out the concern or mischief to which its recommendations were addressed:-

- "If no-one is willing to be appointed as litigation guardian for a person under a legal incapacity and the court does not have the power to appoint a person as a litigation guardian without the person's consent, it may mean that some actions simply cannot be commenced or continued" (paragraph 28.26 of the QLRC Report).
- "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" (paragraph 28.94 of the QLRC Report).

The Public Trustee in his submission to the QLRC in February 2010 and now seeks to assure the Committee that the Public Trustee is alive to the issues the QLRC discussed.

The Public Trustee in his submission to QLRC said:-

> *"The concern raised in the discussion paper is a very real one. The courts and importantly the parties to litigation should not be frustrated in having the litigation at hand disposed of because of the incapacity of the adult who is a party. More significantly the incapacitated adult should be positioned to progress meritorious litigation."*

Indeed the Public Trustee is and always has been firmly committed to advancing the interests of adults with an incapacity – it is central to the role and focus of the office.

The Public Trustee is appointed administrator for in excess of 7,500 adults with an incapacity. The majority of those clients cannot pay the costs of administration or the legal services required. In the annual report published for the financial year 2010/2011 the Public Trustee reported to the then Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State that the cost of providing services in this context amounted to some $16.5M for that financial year.

The recommendations however commended by the QLRC may have unintended consequences and may otherwise be responded to with legislative changes which might address the issues identified in a more comprehensive and cost efficient way.

3.4 **Difficulties with QLRC recommendations**: The Public Trustee respectfully would like to draw to the Committee's attention a number of difficulties or concerns in respect of the QLRC recommendations.

3.4.1 **The extent of the mischief**: In the Public Trustee's submission to the QLRC the Public Trustee related that it is difficult (and indeed likely impossible) for the Public Trustee to assess the likely cost and other impacts of the implementation of the QLRC's recommendations.

The Public Trustee observed (in his submission to the QLRC) that the QLRC "is well placed to appropriately research the number and type of matters contemplated by this amendment. Unfortunately the current discussion paper does not provide that detail to any extent."

Similarly the QLRC's report unfortunately did not describe the extent the problem to which it sought to address – that is the number or type of matters empirically which come before the courts in respect of which litigation is not finalised for want of a litigation guardian.

In the absence of any such evidence the Public Trustee, whose experience in this area is extensive, suspects that there are few matters to which these proposals are in fact addressed; there may however be many more if the recommendations were to be given voice in law.

3.4.2 **Costs**: The QLRC recognises the very significant potential impact that such recommendations might have.

The costs involved in the implementation of this recommendation impact at a variety of levels:-

- first a litigation guardian acting for a plaintiff bears the risk of adverse costs orders (that is the litigation guardian is obliged to pay the costs personally of the defendant) if the litigation is unsuccessful,
- second, there is a prospect that a litigation guardian may be compellable to pay the costs if acting for a defendant, giving rise to the proposed amendment recommended by the QLRC to clarify this position at 28-4(a),
- apart from the possibility of paying the costs of other parties in litigation the Public Trustee would also be obliged to bear the costs of retaining his own solicitors and counsel to advise and conduct the litigation (the Public Trustee as a functionary of the State would be obliged to engage legal advisors, indeed a litigation guardian can only proceed pursuant to the UCPR as it presently stands with solicitors on the record),
- in addition there are not insignificant administrative costs involved in pursuing litigation contingent upon the nature and complexity of the litigation at hand.

The scope of this potential exposure in respect of costs is difficult to estimate given the lack of empirical evidence as to the likely number of matters for which the Public Trustee might be appointed if the QLRC's recommendations are implemented.

The Public Trustee's experience however is that advancing a matter to trial in Supreme Court would ordinarily incur (modestly) between $100,000 - $200,000 of costs – which would be paid for from the Public Trustee's own corporate funds on the footing of this recommendation and the same amount might be ordered against the Public Trustee in each matter particularly if the Public Trustee as litigation guardian is unsuccessful.

The potential impact by way of costs then could amount to an impost of in excess of $1m each year at the suit of the Public Trustee.

The Public Trustee is a wholly self funding organisation and in doing so commits a significant amount of resources to community service obligations – indeed for the last financial year some $24.7M of community service obligations were delivered.

The financial position however is finite in terms of resources – the operating surplus for the last financial year of the office was some $300,000 (only).

The recommendations of the QLRC do not give sufficient comfort in respect of this potential exposure to costs.

The costs involved in engaging lawyers to act for an adult with an incapacity are not considered in any detail in the QLRC report.

Further the potential exposure to other parties' costs are dealt with by recommendations to extend the discretion of the court (as to whether costs should be ordered or not). There is no certainty that the Public Trustee acting as litigation guardian would not have costs visited upon it.

The QLRC identified that it was concerned about the implications of costs:-

> *"The Commission is conscious of the financial and administrative burden that the role of litigation guardian entails for the Public Trustee, both in relation to the Public Trustee's potential liability to pay the costs of the other party and the internal costs to the Public Trustee of actually conducting the litigation. However, that consideration needs to be balanced against the importance of ensuring appropriate safeguards for the rights and interests of adults with impaired capacity."* (Paragraph 28.95 of the QLRC Report).

The Public Trustee contends that those rights and interests can be appropriately safeguarded without recourse to the proposal that the Public Trustee be able to be appointed without consent to the role of litigation guardian.

3.4.3 **Unintended consequences**: The Public Trustee in his submission to the Commission offered that the amendments commended by the QLRC would result in greater advantage for a defendant to have litigation progressed by a plaintiff with an incapacity "for there are (assuming an indemnity is available) recourse to the funds not only of the adult with an incapacity through the indemnity but of the litigation guardian."

The Public Trustee offered that this position would seem to be curious and one which is unnecessary.

The Public Trustee restates those concerns to the Committee.

Ordinarily in litigation the unsuccessful party will pay the costs of the other.

This remains true of litigation where one party has an incapacity.

The position however is a little different where an adult with an incapacity sues unsuccessfully through a litigation guardian.

In those circumstances the litigation guardian (contemplated here to be the Public Trustee) is personally liable for the costs of the defendant.

So therefore the defendant who is successful can be quite sure that his or her costs will be paid by the State (the Public Trustee represents the State in the right of the Crown). The defendant in these circumstances of course is in a much better position in terms of costs or the likely recovery of costs than the defendant would have been had the adult not suffered an incapacity.

The Queensland Law Society in their publication "Elder Abuse: How Well Does the Law in Queensland Cope?" in June 2010 (jointly with the Office of the Public Advocate) succinctly offered a view in respect of this issue:-

> *"It is settled law that a litigation guardian is liable for the costs incurred by solicitors in conducting an action on behalf of a person with impaired capacity, as well as the other side's costs if the proceedings are unsuccessful. The litigation guardian is however entitled to an indemnity from the estate of the person they represent, provided the costs were properly incurred for the benefit of that person. Potential liability for costs may therefore discourage litigation guardians from commencing proceedings on behalf of an older person with impaired capacity, particularly where the older person's estate has been dissipated and an adverse costs order is made. ... It also places the other party to the application in a position of considerable advantage of costs."* (at page 11 of that publication).

The potential for there to be a distortion of this area of litigation for adults with an incapacity if the recommendations were reflected in legislation is, in the Public Trustee's submission, a real consideration.

Perhaps a succinct way to explain is to assume the role of a solicitor to advise the family of an adult with an incapacity and assume that the adult with an incapacity has a viable claim as a plaintiff.

The solicitor would need to explain to the family (who likely are caring and close to their family member) that one of them would need to act as litigation guardian for the matter to proceed.

If the amendments commended by the QLRC were reflected in law the lawyer likely would also need to explain that there is a personal liability which attaches to that role of litigation guardian – a personal liability for his or her costs and the costs of any barristers retained.

Further there would need to be an explanation that if unsuccessful the other sides costs would also need to be paid and that the person who acted as litigation guardian would be liable (personally) for those costs as well.

Finally however a solicitor would likely be obliged to advise that if none of the family members consented to act as litigation guardian there was a very real prospect that the court would order (particularly in the case of litigation already commenced) that the Public Trustee be obliged to accept the role and bear those risks of costs. There is in this way some great advantage in the family *not* accepting the role of litigation guardian but rather for the family to proceed with an application to have the Public Trustee appointed.

The prospect of the Public Trustee being appointed litigation guardian for matters which presently family members or others would assume is a very real one in the Public Trustee's view.

An unintended consequence then might well be that the Public Trustee might be appointed litigation guardian for many matters beyond that contemplated by the QLRC. It might be intended that the Public Trustee be appointed litigation guardian only as "last resort" but if other individuals who previously would have acted as litigation guardian refused to consent, in the knowledge that the Public Trustee might be compellable to act, many more matters might be presented to the Public Trustee.

3.4.4 **Effectiveness in the role**: The Public Trustee offers that changes to the legislative scheme in respect of litigation on behalf of adults with an incapacity more generally should be undertaken.

This includes changes so that an administrator can institute or defend proceedings in the name of the incapacitated adult as presently occurs in Tasmania, Victoria and South Australia.

One of the reasons for this approach it is offered is that the appointment of the Public Trustee as a litigation guardian in circumstances where the Public Trustee has no other relationship with the adult is likely to prove in practical terms unworkable.

This impracticability arises because the role of the litigation guardian is to advance proceedings in court either as a defendant or plaintiff.

A litigation guardian has no other role in the person's life for whom he (in the case of the Public Trustee) is appointed.

The Public Trustee, appointed litigation guardian without the Public Trustee's consent (as is conceived by the QLRC's recommendations) could not for example:-

- Generally obtain from the adult for whom he is appointed documentation or property or even access to the adult for whom he acts as litigation guardian. This is because the Public Trustee would not have any general right or power in respect of the adult's financial and legal matters beyond the litigation.
- Have recourse to the funds of the adult but for the indemnity which ordinarily flows – the Public Trustee would be obliged to fund specialist medical reports and outlays for the purposes of the litigation even if the adult concerned has funds or property. A litigation guardian does not by virtue of that appointment have an administrative or substantive right to access the funds of the adult for whom he or she is appointed.
- There may be very real difficulties in obtaining instructions – or obtaining the advices of the adult concerned – with no prior relationship with the adult. The conduct of the litigation is likely to be imperilled without the involvement of the adult with the incapacity.

As a consequence the relatively blunt instrument of compelling a statutory officer to act as litigation guardian will carry with it very real potential that the issue to be addressed – the progress of the litigation - cannot be.

3.4.5 **The substantive issue – the need for an administrator**: That which sets the context for the issue identified by the QLRC – litigation not being actively pursued in the absence of a litigation guardian is in truth likely not to be the central issue at hand.

From the perspective of a court however litigation sometimes comes before the court where it is apparent that there are concerns as to the capacity of one of the agitants.

The difficulty however is that there ought, in the Public Trustee's respectful view, be a consciousness that incapacity rarely emerges just in respect of litigation. If the adult lacks capacity to conduct litigation it is likely that the adult is more generally in need of support and perhaps a substitute decision maker.

More particularly it is likely that this need (for either a litigation guardian or an administrator) might have been identified at a much earlier point in time.

The QLRC in framing its recommendations in this respect made reference at paragraphs 28.34 – 28.40 to the Western Australian Supreme Court Decision of *Farrell v Allregal Enterprises Pty Ltd (No. 2) [2009] WASC 65.*

The characterisation of the case by the QLRC is respectfully quite accurate.

That which also needs to be examined however is that a succession of courts in that matter were not seized of the apparent incapacity of the party to the litigation – Mrs Farrell at an earlier point in time. In that matter the decision before Pullin J. was whether to appoint the Public Trustee of Western Australia in respect of three appeals.

The three appeals included appeals against:-

- Mrs Farrell by way of summary judgment for in excess of $1M by order of a Master of the Supreme Court in Western Australia.
- A decision by the Chief Justice to extend time in respect of a caveat lodged by or ostensibly on behalf of Mrs Farrell in respect of some real property.
- An order by the Chief Justice to remove certain caveats.

In all three of these matters it would seem from the judgment that Mrs Farrell (the incapacitated adult) appeared in court and made submissions (paragraphs 6, 8 and 10 of the judgment).

Pullin J. observed at paragraph 12 "It is arguable that the judgments entered in all three cases were irregular because they were conducted contrary to the rules and were liable to be set aside" (for want of a guardian ad litem).

That which emerges from the decision is that the court, with respect, was not seized of the issue that Mrs Farrell lacked capacity and judgments or orders were made against her on at least three separate occasions.

Of *Energex Ltd v. Sablatura [2009] QSC 356,* the QLRC had reason to examine the decision in support of its proposition that their needed to be law reform of the particular kind commended in the report.

In that matter it ought be recognised the Public Trustee did consent to act as litigation guardian and so the concern presented to the court was met.

The concern that (in addition to costs) which attended that matter included the finding that the court determined that the matter related to financial matters for which the Public Trustee was suited to act as litigation guardian. The litigation

there concerned an application by Energex Limited to restrain the incapacitated adult from interfering with Energex's rights pursuant to an easement.

The Public Trustee was at the time concerned as to whether it was the appropriate person to be appointed as litigation guardian. It is true that the matter concerned property rights insofar as they touched upon an easement but equally and perhaps more significantly the relief specifically sought (see page 2 of the decision) was to restrain the adult and to permit Energex to go onto the land. Restraint of the adult (the relief sought) is more likely a personal matter within the contemplation of the *Guardianship and Administration Act 2000* and the Public Trustee's reticence in this matter related not just to the costs involved but to whether it was a proper respondent to the application as litigation guardian.

This was not at the time related to the court, the decision being for the Public Trustee to act as litigation guardian.

In short, one of the primary concerns the Public Trustee has which are not necessarily addressed by the recommendations of the QLRC is the seminal difficulty of adults with an incapacity – that is people, including courts, recognising or being alive to the issue of incapacity and for appropriate substitute decision makers to be appointed to act on their behalf, in a timely way.

By the time litigation advances to the point of an injunction (in the *Energex* case) or appeal (in the Western Australian case of *Farrell*) matters have progressed to an unfortunately dire and urgent position.

That which the Public Trustee supports is that in these types of matters but preferably before reaching that stage, the courts refer adults in person who apparently have an incapacity to QCAT for the determination of whether an administrator needs to be appointed.

Frequently courts are not seized of reliable information or evidence before them as to whether there is an incapacity (often this is not central to the litigation at hand) although concerns about incapacity are patent.

A referral to QCAT would permit under the *Guardianship and Administration Act 2000* an assessment of capacity to take place.

More importantly perhaps however, QCAT would then be in a position to make a determination as to what type of substitute decisions need to be made and therefore fashion an appropriate appointment. Rarely would an adult who is incapacitated and before the courts have need simply for a litigation guardian – more likely their needs extend well beyond the conduct of the litigation.

Consequently the Public Trustee supports the recommendations by the QLRC at 29-9 that the *Guardianship and Administration Act 2000* be amended to provide for easier transfers of court matters to the Tribunal (QCAT).

More importantly however if this was accompanied by amendments to the *Guardianship and Administration Act 2000* to allow an administrator (and guardian) to sue in the name of the adult and to defend, the adult's interests more generally would be advanced without the potential for adverse costs orders to be payable by the administrator or guardian personally.

3.5 **The Proposal**: As foreshadowed in this submission the Public Trustee offers that a useful and balanced proposal is that the *Guardianship and Administration Act 2000* be amended so that an administrator (and guardian) relevantly can sue or be sued in the name of the adult for whom the administrator or guardian is appointed.

Consequential amendment ought be made recognising this power in the UCPR.

This proposal is likely to address the central issue of an individual being prepared to act in litigation on behalf of the adult with an incapacity because it would remove the prospect of adverse costs being payable by the substitute decision maker.

In Victoria such a provision applies, s.58B(2)(1) of the *Guardianship and Administration Act 1986.*

It allows an administrator to bring in the name and on behalf of a represented person legal proceedings.

The rules of the relevant courts in Victoria provide that "except where otherwise provided by or under any act" a person under a disability may commence or defend proceedings by a litigation guardian.

Because the *Guardianship and Administration Act 1986* permits litigation by an administrator a litigation guardian therefore is not required.

Similarly in South Australia the *Guardianship and Administration Act 1993* at s.39(j) provides that an administrator may "institute or defend, in the administrators own name or in the name of the protected person, any action or other proceeding related to the protected persons estate".

In Tasmania a similar provision to that which is reflected in South Australia and Victoria also applies – s.56 of the *Guardianship and Administration Act 1995* provides that one of the powers of an administrator included the power

to "bring and defend actions and other legal proceedings in the name of the represented person" (s.56(2)(l)).

Similar amendments are commended by the Public Trustee to the Queensland *Guardianship and Administration Act 2000.*

The QLRC found it unnecessary to consider such a proposal because (paragraph 28.118) "in view of the commission's recommendations in relation to costs, it does not consider it necessary to recommend an alternative system for bringing and defending proceedings by, or against, adults under a legal incapacity."

In the Public Trustee's respectful view amendment such as that proposed would:-

- Importantly permit administrators and indeed guardians to advance litigation on behalf of adults with an incapacity.
- The advancing of this litigation would not be at risk of adverse cost orders from other parties, but rather any costs orders would be visited upon the estate of the incapacitated adult.
- There is no proposal to change the current provision in the UCPR in respect of a litigation guardian which can and ought continue to run parallel to this capacity to sue.
- Administrators and guardians are more likely as a consequence to not only accept those roles but also to become involved in litigation where it is appropriate and necessary to do so on behalf of adults with an incapacity.

3.6 **Alternative Proposal**: If the Public Trustee's proposal set out above in 3.5 do not meet with the Committee's favour there is a need to further consider and revise the proposals commended by the Queensland Law Reform Commission.

First given that there is a real likelihood that others may choose not to act as litigation guardian given that the State would act as surety for the costs involved in the litigation (with the Public Trustee being appointed), any amendment to s.27 of the *Public Trustee Act 1978* should make it clear that appointment should only be as a last resort. Those words might be used.

Second that which is proposed by the QLRC in respect of costs does not advance matters significantly.

The proposal is that the current position in respect of acting as a litigation guardian for a defendant be reflected in the UCPR (that is a litigation guardian for a defendant is only obliged to pay costs personally if the litigation guardian has acted negligently or through misconduct) and that more generally there be

some discretion in the interests of justice to make orders as to costs at any stage.

Both of these recommendations are found at 28-4 of the QLRC report.

The Public Trustee submits that the UCPR should be amended so that the litigation guardian is simply not liable personally to meet costs in respect of litigation advanced or defended particularly where the Public Trustee has been appointed without his consent.

Cost orders should be able to be made against the estate of the adult for whom the Public Trustee is appointed.

The Public Trustee

PUBLIC TRUSTEE'S SUBMISSION

HEALTH & DISABILITIES COMMITTEE

QUEENSLAND LAW REFORM RECOMMENDATIONS ON GUARDIANSHIP LAWS ENQUIRY

ANNEXURE TO PUBLIC TRUSTEE'S SUBMISSION IN RESPECT TO DISCUSSION PAPER OF THE QUEENSLAND LAW REFORM COMMISSION FEBRUARY 2010

DECEMBER 2011

Authored By: Mark Crofton
Deputy Public Trustee and
Official Solicitor

9-12 Should the *Powers of Attorney Act 1998* (Qld) provide for registration of enduring powers of attorney, and why or why not?

9-13 If yes to Question 9-14:

(a) should registration be mandatory or optional; and

(b) what other features should the registration system have?

The question of whether there should be a registration system for powers of attorney turns upon what is the difficulty that is sought to be addressed.

The Public Trustee holds no strong view as to whether there should or should not be a registration system.

The question of registration is a significant one and to some extent one which requires broad consultation and careful consideration.

As the discussion paper rightly identifies – 9.99 and 9.97 – a register will have significant resource implications.

Before offering a view the Commission would be well-placed if it were to assess those resource implications so that the Attorney-General might be properly informed on any proposal which is offered. Research as to the practical experience of registration systems in the UK and Tasmania would be invaluable it is suspected.

If a registration system were introduced the Public Trustee does not agree that there would be an undesirable perception of conflict of interest (9.99) if the Public Trustee (and indeed any other part of Government) were to maintain that register.

The register as it is commended is uncontentious in respect of function – there simply would be no scope for there to be such a perception and the discussion paper does not identify on what basis such a perception might be founded.

The following are tentative views on the topic:-

- The question which arises is the purpose for which a register would be constructed. The discussion paper offers the view that registration might "bring (ing) a document into the public domain and establish(ing) its formal validity" (borrowing from the English Law Reform Commission).

- In the Public Trustee's view registration should not be determinative of the validity of a document.

- The reason for this position is to some limited extent exposed in the discussion paper at 9.83 and 9.84.

- The other reason for a register – that it would bring the documents into the public domain has some merit. The acceptance of particularly institutional lenders of enduring powers of attorney has been problematic for some time although it might be that this concern might be addressed by discussions directly with those institutions, perhaps at Government level.

- A registration system may have merit if it is coupled with a form of statutory insurance – that is part of the registration fee funds a form of statutory insurance for those who suffer a loss caused by the "misuse" particularly of enduring powers of attorney. For this to be viable it would be likely that registration should be compulsory.

- Such a scheme might bear similar framework to that exists in the Torrens Titling System in Queensland (see sections 188 – 190 *Land Title Act 1994*).

- The scheme would not be predicated upon a loss of title but rather a loss caused by the fraud or misuse of particularly an enduring power of attorney by the attorney. The State could be subrogated to the rights of the principal should compensation be paid as is the case for those who lose an interest in a lot under the Torrens System (section 188 (2) and section 190 of the *Land Title Act 1994*).

- So that there is no distinction between loss occasioned by the similar roles of financial administrators and attorneys the scheme might also be conveniently extended to losses at the hands of financial administrators.

  A statutory insurance scheme particularly for elder financial abuse, largely self-funded through registration fees, might represent a very real and practical step in addressing the concerns that the Public Trustee has in respect of financial abuse by fiduciaries in this area.

  It is appreciated that the discussion paper does not raise such a proposal as a discussion point.

9-16 Should the *Powers of Attorney Act 1998* (Qld) include any notice requirements in relation to the execution or commencement of an enduring power of attorney?

9-17 If yes to Question 9-16, what sort of notice should be required:

(a) notice of the execution of an enduring power of attorney;
(b) notice of the attorney's intention to begin exercising power under the enduring power of attorney;
(c) some other notice?

The questions posed are largely contingent upon the Commission's final recommendation as to a registration system and so therefore are difficult to address.

There is however merit in the proposal offered that notices should be given as discussed at 9.108 in respect of enduring powers of attorney when the attorney intends to act pursuant to the document, subsequent to the loss of capacity of the donor.

The reason that such notices might be of benefit is largely that reflected in that offered by Brian Herd and footnoted – 729, excerpted in 9.111 – that is letting particularly family know that an EPA is to be operated upon might introduce a level of scrutiny which otherwise would not apply.

The difficulty of course in this respect is that in the absence of a capacity for those to whom notices must be sent to scrutinise the actions of an attorney in a very real way such notices might be of little effect in this regard.

Further the requirement for notices carries with it an administrative burden which likely will be frequently overlooked.

It has been previously commended in this paper that thought should be given to attorneys submitting to the same level of scrutiny and prudential oversight as administrators – notices coupled with that initiative might yield greater transparency.

19. **Chapter 23 – Legal Proceedings Involving Adults with Impaired Capacity:**

23-1 Should a person's consent generally be required in order for the court to appoint the person as a litigation guardian for a person under a legal incapacity?

A person's consent should be required in order for the Court to appoint the person as litigation guardian. It is of interest to note that until 1 July 2000, Rule 95 (3) UCPR provided "a Court may appoint a person a litigation guardian only if the person consents to that appointment".

That subsection was repealed by the Uniform *Civil Procedure Amendment Rule (No. 1) 2000.*

Whilst it has not been the subject of a general enquiry or debate and there are no explanatory notes to the amendment to Rule 95 (3) it would seem that there was a decision taken in Queensland to remove the requirement for consent. For the reasons offered in the discussion paper – 23.22 – personal liability for costs as well as costs of the legal representative as well as the responsibilities of the task itself a person's consent must be obtained. To do otherwise would be to adversely affect the rights and interests of the litigation guardian appointed without agreement.

23-2 **Should section 27 of the *Public Trustee Act 1978* (Qld) be amended so that section 27(3) which requires the consent of the Public Trustee, does not apply to the appointment of the Public Trustee as a litigation guardian for an adult under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld)?**

23-3 **Alternatively, or in addition, should the *Guardianship and Administration Act 2000* (Qld) be amended:**

(a) **to include, as an additional function of the Adult Guardian in section 174, 'acting as the litigation guardian of an adult in a proceeding not relating to the adult's financial or property matters';**

(b) **to provide that the Adult Guardian may exercise the power under rule 95(1) of the *Uniform Civil Procedure Rules 1999* (Qld) to file a written consent to be the litigation guardian of an adult in a proceeding not relating to the adult's financial or property matters; and**

(c) **to provide that the court may, under rule 95(2) of the *Uniform Civil Procedure Rules 1999* (Qld) appoint the Adult Guardian, without the Adult Guardian's consent, as the litigation guardian of an adult in a proceeding not relating to the adult's financial or property matters?**

The Public Trustee contends that section 27 of the *Public Trustee Act 1978* is largely outside this reference.

Notwithstanding that concern section 27 should be amended to remove doubt that the Public Trustee has a power to refuse appointment as litigation guardian.

There are a number of factors and matters which should be considered:-

- **The Concern**: The concern raised in the discussion paper is a very real one. The Courts and importantly the parties to litigation should not be frustrated in having the litigation at hand disposed of because of the incapacity of the adult who is a party. More significantly the incapacitated adult should be positioned to progress meritorious litigation.

  In the Public Trustee's experience – which is extensive, the majority of matters in which the Public Trustee is asked to act as litigation guardian are ones where litigation has already been commenced, usually with the incapacitated adult as plaintiff.

  Difficulties arise with taking instructions and a view is formed that a litigation guardian is required.

  Alternatively the litigation guardian originally acting in that capacity no longer wishes to.

  It is from such a matter that *Fowkes v Lyons* (23.21) emerged.

- **Before Litigation**: The power to compel the Public Trustee, a functionary of the State, to act as litigation guardian may have unintended consequences.

  Given (particularly in respect of costs of legal representatives and the defendant's costs where the litigation guardian acts as plaintiff) there would be great attraction both for solicitors for the plaintiff and defendants to favour the Public Trustee as litigation guardian – that is well beyond the Public Trustee acting as litigation guardian of last resort.

  The State as surety for those costs would be attractive both for other parties to the litigation and the solicitors of the incapacitated adult – in short that which would likely emerge is the Public Trustee as a litigation guardian of choice given the favoured position of costs that a State agency offers to other parties.

  This would be a most concerning trend if it were to materialise particularly in light of the preferred position currently that family members assist adults with incapacities and others should be sought out for their views if not assumption of such a role, as litigation guardian.

- **The Roles to be Played**: No distinction is made in the discussion paper as to a very important distinction as to role.

  This attends in two dimensions:-

  - First the Public Trustee's experience and knowledge extends to acting as financial administrator for adults with impaired capacity. It does not apply for example to "personal matters".

    The Public Trustee appointed litigation guardian where the matters agitated are largely if not wholly, dealing with personal matters would put the Public Trustee in a difficult position of acting in a role beyond his existing competence and knowledge.

    An illustration may assist. In that matter of *Energex Limited v Sabilatura* referred to in response to question 4-1 and 4-2, the relief sought was relief to (physically) restrain if necessary an adult with an incapacity from interfering with the rights of Energex.

    The Public Trustee (at the end of the day) agreed to act as litigation guardian in response to that application.

    In truth however the litigation very much dealt with personal matters – the physical integrity of the adult with an incapacity.

    Other litigation might be imagined where the Public Trustee might be compelled to act as litigation guardian; family law matters, custody matters, matters dealing with where the adult lives, health care matters to name but a few are all matters which ordinarily are attended to within the scope of the legislative framework by a guardian and if they were to be litigated should be attended to by first a person who accepts such an appointment and second, a person (or organisation) with existing competence in respect of such areas.

Judgments in this area are fine ones and a simple default position of the Public Trustee may not be appropriate in many circumstances - or desirable for the adult with an incapacity.

- There is a difference between matters for which the Public Trustee is already appointed administrator for an adult and those which the Public Trustee is not.

  In matters for which the Public Trustee has an existing administration order, close scrutiny and involvement in any litigation (where there is a plenary order) has already occurred – given that the Public Trustee as administrator has a decision-making role in *legal* matters.

  This is different from matters where the Public Trustee has no connection with the adult concerned previously. That absence of a connection puts beyond reach the powers of an administrator to fully inform the administrator of all of the circumstances attending upon the adult, including a recourse to the adult's assets should the case so demand.

Accordingly a serious concern raised by the Public Trustee if the power to consent were removed is that the Public Trustee as a litigation guardian without power to refuse, might be compelled to act in matters and cases which properly should be the province of others, including other entities with competence in those areas (personal matters as they are understood in the GAA). Further, the absence of any nexus with the adult with an incapacity may prove very difficult for the Public Trustee to properly conduct any such litigation.

- **Special Functions:** The discussion paper contends that there is some analogy between the functions the Public Trustee undertakes by statutory fiat of a public nature pursuant to the *Public Trustee Act 1978*. A clear analogy cannot be drawn.

  The Public Trustee remains able to consent to (or refuse) appointments of a fiduciary capacity pursuant to section 27. The functions of a public nature are limited temporally and in terms of endeavour and effort.

  These are discussed elsewhere in this paper but include a quasi judicial power to sanction (section 59) to audit trusts (section 60) to sign release of mortgages and transfers (sections 61 and 62). Those functions are finite in resources required and time involved.

  Even the obligation to administer the property of prisoners is subject to the Public Trustee's capacity to discontinue such management (see part 7 of the *Public Trustee Act 1978*).

- **Costs**: That which might emerge from such a proposal is that the Public Trustee as litigation guardian be exhausted in terms of resources with the introduction of a defacto legal aid scheme through the amendment proposed.

  That is not to say that the Public Trustee is not vitally interested in the proper husbanding of litigation in respect of adults with an incapacity - rather it places into focus the type of resources that might be required should the Public Trustee be compelled to act in all or any matter where a litigant has a relevant incapacity.

  The legislature will need to arrive at a view but the Commission is well placed to appropriately research the number and type of matters contemplated by this

amendment. Unfortunately the current discussion paper does not provide that detail to any extent.

It would be a curious position in this regard as well that the Public Trustee in respect of the fiduciary relationships it enters into has a choice pursuant to section 27 but for the matter of litigation guardian; as good or better argument might be made for the Public Trustee being compellable to act as a trustee or executor when there his no other person appropriate and competent. The issue is one of resources and public benefit for Government to determine.

- **Alternative**: The Law Reform Commission has not sought to explore alternatives to that which is proposed.

Very much the issue of financial impost is a real one as canvassed in the discussion paper – 23.31.

Given the comprehensive regime established by way of the POA and the GAA might not consideration be given to an alternative to the role of litigation guardian?

Might an adult with an incapacity commence or defend litigation through his or her attorney or administrator (and not as litigation guardian) and that the attending rules or provisions expressly provide that the costs of other parties might be visited only upon the adult with an incapacity and not the attorney or administrator?

The rationale for the position of the litigation guardian qua costs described in *Rhodes v Swithenbank* (1889) 22 QBD 577 – and footnote 672 is to ensure the proper and appropriate conduct of the litigation guardian. This is also reflective of that which is discussed in footnote 963 that the litigation guardian, in the role of defendant generally is not liable for costs, but as plaintiff is exposed.

The Courts retain now close supervision of all litigation but particularly civil litigation. It would be unusual for an administrator or attorney as it is proposed conducting litigation on behalf of an adult to do so inappropriately; moreover the prudential framework attending administrators for the present adds another layer of assurance in this regard.

Such a change would enable adults with an incapacity through their attorneys or administrators to litigate as would be the case for any other person with capacity – that is putting at risk on the most dour approach the adult's property (but not that of the administrator or attorney).

In one way presently it is of greater advantage for a defendant to have litigation progressed by a plaintiff with an incapacity for there are (assuming an indemnity is available) recourse to the funds not only of the adult with an incapacity through the indemnity but of the litigation guardian.

This would seem to be a curious position and one which is unnecessary.

In short rather than that which is propounded in the discussion paper the Commission should be minded given the framework which exists and the curious results which attend through the engagement of the litigation guardian provision to statutorily permit attorneys and administrators to litigate on behalf of incapacitated adults in the name of the adult.

Such is occasionally already permitted in Queensland where an incapacity arises during the currency of litigation as opposed to before inception (*Fowkes v Lyons* was a matter where a litigation guardian was not appointed).

As the Commission is no doubt aware such a provision already exists for example in Tasmania pursuant to section 56 (2) (l) of the *Guardianship and Administration Act 1995* which holds that an administrator may:-

> "bring and defend legal actions and other legal proceedings in the name of the represented person"

The Public Trustee will, of course, implement successfully any changes required by Government.

23-4 Should section 241 of the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that, for section 241(1), 'proceeding' includes an issue about the capacity of a party to a proceeding before the court?

23-5 Should section 241 of the *Guardianship and Administration Act 2000* (Qld) be amended so that the power to transfer to the Tribunal an issue about the capacity of a party to a proceeding before the court may also be exercised by:-

(a) the District Court;
(b) a Magistrates Court?

Section 241 of the GAA might be amended usefully so that proceedings includes an issue about the capacity of a party and that power should also extend to matters before the District and Magistrates Courts.

It is a very real issue for Courts attended by litigation when there are concerns raised sometimes directly but sometimes indirectly in evidence about matters of capacity of one of the parties.

The Court in those circumstances may embark upon its own enquiry as to capacity but an effective mechanism and one which exists for this purpose is to have the matter referred – that is of capacity to QCAT.

23-6 Should section 245(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to include the circumstance where an amount is payable under a settlement agreement by another person to an adult, not being a settlement sanctioned by the court?

Section 245(1)(a) should be amended so that the Court has broader power to appoint an administrator or refer the matter to QCAT and in particular where the jurisdiction of the Court is not otherwise currently triggered.