



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Legal Advocacy for vulnerable people with Disability

Guardianship and Administration and Other Legislation Amendment Bill 2016

**Submission by Queensland Advocacy
Incorporated**

Department of Justice and Attorney-General

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI does this by engaging in systems advocacy work, through campaigns directed to attitudinal, law and policy change, and by supporting the development of a range of advocacy initiatives in this state.

QAI also runs three individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program. Our experiences in providing legal and advocacy services and support for individuals within these programs has provided us with a wealth of knowledge and understanding about the experiences, needs and concerns of individuals who are the focus of this inquiry.

At the outset, QAI makes the important point that there should never, in this legislation or elsewhere, be a presumption or a decision that a person has no capacity. All people have some capacity at some times for some decisions and can be supported to make some of them. In their paper, 'Equality, Capacity and Disability in Commonwealth Laws', the Australian Law Reform Commission referenced a submission of the Mental Health Coordinating Council which noted:

The role of family members and carers should be recognised in Commonwealth laws. The supporting policy frameworks must reflect that those assessing capacity and supporting decision-making must listen to, learn from and act upon communications from the individual and their carers about what is important to each individual. This involves acknowledging each individual is an expert on their own life and that their 'recovery' and care involves working in partnership with individuals and their carers to provide support in a way that makes sense to them and that assists them realise their own hopes, goals and aspirations.

QAI affirms these sentiments and submits that this approach should inform the current legislative review.

A second important issue we wish to raise from the outset is that, for the purposes of this review and indeed for all purposes, a reference to 'carers' must be a reference to the family, friendship and informal relationship arrangements a person with disability may have, not to paid support workers. This important distinction is discussed below.

As a final initial point to note, QAI submits that that the legislation should clearly establish the position that when applications for guardianship are made, there should be no presumption or entitlement for statutory bodies to be involved, unless the circumstances clearly warrant otherwise.

QAI's Submissions on the Amendment Bill

Reforms to the *Guardianship and Administration Act 2000 (Qld) (GAA)*

Capacity (Clause 5)

The Amendment Bill proposes to replace the current s 11 of the GAA with a new section which broadens the scope of the provision to include whenever a person or entity performs any function or exercises any power regardless of whether the adult has capacity, they must apply the General Principles, including the presumption of capacity. Previously the

application of the General Principles has been limited to functions or powers performed for a matter relating to an adult with impaired capacity.

QAI supports this extension of the scope of operation of the General Principles and recommends that these principles, as core human rights principles, should not be limited in their application. A similar broadening is afforded to the Health Care Principles, which is consistent with the QLRC recommendations.

However, the proposed s 11(2) states that if the tribunal or the court has appointed a guardian or administrator for an adult for a matter, the guardian or administrator is not required to presume the adult has capacity for the matter. This suggests that the initial presumption will be of incapacity, rather than capacity, once a guardianship order has been made. QAI holds concerns about this section as it could potentially subject a person to an order that is not required, particularly in circumstances where they have limited support networks to assist them to advocate for themselves.

QAI submits that there should always be the requirement to start with the presumption of capacity, irrespective of any order or decision – as noted above, there should never be a presumption or a decision that someone lacks capacity. This is required by the United Nations Convention on the Rights of Persons with Disabilities (CRPD). It is also consistent with the recommendations of the QLRC. In our opinion, to presume incapacity until otherwise proven is inconsistent with the presumption of capacity established by General Principle 3(1), which pursuant to Clauses 6 and 39 should always be applied.

Sub-section 11(3) qualifies s 11(2), providing that it does not apply to the extent an order appointing a guardian or administrator includes a term of the type mentioned in section 12(3) (found in Clause 7). **QAI supports this qualification as it addresses the issue of fluctuating capacity.** This is important and appropriate given that it is well understood that capacity can alter over time and guardianship orders can run for substantial periods of time.

Chapter 2A Principles (Clause 6)

QAI supports both the insertion of the General Principles and the Health Care Principles at the beginning of the legislation and their amendment to align more closely with the CRPD, for example by:

- the extension of ‘same human rights’ (the second General Principle in s 11B(3)) to include ‘same human rights and fundamental freedoms’; and
- the extension of the principles on which human rights and fundamental freedoms are based and which are to be taken account of.

While we note that this is not consistent with the QLRC’s recommendations, we agree that commencing both the GAA and the POA Acts with the General Principles will help to bring attention to them and remind decision-makers to apply them, and encourage increased compliance with human rights principles. QAI is hopeful that this new prominence, coupled with the newly expanded scope, will be a step towards ensuring that the General Principles are authentically translated into practice by decision-makers applying the Acts.

QAI has held concerns, notwithstanding that the General Principles expressly recognise some of the human rights proclaimed in the CRPD, that in reality the human rights of a person facing a guardianship order are often given little or no consideration. In QAI’s experience, this is particularly so in the making of an interim order or when a hospital or service provider makes an application for the appointment of a guardian or administrator. It is during these times that the General Principles are often overlooked or not considered and so the individual’s human rights fail to be enlivened.

QAI recommends that safeguards also be introduced to ensure that entities do not give selective weighting to the General Principles in a way that skews the decision-

making process to the statutory body's objectives. For instance, some decision-makers weigh *Principle 10 – Appropriate to the circumstances* more heavily than *Principle 2 – Same human rights*. As a result, the decision-making process is skewed to the statutory body's objective, rather than the individual's.

In QAI's experience, people living in supported accommodation are assailable to abuse, neglect, exploitation and the unlawful and/or coerced use of cruel, inhuman and degrading treatment commonly referred to as Restrictive Practices in the name of managing what is called 'challenging behaviour'. This is especially true for people with no family, friends or advocates to safeguard them. However, even informal familial and friendship relationships can be subjected to manipulations by combative service providers or others, and even indifferently enabled by bureaucracy including formal statutory guardians.¹ While QAI supports the introduction of the requirement that informal decision makers must also apply the General Principles, there must be due diligence to preserve the 'natural authority and authenticity'² of a supportive family and/or informal network.

QAI supports the amendment to the fourth limb of General Principle 9 in s 11B(3) (structured decision-making), whereby advance health directives and Enduring Powers of Attorney must inform the decision-making. This proposal is consistent with the approach taken in the new *Mental Health Act 2016* (Qld).

Eligibility to be a guardian/administrator (Clauses 10 & 11)

QAI considers the use of the term 'paid carer' inappropriate. Carers are not support workers, nor are support workers carers. To conflate these terms potentially creates confusion. While in this submission we have mirrored the terminology used in the amendment Bill for the sake of clarity and consistency, QAI submits that rather than using the term 'paid carer', the reference should be to 'support worker' or 'waged employee'. Carers can be children, neighbours, friends or family members. Support workers may also in some instances be in these roles, but the difference lies in remuneration – support workers draw a wage in payment for services rendered. Carers receive an allowance or pension or sometimes both from Centrelink as financial support as the carer may have given up work to care for the person, or an allowance to cover some of the costs in caring for someone.

QAI is concerned to ensure that being a 'paid carer', or a past 'paid carer', does not preclude a person from eligibility to be a guardian or administrator. Where a person is no longer in a paid formal employment arrangement, there is no ostensible reason why a conflict of interest would exist. While being a current paid support worker may give rise to the potential for a conflict, this should not be decisive and should only be one relevant consideration for the tribunal to consider. In some circumstances, a paid (or previously employed) support worker may be the best, or only, informal support that a person has and may therefore be the most appropriate choice of guardian. QAI proposes that a case-by-case approach should be taken to determine appropriateness, with due diligence recommended. It appears that the amendment is attempting to address the concern that service providers are appointed; in our opinion, this concern could be neutralised by including 'service providers' as an example in the definition of health care provider. The prohibition on service providers being appointed is consistent with the DSA principle that no one service provider should exercise control over the life of a person with a disability. If included, QAI submits that this exclusion:

- should be limited to a set time and we propose, for consistency, that a similar timeframe is applied to that applicable in POA (the preceding three years);

¹ See <http://www.smh.com.au/nsw/mother-branded-mentally-ill-after-complaint-20100929-15xij.html>.

² <http://cru.org.au/wp-content/uploads/2014/04/4.-The-Natural-Authority-of-Families-MKendrick-CT45.pdf>

- should be only one of the considerations and whether it is a relevant factor to consider should remain at the Tribunal's discretion.

Appointment review process (Clause 14)

QAI agrees with the insertion of 5A into s 31 as this:

- is more closely aligned with the CRPD and the General Principles themselves; and
- reflects that a person's circumstances do change and where they once may not have had the support network they do now.

This insertion arguably makes it easier to have an individual appointed when the PG is already in place. This is particularly important with regards to interim orders (up to three months) when the Public Guardian is appointed, often this appointment is made without full appreciation of the relevant facts or on the asserted risks of the applicant requesting the interim order. In practice, if the Public Guardian is appointed under an interim order, they are routinely appointed if a longer order is made.

Increased obligations to consult (Clause 25)

The new s 68A of the GAA imposes obligations on the Tribunal to consult with the listed people/entity. It is not yet clear what the obligation to consult will encompass and we query whether this will mean greater emphasis on a statutory guardian, as opposed to an individual guardian.

QAI asserts that **all informal supporters must consult with the person.**

QAI makes the following recommendations regarding the development of this obligation:

- Given that family members or friends may know the person best, **the obligation to consult should not be too onerous** if it is merely to gather information about the person, although this consulting requirement will depend on a range of factors – number of services involved, co-tenants, living arrangements, etc.
- **Informal supporters should be encouraged to apply the same principles**, but if family members seek guardianship to protect the person from overly controlling external factors such as service providers, this information should be provided to QCAT and the Tribunal members should be required to give serious consideration to the relationship with the service provider and informal supporters.
- Where family members have taken formal guardianship because of the difficulties that they encounter with telcos, banks etc, this points to a clear need for community education about guardianship being the last resort and least restrictive – **the community must respond to informal supporters**. Government has a role to play in providing community education with assistance from peaks such as Business Councils, Chambers of Commerce, banks, etc.
- It must be recognised that some people may apply for guardianship in order to exert control over the person, for ease of management or to exploit the person. While it may be difficult to have a range of responses to the reasons for guardianship applications, the requirement to abide by the General Principles will hopefully see a reduction in applications.

QAI submits that **there should be a framework of relevant factors that must be addressed in such consultations, with a requirement that the least restrictive/last resort principle be applied.** QAI also seeks clarity regarding the impact of any amendment on the operation of the new MHA 2016.

Special Witness Provisions (Clause 27)

QAI supports the extension of the vulnerable witness protections contained in s 99 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) to guardianship proceedings.

Power to Appoint a Representative (Clause 29)

QAI supports the amendment of s 125 of the GAA to permit any member of QCAT to appoint a representative for an adult, where they are concerned the adult's views, wishes and preferences are not being properly represented. If a person does not have a support person or advocate or if they cannot attend the hearing, the Tribunal members will often only hear the version presented by the applicant for the order and will not consider the person's rights.

QAI submits that, in circumstances where the person or their support person/advocate/legal representative cannot attend, consideration should be given to adjourning the hearing until such time as the person and their support people can attend. A relevant consideration in this regard is the risk that this could potentially see an increase in 'on the papers' decision and/or orders being extended or interim orders being made – QAI asserts that this should be avoided as much as possible. The overriding consideration should be to ensure that all measures are taken to enable the person and their support persons to be prepared and attend in person, by phone or video-linkage, and to guard against the practice of scheduling hearings without sufficient notice or consideration of the person's support needs.

Interim Orders (Clause 30)

QAI is eminently concerned that current legislation and the proposed amendments are silent on the Tribunal consulting with the adult and family when making this type of order. We know of cases where interim orders have been made without speaking to either of these parties. **QAI is of the view that s 130 should *oblige* the Tribunal to consult, and given the Tribunal's practice in this regard to date, we submit that this requirement should be mandated in a more enforceable way.**

Insertion of New Chapter 11, Part 4A (Clause 34)

QAI supports the introduction of Part 4A and considers it a much-needed addition to the legislation. Section 250 designates the Minister with responsibility for preparing guidelines to assist persons required to make assessments about the decision-making capacity of adults in making those assessments.

QAI considers that the content of the Minister's guidelines will be critical to the impact of this amendment. The proposed s 250(3) requires the Minister, in preparing the guidelines, to consult with persons who have qualifications relevant to, or experience in, making assessments about the capacity of adults to make decisions about matters. QAI submits that the Minister should make reference to the Chief Psychiatrist guidelines in assessing capacity under the MHA 2016 in drafting the guidelines. This would help to ensure consistency with the MHA 2016, which is particularly important given that capacity is likely to be challenged through QCAT. QAI emphasises, however, that **it is important to ensure that this does not result in conflation of disability and mental illness**, but rather provides a consistent method for assessing capacity.

QAI seeks to be included as a relevant stakeholder in the development of these guidelines. As previously advised, QAI (in conjunction with Allens law firm) has developed a *Handbook for Practitioners on Legal Capacity*.³ This is a useful tool for understanding capacity in the Guardianship regime and may assist in the preparation of these guidelines.

³ Available on our website: www.qai.org.au.

QAI recommends the following are considered when developing the guidelines:

1. Should the draft guidelines be published and open to public submission?
2. In assessing capacity, the functional approach should be used.
3. The appropriate timeframe for review, in light of the supported decision making movement and Article 12 CRPD, should be no longer than three years, with a mechanism for early review of the guidelines be included.
4. Who would be using these guidelines and in what circumstances?
5. What happens if someone does not follow these guidelines? Is there a penalty?
6. The principles encompassed within the guidelines must include:
 - a. that capacity is decision, domain and time specific, that the person's decision-making ability is assessed, **not the** decisions made.
 - b. that the person's privacy is respected.⁴
7. The availability of decision-making support.

We understand the draft guidelines will be provided at a later date for feedback and we welcome the opportunity to do so, particularly in light of the principles of presumed capacity and support for decision making.

Transitional amendments (Clauses 35 – 37)

Part 12 of the Bill sets out transitional provisions for the Act.

Section 37(1) amends Schedule 2 by extending the list of personal matters for an adult (defined as a matter, other than a special personal matter or special health matter, relating to the adult's care, including the adult's health care, or welfare), to include who may have access visits or other contact with the adult and advocacy relating to the care and welfare of the adult. Section 37(2) includes entering a plea on a criminal charge for the adult as a special personal matter (one outside the scope of the guardian's powers). **QAI agrees with the QLRC's position that these are appropriate matters to include.**

Reforms to the Powers of Attorney Act 1998 (Qld) (POA) (Clauses 38 – 65)

For the reasons noted above, **QAI supports the proposal to amend the POA to ensure that all persons or entities performing a function or exercising a power under this Act must not only comply with, but must also apply, the General Principles. QAI supports the inclusion of an express statement of the (expanded) General Principles and Health Care Principals at the start of the POA.**

Section 40 (Clause 40) amends the meaning of 'eligible attorney' for s 29 of the Act, and imposes as an additional eligibility criteria that the person must not have been a 'paid carer' for the principal in the past three years. As noted above, the distinction must be made between 'carers', support workers and 'service providers'. Further, this requirement could limit a person's ability to appoint an attorney, particularly if their network is limited. QAI is concerned that the criterion that the attorney has capacity, which was presumably added to lessen the risk of abuse or exploitation, may be difficult to enforce unless the matter ends up before QCAT.

QAI supports the amendment contained in Clause 43 (advance health directives) to declare that AHDs may be made by an adult principal who is outside the state, which means that

⁴ Refer to submission by Victoria Legal Aid petitioning the inclusion of these principles in Commonwealth Law, which we contend should appear in state law: *Equality, Capacity and Disability in Commonwealth Laws : Submission to the Australian Law Reform Commission's Issues Paper (January 2014).*

regardless of whether person lives interstate or overseas and makes an AHD under Qld legislation it is valid in Qld. Similarly, QAI supports the amendment contained in Clause 41 permitting an EPOA to be made by a principal residing outside of the state.

Section 41 is amended by Clause 44 to require that a principal may only make an enduring power of attorney if they are capable of making it freely and voluntarily. A further subsection is added (s 41(3)) to clarify that the definition of 'capacity' in Schedule 3 does not apply to this section. A similar qualification is added to s 42 by Clause 45, with the effect that the definition of capacity also does not apply to the principal's capacity to make an advance health directive. QAI supports the attempt to balance accessibility and user-friendliness of these orders whilst safeguarding against abuse. However, QAI is concerned that this definition may not contain appropriate safeguards. QAI recommends that prior to approval of applications, there are assurances that the person has adequate and appropriate support to understand the consequences of this application.

While we agree with differentiating this test from the test for capacity used elsewhere in the Act, we emphasise the importance of including appropriate safeguards. QAI supports other amendments made to ensure accessibility and simplicity of these orders (such as to the proof requirements for enduring documents).

Reforms to the *Public Guardian Act 2014 (Qld) (PGA) (Clauses 66 – 75)*

The definition of 'personal matter' in Schedule 2 of the Act is extended by the addition of those who may have access visits to, or other contact with, the principal; and advocacy relating to the care or welfare of the principal. The definition of special personal matters is extended to include entering a plea on a criminal charge for the principal. QAI supports these amendments.

Community Visitors

QAI supports the broadening, by Clause 73, to the scope of s 43 of the GAA to permit persons with an obvious interest in the adult to also be able to request a community visitor visit a visitable site. We query whether this person will also be entitled to receive a copy of the Community Visitors report of the visit, and submit that to do so would be appropriate and would also bring the legislation into greater alignment not only with the CRPD but with the requirements of natural justice.

Conclusion

QAI supports the direction of the proposed amendments to the GAA, the POA and the PGA and applauds the Department for taking steps towards greater compliance with the CRPD. QAI is pleased to see that the QLRC recommendations have been considered and are reflected in the draft bill.

QAI thanks the Department for the opportunity to have input into the proposed legislative amendments. We look forward to working with you further.