

# Guardianship, Substituted and Supported Decision-Making

**Submission by  
Queensland Advocacy for Inclusion**

**to the Royal Commission into Violence, Abuse,  
Neglect and Exploitation of People with  
Disability**

**August 2022**

## About Queensland Advocacy for Inclusion

Queensland Advocacy for Inclusion (**QAI**) (formerly Queensland Advocacy Incorporated) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our mission is to advocate for the protection and advancement of the fundamental needs, rights and lives of people with disability in Queensland. QAI's Management Committee is comprised of a majority of persons with disability, whose wisdom and lived experience is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our four advocacy practices: the Human Rights Advocacy Practice (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law and non-legal advocacy support with the Disability Royal Commission and the justice interface); the Mental Health Advocacy Practice (which supports people receiving involuntary treatment for mental illness); the NDIS Advocacy Practice (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS); and the Disability Advocacy Practice (which operates the Pathways information and referral line, and provides non-legal advocacy support with Education and other systems that impact young people with disability).

From 1 January 2022, we have been funded by the Queensland Government to establish and co-ordinate the Queensland Independent Disability Advocacy Network (**QIDAN**), which includes operating the Disability Advocacy Pathways Hotline, a centralised phone support providing information and referral for all people with disability in Queensland. We have also been funded to provide advocacy for young people with disability as part of the QIDAN network, which we provide in addition to our non-legal education advocacy for Queensland students with disability. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

The objects of QAI's constitution are:

- To advocate for the protection and advancement of the needs, rights and lives of people with disability in Queensland;
- To protect and advance human rights including the Convention on the Rights of Persons with Disabilities (**CRPD**);
- To be accountable to the most disadvantaged people with disability in Queensland; and
- To advance the health, social and public wellbeing of disadvantaged people with disability.

## QAI's recommendations

1. Implement the supported decision-making model as envisaged under the CRPD. Whilst substituted decision-making is theoretically posited as the option of last resort, the lived experience of people with disability does not reflect this. Implement policy reforms that directly target day to day practice and address the conflicting interests that often underpin actions of stakeholders.
2. Implement targeted education and awareness campaigns that place the discussion about decision-making support within a human rights framework, emphasising the rights of people with disability to receive support when making decisions.
3. In conjunction with reforms that would facilitate a nationally consistent supported decision-making framework as per the Australian Law Reform Commission's recommendations, address specific aspects of Queensland's guardianship legal framework that contribute towards the unnecessary appointment of substitute decision-makers for people with impaired decision-making capabilities. For example, introduce a Practice Direction that ensures adequate screening of all applications for guardianship and administration appointments.
4. Improve the accessibility of legal safeguards in Queensland's guardianship system for people with disability. For example, ensure access to free legal representation for all adults subject to applications for guardianship and administration appointments.
5. Work with First Nations communities to ensure that reforms to guardianship legal frameworks are culturally appropriate and cognisant of the unique experiences of First Nations Australians with disability.
6. Similarly, consider the unique and additional barriers experienced by Culturally and Linguistically Diverse communities with regards to decision-making support, such as cultural beliefs about the role of government and the need for independent interpreting services.
7. Address the lack of oversight of substitute decision-makers which leaves adults with impaired decision-making capacity vulnerable to abuse and exploitation. For example, ensure adequate funding for independent disability advocacy services and introduce safeguards around the appointment of nominees in the National Disability Insurance Scheme (NDIS).

For QAI's comprehensive list of recommendations, please see section 5 on page 27.

## Background

QAI's knowledge of Queensland's guardianship framework primarily stems from our experience providing legal advocacy for people with disability subjected to applications for guardianship and administration appointments before the Queensland Civil and Administrative Tribunal (**QCAT**). In this capacity, we act on instructions or on appointment by QCAT as a separate representative for adults, in circumstances, where there is a recognised need for representation and we are unable to act on the client's instructions.

QAI has also encountered some concerning trends regarding attitudes, assumptions, and practices towards decision-making by adults experiencing disadvantage within our other individual advocacy practices. In our NDIS Advocacy Practice, we have been made aware that, whilst decision-making opportunities for people with disability have increased under the National Disability Insurance Scheme (**NDIS**), with its flagship focus on optimising 'choice and control', self-interested service providers remain at liberty to put their own needs ahead of the people they support and, in some situations, this has resulted in the exploitation of people with disability, including people with impaired decision-making skills. For example, QAI has seen a rising number of applications for guardianship and administration appointments by NDIS service providers, many of which are unsubstantiated and occur in situations where the provider has a conflict of interest and seeks financial gain from a participant's NDIS funding. QAI wrote to the Disability Royal Commission regarding this issue in April 2021.<sup>1</sup> The correlation between the rollout of the NDIS and the rise in guardianship and administration applications, many of which are initiated by NDIS service providers, has been documented by QCAT in its 2018-19 Annual Report, with the increase constituting such significance that it justified the allocation of additional registry staff in an attempt to manage the increased workload.<sup>2</sup>

In our Mental Health Advocacy Practice, we have witnessed a continuing practice of guardianship and administration applications being made by members of our client's mental health treating team, most commonly the hospital social worker or another allied health professional. These applications are routinely made in circumstances where our client is experiencing an episode of acute mental illness, during which time they are hospitalised while undergoing an increased treatment regime. Notwithstanding the fluctuating nature of mental illness and its effective response to treatment in many cases, capacity impairments may only be fleeting and of minimal long-term consequence yet applications for the appointment of a guardian or administrator on a long-term basis are vigorously progressed, with significant long-term consequences for the individual involved.

In addition to our individual advocacy on this topic, substituted and supported decision-making has been a long-term focus of QAI's systems advocacy. The key driver behind our work in this regard has been our significant concerns about the making of guardianship and administration appointments, including the circumstances in which applications are initiated and progressed, the experiences of adults subject to these applications and resulting orders, and the enduring impact on their lives from this loss of autonomy, choice and control. QAI considers that the impact of the appointment of a substitute decision-maker on the human rights of the adult concerned is so significant that robust safeguards are required. QAI was actively involved in the review of the *Guardianship and Administration Act 2000* (Qld), making a submission on the *Guardianship and Administration and Other Legislation Amendment Bill 2016* (Qld) in response to an invitation from the

---

<sup>1</sup> Queensland Advocacy Incorporated (2021) *Increasing guardianship applications in the NDIS*; <https://qai.org.au/2021/03/26/increasing-guardianship-applications-in-the-ndis/>

<sup>2</sup> Queensland Civil and Administrative Tribunal, *Annual Report 2018-19*, p 26 – 27.

then Attorney-General; making submissions and appearing at the Public Hearing on the *Guardianship and Administration and Other Legislation Amendment Bill 2017* (Qld) before the Legal Affairs and Community Safety Committee; and making a submission commenting on the Draft Guidelines for Australian Tribunals developed by the New South Wales Civil and Administrative Tribunal on behalf of the Australian Guardianship and Administration Council (AGAC) in 2019. We have also worked extensively with the Office of the Public Guardian and the Public Trustee Queensland to progress proposals for internal reform, as well as with the Queensland Public Advocate. QAI has been part of the Office of the Public Advocate’s Advisory Group on Supported Decision-Making and the working group contributing to the development of the Queensland Capacity Assessment Guidelines published by the Queensland Government.

QAI has also engaged in extensive community legal education and community education in the areas of supported and substitute decision-making. QAI has co-authored publications such as the Queensland Handbook for Practitioners on Legal Capacity, a widely utilised resource that seeks to provide Queensland lawyers with a sound conceptual framework for assessing whether a client has capacity to give legal instructions and details the steps practitioners can take when their client’s capacity is in doubt. In developing this Handbook, a key driver was our appreciation of the importance of developing the understanding of capacity within the legal profession, to support increased rates of legal representation and therefore access to justice for those in our society facing significant disadvantage. We are currently undertaking an extensive review of this Handbook with our pro bono partners and will be publishing an updated edition in late 2022. QAI has also collaborated with ADA Australia to develop and launch the MHLaw Qld Website, which includes content on capacity and decision-making. Further, QAI regularly participates as part of the civil society delegation at the United Nations’ Conferences of States Parties to the CRPD, at which the progressive realisation of supported decision-making for persons with disability is always central to the agenda.

## Endorsements



## Introduction

QAI welcomes the Disability Royal Commission's enhanced focus on guardianship, supported and substituted decision-making. While the intent behind guardianship legislation is to protect people with impaired decision-making capacity who are unable to make their own decisions, it is also a means through which many people with disability experience significant abuse and exploitation. People with disability have historically had their legal capacity denied on account of arbitrary conclusions drawn from the presence of an impairment. Despite the rising dominance of the social model of disability and its focus on the environmental barriers that hinder the realisation of fundamental human rights, including the right to exercise legal capacity, people with disability continue to encounter unjustified challenges to their legal capacity as a result of paternalistic attitudes that pathologize their disability.

This 'best interests' approach to decision-making, when combined with a substituted decision-making framework that typically favours the interests of government departments and service providers, and which fails to prevent unnecessary and inappropriate appointments of guardians and administrators, represents an almost insurmountable obstacle to the enjoyment of legal capacity for many people with disability. This is despite recognition by the Committee on the Rights of Persons with Disabilities that the realisation of the right to legal capacity is integral to the deinstitutionalization of persons with disabilities.<sup>3</sup> The system, through its ideological and procedural failings, is in and of itself abusive and lacks the accountability that its actions deserve. While the supported decision-making model envisioned under Article 12 of the CRPD offers an alternative and improved approach, its implementation into Australian policy and practice has met resistance and has been the subject of an interpretive declaration, as discussed below.

This submission will begin by discussing the importance of adopting a supported decision-making approach (*section 1*) and outline current inadequacies in the community's understanding of decision-support needs of people with disability (*section 2*). It will then identify key problems with Queensland's guardianship system that either directly cause, or indirectly facilitate, human rights violations of people with disability (*section 3*). The submission will then examine the risks of exploitation of people with impaired decision-making ability by substitute decision-makers, many of which are realised due to inadequate and/or inaccessible safeguards (*section 4*), before concluding with key recommendations for change (*section 5*). In doing so, it will demonstrate that Australia is scarcely implementing its own interpretive declaration on Article 12, let alone the model envisaged by the original contents of the Convention.

As a state-wide, Brisbane-based disability advocacy organisation and specialist community legal centre, QAI's experience is with the Queensland guardianship laws and practices and this necessarily focusses our submission on the Queensland experience. We also note that, while concerns pertaining to substitute decision-making are not only relevant to persons with disability (for example, very similar concerns are applicable for the aging members of our society), we have focussed our submission on the issues impacting persons with disability, in accordance with our expertise and the Commission's terms of reference.

---

<sup>3</sup> Committee on the Rights of Persons with Disabilities, *Draft Guidelines on Deinstitutionalization, including in emergencies*, June 2022

## 1. A paradigm shift to a supported decision-making approach

In signing and ratifying the CRPD, the Australian government committed to a supported decision-making approach. This flows explicitly from the text of the CRPD, with Article 12(3) requiring States Parties to provide access for persons with disabilities to the support they may require in exercising their legal capacity, to ensure that the rights, will and preferences of persons with disabilities are enjoyed on an equal basis with others.<sup>4</sup> The Committee on the Rights of Persons with Disabilities has also issued clear guidance that substitute decision-making arrangements are discriminatory and deny people with disability the right to exercise legal capacity, and should be replaced by supported decision-making.<sup>5</sup> Yet in ratifying the CRPD, the Australian Government made an interpretive declaration<sup>6</sup> in relation to Articles 12, 17 and 18 of the CRPD. The interpretive declaration stated, among other things, that:

*Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.*

Australia therefore has in principle support for supported decision-making, tempered by the adoption of substituted decision-making as a last resort. It is noted that, in Australia, notwithstanding the shift towards a supported decision-making approach internationally and Australia's express support for this paradigm shift, the guardianship and administration framework remains firmly rooted in substitute decision-making. Further, while substituted decision-making is theoretically posited as the option of last resort by the state and federal governments, the lived experience of persons with disability does not reflect this. Additionally, substituted decision-making remains deeply entrenched in key aspects of domestic laws, policy, and practices, and significantly curtails more creative and person-centred approaches to personal autonomy and choice. Substituted decision-making occurs in situations where it is not necessary, is not a last resort and is not subject to adequate safeguards, as this submission will canvass, and therefore undermines Australia's implementation of its interpretive declaration.

While in some respects Queensland's guardianship laws are consistent with a supported approach to decision-making, substitute decision-making remains the bottom line. In practice, significant resourcing constraints, coupled with paternalistic attitudes and assumptions, limit the ability of QCAT, statutory bodies, advocates and legal representatives alike to engage in the processes that are recognised to increase decision-making capacity and support the establishment of relationships that enable the views, will and preferences of adults subject to guardianship and administration applications to be fully expressed and understood.

The important role of decision-making support has been recognised in the context of the determination of applications for the appointment of substitute decision-makers, with recognition that the need for an appointment can be negated by the provision of adequate informal decision-making support.<sup>7</sup> In Queensland,

---

<sup>4</sup> UN Convention on the Rights of Persons with Disabilities, Article 12(1)(2) and (4).

<sup>5</sup> Committee on the Rights of Persons with Disabilities. *General Comment No 1 (2014) Article 12: Equal Recognition before the law.* CRPD/C/GC/1.

<sup>6</sup> An interpretive declaration is a unilateral statement made by a State or international organization, in which that State or organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions: International Law Commission, *Guide to Practice on Reservations to Treaties* (2011) [1.2].

<sup>7</sup> Office of the Public Advocate (Qld). *Decision-making support and Queensland's guardianship system: A systemic advocacy report.* April 2016. Page 82.

the legislation specifically notes the importance of recognising and protecting informal supportive arrangements. However, as we discuss in detail below, QAI's position is that there remains significant work to be done in Australia before the human rights-centred approach to decision-making support demanded by the CRPD is realised. A key barrier is the inadequate understanding of the decision-support needs of people with disability throughout the broader community and within key government departments that interact regularly with people with disability.

## 2. Inadequate community understanding of decision-support needs

Decision-support is a novel concept in societies where legal systems traditionally only recognise independently exercised autonomy and decision-making.<sup>8</sup> However, the social model of disability and Article 12 of the CRPD requires the provision of "supports...to allow an individual with cognitive disability to engage in decision-making, either independently or with assistance from others".<sup>9</sup> It is therefore imperative that members of the community understand the legal impetus behind decision-making support, the human rights framework underpinning it and the evidence base supporting its efficacy.

However, QAI has found that many stakeholders involved in supporting people with impaired capacity are not fully cognisant of the complexity of decision-making support, the challenging and often changing life circumstances of individuals who require it and the associated skills required to effectively work alongside a person with impaired decision-making abilities. Such nuanced work does not come naturally and requires specific training and the development of specialised skills. In the absence of training on supported decision-making principles, people can revert to 'best-interests' approaches where they take a course of action or make a decision that *they* perceive to be in the individual's best interests as opposed to enacting the will and preferences of the individual concerned. Whilst such an approach may be well-intentioned, it is rooted in ableist ideology and fails to implement the rights-based framework required under the CRPD. Further, it results in the unnecessary utilisation of state and territory guardianship legal frameworks and the subsequent removal of a person's right to equality before the law.

Some people with disability have decision-support needs that are very complex. For these individuals, general decision-support practices of people such as paid support workers will not be sufficient to adequately meet their decision-support needs. For example, the person may have no informal supports upon which to rely and be vulnerable to undue influence by service providers. They may experience cognitive challenges, have difficulty processing abstract concepts or experience poor memory recall. Or they may experience expressive communication challenges. These individuals often require specialist decision-making support from independent, professional advocates who are trained in working alongside people with impaired capacity to elicit their will and preferences and to maximise their autonomy. Referrals to independent advocacy organisations in these situations can ensure the individual's human rights are protected and are not usurped by the interests of those around them, including service providers, as is often the case.

A lack of adherence to supported decision-making practices is especially apparent within the health setting. Reoccurring hospital bed shortages and attitudes remnant of the medical model are often behind a clinician's recourse to substituted rather than supported decision-making practices, where the views and preferences of

---

<sup>8</sup> Arstein-Kerslake, A., Watson, J., Browning, M., Martinis, J. and Blanck, P. (2017) Future Directions in Supported Decision-Making, *Disability studies quarterly*, vol 37, no 1, p 5

<sup>9</sup> *Ibid*

family members or guardians are often obtained instead of providing the person with disability the necessary time, information, and support to lead decision-making regarding their discharge planning. At best, it reflects a lag in attitudinal change among health practitioners; at worst, it reflects a direct manipulation of the substituted decision-making framework to meet the vested interests of a government agency.

An illustration of the level of support required for some individuals with impaired decision-making abilities is provided in the following case study:

### **Case study**

Tracey\* lives alone in a small town in regional New South Wales. She is an engaging, intelligent woman who has some strong and fixed opinions arising from a long history of difficult personal experiences. Tracey has multiple psychosocial disabilities as well as regular migraines. These conditions impair her cognitive function and make it difficult for her to function, including managing day-to-day affairs. Her speech and interpersonal interactions become difficult if concentration is lost and she can become over-reactive and physically ill when trying to prepare for commitments. For approximately one week per month, Tracey is almost completely unable to make basic decisions about her day, and especially more complex decisions about the NDIS supports she needs. Unfortunately, despite regular attempts to create new connections through her community, Tracey has no other close relationships she can call upon. Tracey is her own legal decision maker and has no NDIS Plan Nominee.

Tracey sought assistance to prepare for her first NDIS Plan Meeting and implementation of her first NDIS Plan. Tracey engaged an independent, decision-support advocate who undertook structured conversations during Face-to-Face meetings to ascertain her aspirations, goals, and to determine what supports were needed to achieve her goals. These were recorded in a document which was sent to the LAC ahead of the Plan Meeting. Sending this ahead of the meeting served two purposes: one was to enable the LAC to become familiar with, and thus better relate to Tracey as a person at the Plan Meeting; and two – providing insight into her situation as well as detailed personal information ahead of time, considerably shortened what can sometimes be a very lengthy meeting. Both of those imperatives were very important to Tracey.

Tracey subsequently received her first Plan. What followed was a great deal of nuanced, individualised support on the part of the advocate, who assisted Tracey to make decisions that suited her preferences in a way that ensured Tracey was informed as to the potential consequences of engaging certain providers. Understanding Tracey's history was integral to this. Tracey previously worked in the disability sector and was concerned about her privacy in the event of engaging local, registered NDIS providers. Protecting her privacy was critical to maintaining her mental health and well-being. Tracey also had a preference for alternative medicines. The advocate assisted Tracey to explore the availability of, and cautions around, engaging independent contractors.

The issues that were non-negotiable for Tracey are unlikely to be important to most other participants. Her experience in the disability sector led her to have assumptions about what supports she could and could not purchase. Her decisions could appear ill-informed to someone who did not know Tracey, and certainly presented challenges. The advocate sought to:

- correct what Tracey believed to be accurate information but which was incorrect
- provide current guidelines and documents rather than old versions that Tracey had sourced herself
- help Tracey understand the ramifications of becoming an employer as opposed to being someone who simply “contracts” an independent provider

- identify and engage a Plan Manager who could work to uphold her desire for privacy
- recognise and manage their own biases as an advocate, balancing Tracey’s right to choice and control with the advocate’s responsibility to ensure Tracey is provided with information that is comprehensive, yet delivered in a way which is accessible and likely to increase the chance of Tracey making well informed decisions
- use innovative approaches to sourcing potential local providers whilst upholding Tracey’s desire to not inform those providers of her NDIS Participant status
- explore the possibility of engaging a remote Support Coordinator who will not know her or need to meet Face-to-Face
- regularly revisit the notion of “Reasonable and Necessary” supports and ensure Tracey understands the possible consequences of purchasing supports that are potentially inappropriate to purchase via her NDIS Plan
- emphasise the aspects of her life that fall within the health domain as opposed to disability and ensure supports engaged via her NDIS Plan will address her disability related needs
- gather information about the obligations of registered and unregistered providers and provide sufficient information to support sound decision making during the selection of her providers, the expectations she is entitled to have of them, and what moral imperatives are at play when they don’t know they have become an unregistered NDIS Provider by virtue of being paid by Tracey’s NDIS funds to deliver their services
- accommodate Tracey’s limited computer skills and device limitations

Significant effort was required to research information and provide it in a format that was clear and appropriate. To date, Tracey has engaged some contractors on a casual basis to attend to specific tasks. This has been a good way for her to get a “feel” for how to select, engage, and pay these providers and to then get reimbursed by her Plan Manager.

This level of nuanced work goes significantly beyond the level of decision-support assistance that a paid disability support worker, for example, could be expected to provide.

*\*Name has been changed to protect confidentiality.*

Decision-support must always begin with a presumption of capacity and must be provided in a manner that is least restrictive of a person’s human rights. Informal arrangements must be maintained and preserved where possible and formal appointments of substitute decision-makers must genuinely be measures of last resort. The individual circumstances of the person also need to be considered, such as whether they are receiving decision-support from formal or paid support workers or service providers in the absence of informal networks.

Ultimately, and perhaps critically, decision-supporters need to build knowledge of the individual’s context by building a respectful and supportive relationship based upon trust. The decision-supporter should seek to understand the person’s communication needs and assist them to receive information in relevant formats, including via relevant communication aids, by understanding facial expressions or gestures and taking breaks as required. They should consider the decision-making history of the person, as well as any other expert or relevant information to the decision, such as its urgency, its sensitivity and/or whether the person is experiencing any personal issues that might impact their decision-making. The physical environment of the discussions should also be considered and managed, and potential sources of informal decision-support

identified and accessed if appropriate. Importantly, the person should be given sufficient time to consider their options and be permitted to delay decision-making and to seek further advice as necessary. The decision-supporter should anticipate that the person may change their mind and check in again with the individual a few days after a decision has been made.

In QAI's experience, there is a lack of community understanding of the complexities involved in providing individualised decision-support to persons with impaired decision-making abilities. When such nuanced support is *not* provided, the person's right to legal capacity can be denied and their autonomy and self-determination suppressed through resort to formal guardianship arrangements that would otherwise not be required if the individual was adequately supported. Such arrangements not only violate a person's right to equality before the law, but they can also lead to the exploitation of people with disability, where substitute decision-makers act and make decisions in accordance with their own personal interests as opposed to the will and preferences of the individual concerned. There are key pitfalls within Queensland's guardianship legal framework that contribute to the inappropriate utilisation of guardianship and administration appointments, which, when combined with inadequate community understanding of decision-support needs, results in the unlawful derogation of people with disability's right to legal capacity and thus constitutes unacceptable abuse, neglect, and exploitation of people with disability in Australian society.

### 3. Queensland's guardianship legal framework

Queensland's guardianship system is based upon the premise that everyone has the capacity to make their own decisions unless and until proven otherwise. For adults who are found to lack the capacity to make their own decisions, substitute decision-makers can be appointed under the *Guardianship and Administration Act 2000* (Qld) (**GA Act**). The legislation also provides safeguards against abuse and offers remedies for when substitute decision-makers fail to comply with their legal duties. The GA Act provides QCAT with the discretion to appoint an administrator and/or a guardian for an adult where three criteria are satisfied, noting QCAT is not bound by the rules of evidence in making such an order.<sup>10</sup> The criteria are that:

- the relevant adult has impaired capacity for a matter; and
- there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
- without the appointment of a substitute decision-maker, the adult's needs will not be adequately met or their interests will not be adequately protected.<sup>11</sup>

The types of "matters" a substitute decision-maker may be appointed for, are: financial matters; personal matters (which includes decisions about where the adult lives, the services they receive, health care, restrictive practices, and with whom the adult has contact with); special personal matters; health matters and special health matters; and legal matters.<sup>12</sup>

---

<sup>10</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3)(b).

<sup>11</sup> *Guardianship and Administration Act 2000* (Qld), s 12(1).

<sup>12</sup> *Guardianship and Administration Act 2000* (Qld), Schedule 2.

The GA Act explains that its primary focus is the relevant adult with impaired capacity.<sup>13</sup> The Act also provides 10 ‘General Principles’, which are to be applied by all people and entities who perform a function or exercise a power under the GA Act.<sup>14</sup> The General Principles include the presumption of capacity, the same human rights and fundamental freedoms, and maximising the adult’s participation in decision-making.<sup>15</sup>

Where QCAT is satisfied an order appointing an administrator and/or guardian is needed, it must then consider who is the most appropriate person/s for the appointment. In doing so, QCAT must have regard to what is known as the “appropriateness considerations” contained in the GA Act.<sup>16</sup> The GA Act expressly recognises that the appointment of the Office of the Public Guardian is an appointment of last resort in circumstances where there is no other appropriate person available for the appointment.<sup>17</sup> Unless QCAT orders otherwise, a guardian and/or administrator is authorised to do anything within the terms of their appointment, in relation to the particular matter, that could have been done by the relevant adult if they otherwise had capacity.<sup>18</sup>

Guardianship and administration orders must be reviewed at least every five years, unless the order is an administration order appointing the Public Trustee of Queensland as the adult’s administrator.<sup>19</sup> In these circumstances, there is no requirement the administration order be reviewed.<sup>20</sup> This requires the relevant adult to commence a review on their own initiative.<sup>21</sup>

Recent amendments in 2020 saw a further entrenchment of the CRPD into the legislation’s General Principles and Healthcare Principles. This reflects a broader trend at the state level which is increasingly recognising the importance of a human rights framework. QAI welcomes the closer alignment of the General Principles with human rights, in particular the CRPD, and the increased emphasis on participation by adults alleged to have impaired decision-making. However, the extent to which the reforms will achieve their desired outcome and offer greater protection to adults with impaired decision-making capacity remains to be seen, and will no doubt be tempered by the deeply rooted cultural inclination towards substitute decision-making and the existence of the following issues.

### Problems with Queensland’s guardianship legal framework

Whilst Queensland’s legal framework is often noted as being more progressive than other Australian states and territories, QAI remains deeply concerned that many aspects of Queensland’s guardianship legal framework result in the violation of people’s human rights and the abuse and exploitation of people with a disability. In our experience, we know the following to be true:

1. People subjected to guardianship and administration applications rarely have **access to legal advice and/or representation**. It is a largely self-represented jurisdiction where adults, many of whom have disabilities, are expected to assert their legal rights in a formal environment without legal assistance to

---

<sup>13</sup> *Guardianship and Administration Act 2000* (Qld), s 11A(1).

<sup>14</sup> *Guardianship and Administration Act 2000* (Qld), s 11B(1).

<sup>15</sup> General Principles 1, 2, and 4.

<sup>16</sup> *Guardianship and Administration Act 2000* (Qld), s 15.

<sup>17</sup> *Guardianship and Administration Act 2000* (Qld), s 14(2).

<sup>18</sup> *Guardianship and Administration Act 2000* (Qld), s 33(1) and (2).

<sup>19</sup> *Guardianship and Administration Act 2000* (Qld), s 28(1).

<sup>20</sup> *Guardianship and Administration Act 2000* (Qld), s 28(1)

<sup>21</sup> *Guardianship and Administration Act 2000* (Qld), s 29(1)(b)(i).

navigate what is a complex and deeply personal area of law. There is also a concerning lack of information available as to the number of guardianship and administration applications that are heard by the Tribunal where the adult subjected to the application has legal representation. Only a small percentage of guardianship and administration cases are actually reported by the tribunal, meaning that the vast majority of cases have little publicly available information as to the legal representation of its parties and therefore the extent to which adults have adequate support to defend sometimes vexatious and unsubstantiated applications.

The importance of legal representation as a means of accessing justice for persons whose decision-making capacity is at issue has been broadly recognised by the Australian Government. The United Nations' 'Principles for the protection of persons with mental illness and the improvement of mental health care' was adopted by the General Assembly on 17 December 1991. The Australian Government and the Australian Human Rights and Equal Opportunities Commission (as it then was) played a major role in drafting these principles.<sup>22</sup> These principles specify that the right of a person whose capacity is at issue to be entitled to legal representation is both a basic right and fundamental freedom.

The General Principles in the GA Act were amended in November 2020 to align more closely with the CRPD and to put a greater emphasis on the participation by adults with impaired capacity in decision-making about their own lives. General Principle 8 expressly recognises that:<sup>23</sup>

- a. an adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account;
- b. an adult must be given the support and access to information necessary to enable the adult to make or participate in decisions affecting the adult's life; and
- c. an adult must be given the support necessary to enable the adult to communicate the adult's decisions.

The desirability of an automatic right to legal representation in guardianship proceedings was recently considered by the Australian Guardianship and Administration Council (the **Council**). In June 2019, the Council published guidelines for Australian Tribunals on maximising the participation of the person the subject of guardianship proceedings.<sup>24</sup> Several organisations made submissions that the guidelines should be amended to give legal practitioners an automatic right to represent the adult concerned without leave. As one organisation making this submission, the Law Council of Australia noted that the involvement of legal practitioners in proceedings can significantly enhance the efficiency and fairness of proceedings and improve the adult's experience and that, where legal representation is denied, there is a serious risk of unfairness or injustice for vulnerable parties, pointing to 'strong indications' that self-represented people face worse outcomes in proceedings.<sup>25</sup>

---

<sup>22</sup> Human Rights and Equal Opportunity Commission (December 1992), *Mental health legislation and Human Rights : An Analysis of Australian State and Territory Mental Health Legislation in terms of The United Nations Principles for the Protection of Persons with Mental Illness*, 7.

<sup>23</sup> *Guardianship and Administration Act 2000* (Qld), s 11B.

<sup>24</sup> Australian Guardianship and Administration Council (June 2019), *Maximising the participation of the Person in guardianship proceedings: Guidelines for Australian Tribunals*.

<sup>25</sup> Australian Guardianship and Administration Council (June 2019), *Maximising the participation of the Person in guardianship proceedings: Guidelines for Australian Tribunals*, Ann. 1, p 13, citing Elizabeth Richardson, Tania Sourdin and Nerida Wallace, Australian Centre for Justice Innovation, *Self-Represented Litigants – Gathering Useful Information: Final Report* (2012) 11.

The lack of an automatic right to legal representation in Queensland's guardianship regime can be contrasted to the position under the *Mental Health Act 2016* (Qld) (**MH Act 2016**). The MH Act 2016 was enacted on 4 March 2016 and, upon taking effect on 5 March 2017, repealed the previous *Mental Health Act 2000* (Qld) (**MH Act 2000**). One of the significant divergences between the MH Act 2016 and its predecessor is that the MH Act 2016 introduced a right to *free* legal representation for a person the subject of certain proceedings before the Mental Health Review Tribunal (**MHRT**).<sup>26</sup> While under the MH Act 2000 patients had an automatic right to legal representation at hearings before the MHRT, Queensland's rates of legal representation before the MHRT were among the lowest in Australia.<sup>27</sup> We note that the Public Advocate has recommended that the adult concerned be provided with representation in guardianship proceedings before QCAT,<sup>28</sup> noting that, as at 2016, Queensland had the highest number of people subject to public guardianship compared to other Australian States and Territories.<sup>29</sup>

The arguments against introducing a right to legal representation in guardianship proceedings are almost exclusively concerned with practical and procedural barriers to the exercise of that right, namely funding constraints. The Commission noted that considerations of that nature include "*the affordability of private legal representation and the limited availability of publicly funded legal representation.*"<sup>30</sup>

Guardianship matters account for a significant portion of QCAT's workload. In QCAT's Annual Report for 2020 to 2021, it was acknowledged that the guardianship jurisdiction is a complex one requiring significant resources from both QCAT and the Registry.<sup>31</sup>

As noted above, QCAT has documented the increase in guardianship and administration applications flowing from the rollout of the NDIS in Queensland, many of which are initiated by NDIS Service Providers,<sup>32</sup> and a majority of which are successful. While at times these appointments are necessary, they remain the legislated option of last resort. QAI is concerned that, contrary to the Scheme's stated objective of increasing choice and control for people with disability, on many occasions applications and appointments of substitute decision-makers are made in circumstances where informal support arrangements are working well and should be maintained (consistent with the General Principles in the GA Act).<sup>33</sup> Further, there are significant concerns with both procedural and substantive fairness with many of these applications, particularly when considered through the lens of the *Human Rights Act 2019* (Qld), which makes independent, skilled legal representation particularly vital to achieving an appropriate outcome.

---

<sup>26</sup> *Mental Health Act 2016* (Qld) ss 739(1), 740(6).

<sup>27</sup> Queensland Mental Health Commission, *Mental Health Legislation: Submission to the Health and Ambulance Services Committee of the Queensland Parliament* (October 2015), p 25.

<sup>28</sup> Office Public Advocate (Qld) (April 2016), *Decision-making support and Queensland's guardianship system: A systemic advocacy report*, Recommendation 15.

<sup>29</sup> Office of the Public Advocate (Qld) (16 June 2016), "Independent report identifies opportunities to strengthen Queensland's guardianship system".

<sup>30</sup> QLRC Report 2010, vol. 4 at 21.167.

<sup>31</sup> QCAT Annual Report 2020-21, p 10.

<sup>32</sup> Queensland Civil and Administrative Tribunal, *Annual Report 2018 – 19*, 26 – 27. In the QCAT 2019-2020 Annual Report, a further 7% increase in guardianship and administration applications (an additional 919 matters) was reported: 20. In QCAT's 2017 – 2018 Annual Report, it noted: "The NDIS rollout in Queensland is putting significant pressure on QCAT's guardianship jurisdiction": 18.

<sup>33</sup> *Guardianship and Administration Act 2000* (Qld), s 11B, General Principle 4.

The lack of free and independent legal services available to meet present demand in the guardianship space exacerbates existing disadvantage experienced by people the subject of guardianship applications. In QAI's experience, the majority of people subject to guardianship applications are on the Disability Support Pension and cannot afford to pay for legal representation (assuming leave to be represented is obtained).

2. In the absence of a threshold test, whereby applications for guardianship and administration must meet a certain level of evidentiary proof before being accepted by the Tribunal, the **burden of proof is at times perversely placed upon the adult** to prove their decision-making capacity. This is contrary to the GA Act, which establishes that all adults must be presumed to have decision-making capacity until proven otherwise,<sup>34</sup> and is the first General Principle contained in that Act. The lack of material scrutiny of the evidence and the failure to examine the motive of the person bringing the application means that unsubstantiated and/or vexatious applications still result in a hearing where the adult is forced to prove their decision-making abilities despite the existence of the presumption of capacity.

In seeking to prove their decision-making capacity, many people with disability are forced to obtain independent **capacity assessments which can sometimes cost thousands of dollars**. This is completely inappropriate given the legislated presumption of capacity and can place people into significant financial distress. It is especially difficult for people who receive social security benefits such as the Disability Support Pension as their primary source of income. A recent senate inquiry into the Disability Support Pension heard extensive evidence as to the inadequacy of this payment and highlighted the reality that many Disability Support Pension recipients live in poverty. QAI has also written to the Disability Royal Commission about the Institutional Economic Neglect of people with disability in this regard.<sup>35</sup>

3. QCAT is **not bound by the rules of evidence** which means that applications for guardianship or administration are often inappropriately made using medical or allied health reports that have been prepared for alternative purposes, such as NDIS access requests. This often occurs without the original author of the report providing consent for the report to be used for the purpose of a guardianship or administration application and the content of such report may not even relate to the person's decision-making abilities. Reports such as NDIS functional capacity assessments are often written in deficit laden language in order to establish the individual's eligibility under the scheme, and are an inappropriate reflection of a person's decision-making abilities. Furthermore, such reports are often outdated and no longer relevant to a person's situation at the time of the guardianship or administration application. For example, a clinical report written by a mental health service for a person with psychosocial disability during a period of acute illness is unlikely to be relevant months or years later. This is because of the fluctuating and time specific nature of capacity, yet such reports have and continue to be used to support applications for guardianship and administration appointments for people with disability.
4. **Applications are also sometimes completed inaccurately**. For example, an applicant may state that they have informed the adult of their intention to submit an application to QCAT to seek the appointment of a substitute decision-maker, however this is later found out not to be the case. Sometimes the adult who is subject to the application first learns of it when they receive a copy of the application in the mail. In

---

<sup>34</sup> *Guardianship and Administration Act 2000* (Qld), s 11(1).

<sup>35</sup> Queensland Advocacy for Inclusion (2021) *Institutional Economic Neglect*; <https://gai.org.au/wp-content/uploads/2021/12/Institutional-Economic-Neglect-DRC-December-2021.pdf>

addition to the significant distress that this causes the person, there is no accountability for the applicant whose actions go without punishment and yet are untruthful to the Tribunal and can have detrimental impacts to the person's mental well-being. QAI has advocated for the introduction or amendment of a Practice Direction requiring that all applications are screened to ensure that they meet a prescribed threshold, which not only stipulates compliance with form but ensures that they are accompanied by relevant, recent evidence that supports the application. To date, this proposal has not been adopted.

5. The **compatibility of interim orders** made pursuant to section 129 of the GA Act with Queensland's *Human Rights Act 2019* (Qld) is also yet to be determined. Under s 129 of the GA Act, QCAT is empowered to make an interim order where the Tribunal is satisfied, on reasonable grounds:
1. the adult concerned in an application has, or may have, impaired capacity for a matter; and
  2. there is an immediate risk of harm to the health, welfare or property of the adult, including because of the risk of abuse, exploitation or neglect or, or self-neglect by, the adult.

Section 129(2) permits the Tribunal to make an interim order in the proceeding **without hearing and deciding the proceeding** and without **otherwise complying with the requirements of the GA Act**, including – importantly, the requirement under s 118 of the GA Act that the Tribunal advises persons concerned of the hearing. Interim orders are made for up to three (3) months, and can be renewed where the Tribunal, constituted by a legal member, is satisfied there are exceptional circumstances justifying the renewal.<sup>36</sup>

QAI considers that the strong powers under s 129 of the GA Act to make interim orders must be exercised extremely judiciously and accompanied by appropriate safeguards, given the significant impact it has on the human rights of a person whose voice is yet to be heard. We note that these provisions have not been amended since the passage of the *Human Rights Act 2019* (Qld), which introduces key provisions of relevance, including the right to a fair hearing<sup>37</sup> and the right to recognition and equality before the law.<sup>38</sup> QAI holds grave concerns that the making of interim orders is not consistent with these rights, and that their violation is the cause of significant harm to many adults who are already experiencing disadvantage.

QAI considers that the power to make an interim order should only be able to be exercised where there is clear, cogent, contemporaneous evidence of an immediate risk of harm. Safeguards should be introduced to ensure that the person proposed to be subject to the order has, at a minimum, been notified and consulted and their views considered prior to the making of the order, with an exception for situations where there is evidence this would increase the risk of harm to the adult. In QAI's experience, this is not always the case. In the context of the current significant constraints on QCAT's resources, and the resulting lengthening of timeframes from the filing to hearing of substantive applications, QAI is concerned that additional applications for interim orders are being made and granted, in circumstances where the threshold requirements are not adequately established.

Applications for interim orders can at times be made on the basis of inadequate evidence and without hearing the views and wishes of the person subject to the order. In cases where there is ultimately insufficient evidence to demonstrate the need for a substitute decision-maker, an interim order removes a person's right to self-determination often for a period of (the maximum) three months. During this time,

---

<sup>36</sup> *Guardianship and Administration Act 2000* (Qld), s 129(6), (7).

<sup>37</sup> *Human Rights Act 2019* (Qld), s 31.

<sup>38</sup> *Human Rights Act 2019* (Qld), s 15.

the individual may endure serious consequences as a result of the temporary appointment of a guardian or administrator who acts on their behalf but in the absence of sufficient knowledge of the adult, their history, preferences and overall personal circumstances. QAI is also aware of applications for interim orders occurring due to lengthy waiting times for substantive hearing dates at QCAT. These applications are an inappropriate use of the legislation and can occur in the absence of an *immediate* risk of harm being identified, as is required by law.

6. In Queensland, as in New South Wales, South Australia and the Northern Territory, there are some restrictions on the persons who have standing to apply to the relevant tribunal for a guardianship order to be made. Generally, the classes of persons who may make a guardianship and/or administration application are:
  3. the adult themselves;
  4. The Public Guardian / Public Trustee;
  5. other persons who can establish sufficient interest in the welfare of the adult, for example, the adult's spouse, relatives, current guardian and/or carer.

In other jurisdictions, an application for a guardianship order may be made by any person.

QAI notes that, even in the jurisdictions (including Queensland) where there are some restrictions on who may apply, **standing to commence an application for the appointment of a substitute decision-maker is extremely broad**. While we note the protective reasons that favour broad standing in this jurisdiction, the concern is that there are insufficient safeguards in place to filter out frivolous or vexatious applications, which has the effect of compelling adults who are already experiencing significant disadvantage to respond to applications in inappropriate circumstances.

It has previously been suggested that unnecessary guardianship and administration appointments may be predicated by insufficient scrutiny in the course of assessments of applications, both before and during hearings.<sup>39</sup> A report by the Office of the Public Advocate has highlighted the common practice of applications being made by third party organisations for the appointment of administrators and, to a lesser extent, guardians, in circumstances where informal decision-making arrangements are not recognised or accepted by third party organisations. The most common of these were documented to include:

- (a) aged care providers requiring a formal order prior to a person entering their care;
- (b) financial institutions requiring formal authority for a person to act on behalf of another;
- (c) government agencies requiring a nominated liaison with whom they can interact with authority;
- (d) service providers (eg telephone companies, electricity companies, disability support providers, real estate agents) requiring formal authority for a person to act on behalf of another person; and
- (e) hospitals requiring authorisation to act.<sup>40</sup>

The assumption of the role of service providers in the aged care and health care sectors, noted as “skilled in securing guardianship and administration appointments” by key stakeholders to the review, as

---

<sup>39</sup> Office of the Public Advocate (Qld). *Decision-making support and Queensland's guardianship system: A systemic advocacy report*. April 2016. Page 75.

<sup>40</sup> Office of the Public Advocate (Qld). *Decision-making support and Queensland's guardianship system: A systemic advocacy report*. April 2016. Page 70.

applicants for orders, was noted. This role was, correctly in QAI's experience, linked both with risk mitigation and management, driving particular decision-making and assisting with discharge planning.

In conjunction with other factors, the report noted that "concerns that the last resort intervention of guardianship is overused and misapplied in response to circumstances...are longstanding. The accessibility and low cost of guardianship has resulted in applications being sought in preference to other options that are less restrictive and do not infringe on people's rights".<sup>41</sup>

- 7. Confidentiality provisions within the GA Act and a lack of transparency in guardianship and administration matters limit the accountability of stakeholders** in cases where a person with disability's rights have been violated. For example, section 114A(2) of the GA Act prohibits the publication of "information about a guardianship proceeding to the public" in instances where the publication is likely to lead to the identification of the relevant adult. While QAI appreciates the private nature of guardianship and administration proceedings, we consider the GA Act's confidentiality provisions, such as section 114A, that seek to protect an adult's privacy are not consistent with an adult's right to freedom of expression and with principles of open justice. In instances where an adult has been subject to an unmeritorious or frivolous complaint, and which had ultimately been rejected by QCAT, the impact of section 114A(2) of the GA Act places an unnecessary limitation on the adult's ability to share their experience of the guardianship system, and the circumstances leading to the application, with the public.

QAI also notes that the prohibition in s 103(2) of the GA Act upon non-parties being given access to documents before or during a hearing, indirectly creates a barrier to the adult concerned obtaining necessary information ahead of a hearing. While the adult concerned does have a right to access these documents,<sup>42</sup> in QAI's experience the adult concerned often relies upon a member of their support network or their advocate to assist with obtaining documents via formal or informal requests of the QCAT Registry (and, as they are not "active parties", they fall within the prohibition in s 103(2)).

QAI is concerned that one of the implications associated with the confidentiality protections for guardianship hearings is the lack of transparency and accountability for decisions made by QCAT in guardianship and administration matters, with the small volume of published decisions stunting the development of precedent in this area. QCAT has an extremely broad and varied jurisdictions, with 18 specialist tribunals and 23 jurisdictions consolidated by its creation. Within the Human Rights Division, which is responsible for hearing and deciding guardianship and administration applications, there are only a small number of permanent members and a significant number of sessional members. The process of appointing new members, as well as the existing skills and expertise of members and the training provided, is not transparent and there is an absence of a guarantee of independence in the appointments.

In May 2020, QCAT's guardianship bench book was launched. Unlike bench books used by the Supreme and District Courts of Queensland, QCAT's guardianship bench book is not publicly available. Given the extremely limited number of guardianship matters that result in a published judgment, making the bench book publicly available is one means of increasing public awareness within the legal sector of QCAT's approach in guardianship matters and promoting the making of coherent and consistent decisions in guardianship matters.

---

<sup>41</sup> Office of the Public Advocate (Qld). *Decision-making support and Queensland's guardianship system: A systemic advocacy report*. April 2016. Page 72.

<sup>42</sup> Section 103(1) of the *Guardianship and Administration Act 2000* (Qld).

Appeals from decisions of QCAT are time and resource intensive and thus infrequently pursued, with dissatisfied parties more usually challenging the decision by applying for a review of the order, supported by additional evidence. While this practice is often appropriate as it best protects and advances the interests of the adult concerned, the limitation is that the precedent in this area develops in a very slow and disjointed way, when compared with other jurisdictions where the appeals processes offer significant advantages over a fresh hearing.

8. While the functions of the Office of the Public Guardian include investigating complaints and allegations about actions by, among others, guardians or administrators,<sup>43</sup> stretched resources are translating into significant delays of approximately 12 months at present. QAI also considers there to be an inherent conflict in the Office of the Public Guardian holding the dual roles of investigating complaints and allegations of misconduct by guardians and performing the function of guardian of last resort.

While this legislative power does exist, and is exercised, in QAI's experience there remains a lack of accountability for persons who experience mismanagement whilst under a substitute decision-making appointment.

The following case study provides a recent example of this lack of accountability, where the substitute decision-maker was the Public Trustee of Queensland:

#### **Case study**

Julia\* is a 68-year-old woman who has multiple mental health diagnoses. Julia was subject to a guardianship and administration order appointing the Public Guardian as her guardian and the Public Trustee as her administrator for approximately 18 months. Julia had minimal assets, no liabilities, and was a recipient of the Age Pension, approximately \$945 per fortnight.

By the terms of the Public Trustee's appointment, Julia maintained most of her financial independence, paying her bills and living expenses herself. Julia had concerns about the fees the Public Trustee was charging to manage her limited assets (approximately \$570 per month comprised of a "Personal Financial Administration Fee" and "Assets Management Fee"). When Julia's advocate raised these concerns with the Public Trustee on her behalf, the advocate was informed that: "as part of The Public Trustee's Community Service Obligation, [Julia] is in receipt of a hardship rebate. Additional information regarding fees and charges can be found on The Public Trustee of Queensland Website under Financial Administration, Fees and Charges". This response was not only vague and non-descriptive, but the hardship rebate was inconsistently applied to Julia's account.

In addition to ambiguity surrounding the Public Trustee's fee structure and response to this uncertainty, the Public Trustee also cancelled Julia's funeral insurance policy. Upon appointment as her administrator, the Public Trustee cancelled all her direct debits, including her funeral insurance policy, which she had contributed towards for approximately nine (9) years. The Public Trustee explained it instead attempted to make an annual payment to Julia's policy, however, the insurance company was unable to reconcile this payment and redirected the money back to the Public Trustee. No further action was taken by the Public Trustee and, consequently, Julia's funeral insurance policy

<sup>43</sup> *Public Guardian Act 2014* (Qld), s 12(1)(c).

was cancelled. The Public Trustee took no action to rectify this and simply informed Julia she was able to look for a new insurance policy.

QAI successfully advocated for both the guardianship and administration orders to be revoked. QAI subsequently made a facilitated referral to a private insurance firm, which provided pro bono support to successfully reclaim the client's lost insurance premiums.

*\*Name has been changed to protect confidentiality.*

9. There are significant **resourcing constraints** across the jurisdiction, at least in Queensland, that impede the timely and expedient resolution of matters. Guardianship matters account for a significant portion of QCAT's workload. In QCAT's Annual Report for 2020 to 2021, it was acknowledged that the guardianship jurisdiction is a complex one requiring significant resources from both QCAT and the Registry.<sup>44</sup> The table below sets out the number of lodgements in the guardianship jurisdiction, the outcome of those matters (clearance rates) and the number of matters remaining outstanding at the end of the relevant period.<sup>45</sup>

**Table 1: Statistics on guardianship matters in QCAT from July 2019 to June 2021**

Lodgements			Clearance rates			Pending at period end		
2019-20	2020-21	% diff	2019-20	2020-21	% diff	2019-20	2020-21	% diff
13,724	14,376	5%	97%	88%	-9%	3,949	5,680	44%

Notably in the last financial year:

- a) the guardianship jurisdiction received the greatest number of lodgements of any of QCAT's jurisdictions (including minor civil disputes). By comparison in QCAT's Human Rights division, QCAT only received 64 lodgements for anti-discrimination matters and 507 lodgements for children matters;
- b) the number of guardianship matters being cleared within the reporting period dropped by 9% from the previous financial year; and
- c) there was a 44% increase since the previous financial year in guardianship matters that remained outstanding as at the end of June 2020.

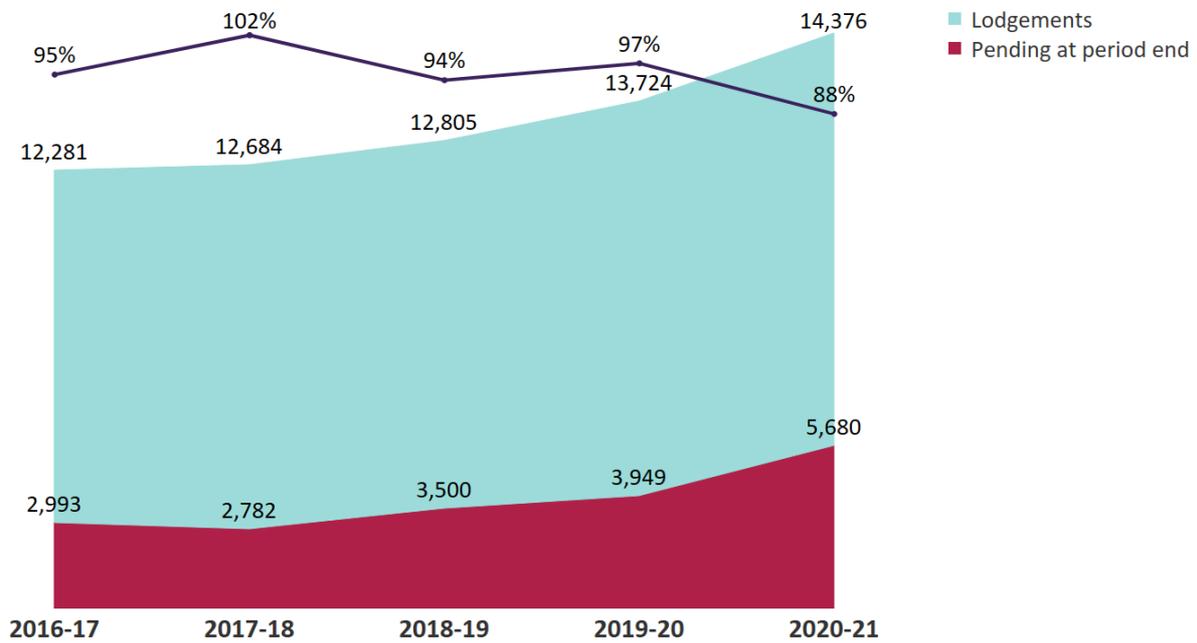
Based on QAI's review of earlier annual reports of QCAT, since July 2018 there has been a trend of an increase in the number of guardianship matters being lodged and a decrease in the number of those matters being resolved within the relevant financial year:

<sup>44</sup> QCAT Annual Report 2020-21, p 10.

<sup>45</sup> Extracted from QCAT Annual Report 2020-21, p 12.

## Statistics on guardianship matters in QCAT from July 2016 to June 2021<sup>46</sup>

### Clearance Rates v Lodged and Pending Applications



### Applications pending at period end



<sup>46</sup> Data extracted from QCAT Annual Reports for 2017-2018, 2018-2019, 2019-2020 and 2020-2021.

It is apparent from this data that QCAT is not appropriately resourced to deal with the increasing number of guardianship matters being lodged. This has a direct impact on the rights of people with disability and their ability to uphold their right to equality before the law, something often taken away in situations of abuse or indeed which can lead to situations of abuse.

QAI notes that the resourcing constraints are not isolated to QCAT, or to the community legal sector attempting to meet the demand for legal advice and representation in guardianship and administration hearings. They also extend to the Office of the Public Guardian, which is responsible for, among other things, promoting and protecting the rights and interests of adults with impaired capacity and protecting adults from neglect, exploitation and abuse, and which results in significant delays in the investigation of such complaints.<sup>47</sup>

QAI considers there is an urgent need for the government to ensure that the agencies that form part of Queensland's guardianship system are adequately funded to fulfil their mandate, particularly in light of the current and forthcoming pressures on the guardianship system.

10. Creative, **less-restrictive alternatives to substitute decision-making appointments are seldom explored.** In Queensland, the GA Act provides QCAT with significant scope and flexibility to make orders on terms considered to be appropriate. As the Public Advocate's report has noted, this allows "Tribunal members to include terms that enable creative solutions, lessen the severity of an order, and minimise the limitations on a person's decision-making and legal capacity. Yet the research has identified that these creative mechanisms for making the least restrictive order are not often used."<sup>48</sup>
11. The Queensland guardianship system is **culturally inappropriate for First Nations Australians** with impaired decision-making capacity. Research has found "fundamental incompatibilities" with the "values, intentions and practices of the guardianship system, which is imbedded in Western philosophic traditions (individualistic), and the aspirations, culture and social realities for Indigenous people (collective)."<sup>49</sup> The unique experiences of, and cultural traditions within, First Nations communities demand an intersectional approach to the realisation of the right to legal capacity. Reforms must be led by and designed with First Nations communities.
12. Similarly, the unique and additional barriers experienced by Culturally and Linguistically Diverse (CALD) communities are frequently overlooked. For example, applications for the appointment of the Public Guardian or Public Trustee as substituted decision-makers are less likely to be challenged by family members if, due to the family's cultural beliefs and experiences, they do not feel comfortable challenging the government. This can lead to a loss of informal support for the adult and a deterioration in important personal and family relationships. Furthermore, the use of certified and independent interpreters continues to be inadequate, with some government departments still inappropriately using family members as interpreters.

---

<sup>47</sup> Under Chapter 3, Part 3 of the *Public Guardian Act 2014* (Qld), the Public Guardian is responsible for investigating and reporting on neglect, exploitation and abuse of adults with impaired capacity.

<sup>48</sup> Office of the Public Advocate (Qld). *Decision-making support and Queensland's guardianship system: A systemic advocacy report*. April 2016. Page 93.

<sup>49</sup> Office of the Public Advocate (Qld) *Research Insights: Aboriginal and Torres Strait Islander Queenslanders with impaired decision-making capacity*, 2013

From this brief overview, it is apparent that the current regime for the appointment of substitute decision-makers for people whose capacity is questioned is deeply flawed, both in its design and implementation, and that there is significant room for improvement in this jurisdiction. While this analysis has focused on the Queensland experience, these problems are not isolated to Queensland and are largely consistent with the approach that both levels of government have taken to decision-making for people with disability. Indeed, inconsistency between jurisdictions is another issue, leaving a person's access to justice influenced, in part, by their postcode. Strong, consistent leadership at a federal level is therefore required to begin the work of properly realising the commitment to a supported decision-making approach agreed to in the CRPD. Until such time as this occurs, people with disability who are already facing significant disadvantage will continue to experience exploitation and violation of their human rights.

#### 4. Risk of exploitation by substitute decision-makers

In addition to the aforementioned risks to a person's right to legal capacity, people with impaired decision-making abilities are also at an increased risk of exploitation from substitute decision-makers. This includes being susceptible to undue influence from well-meaning family members and friends, which can occur in situations where the individual is unaware of the extent to which they are being subjected to the influence of those around them and/or when the family members and friends are unaware of the extent to which their input is overriding the will and preferences of the adult concerned. It also includes situations where substitute decision-makers consciously misuse the power entrusted through their appointment to further their own material interests and subsequently cause harm to the individual with disability. This is illustrated with the following case studies:

##### **Case study**

Wendy\* is a 55-year-old woman who lives in regional Queensland. Unfortunately, Wendy suddenly lost her life-long partner and became unwell and was admitted as an inpatient to a mental health unit. During this time, Wendy's two brothers made applications for an interim and substantive order seeking to appoint them both as Wendy's guardians and administrators under the Guardianship and Administration Act 2000 (Qld). Wendy's brothers did this without consulting her. In accordance with these applications, the Queensland Civil and Administrative Tribunal made an order appointing her brothers as her guardians for most personal matters and administrators all financial matters.

Wendy and her brothers had an amicable relationship prior to this order, however, after the order was made, Wendy began to feel as though her brothers were controlling all aspects of her life and not consulting with her prior to doing so. Because her brothers were appointed as guardian for the personal matter about who Wendy could contact, her brothers became controlling over who Wendy could contact and made attempts to prevent Wendy contacting her new partner. Wendy was also denied access to her savings account and had noticed money was being spent from her accounts by her brothers without any communication or justification of the expenses. This level of control left Wendy feeling incredibly anxious and upset and as though her relationship with her family had significantly changed. To remove herself from this level of control by her brothers, Wendy made an application to remove them as her guardians and administrators and was ultimately successful, however Wendy experienced considerable distress during this process.

*\*Name has been changed to protect confidentiality.*

### **Case study**

Josh\* is a 65-year-old man with two adult children. Both of Josh's children are appointed as his joint attorneys under an enduring power of attorney for financial matters (the EPOA) and this appointment has been in place for a number of years.

Josh had significant savings in his account (around \$50,000). Unfortunately, Josh had an accident and had been a long-stay inpatient at his local hospital for a number of months while his health and capacity improved. During this time, however, one of Josh's children, his eldest son, Simon\*, has been accessing his savings account, under the purported authority of the EPOA, and has spent almost half of Josh's savings.

Josh said the EPOA came about when Simon took him to his bank and suggested it would be a good idea for Josh to appoint his children as his EPOA should anything happen to him. However, Josh does not remember getting the original or a copy of any of this documentation.

Josh came to QAI to seek advice on removing Simon as his attorney under the EPOA. Josh wanted his youngest son to be his attorney. When Josh informed Simon of his intentions, Josh's access to most of his bank accounts was blocked. In order to move forward with rectifying his situation and revoking Simon's appointment, Josh had to engage an advocate to assist him locating and accessing a copy of the EPOA from the only known location of its potential storage, his bank.

Josh was then able to complete the required documentation to revoke Simon's authority and provide his updated EPOA to his bank. Unfortunately, due to Josh's recent residential move, he lost his copy of the updated EPOA (revocation) and had to contact the bank, again, to be provided with copies in order for him to give it to his sons. Josh also had concerns around providing a copy of the revocation documentation directly to Simon.

*\*Name has been changed to protect confidentiality.*

Whilst Wendy and Josh were ultimately able to remove their family members as substitute decision-makers, they endured significant harm during the appointments and experienced long-term consequences to both their relationships and financial security. Recent amendments to Queensland's guardianship legislation have introduced additional safeguards and remedies for people whose substitute decision-makers fail to comply with their legal duties. For example, if an attorney, administrator, or guardian (or former attorney, administrator, or guardian) has failed to comply with their duties under the guardianship legislation, an adult or their estate can now be awarded compensation by QCAT for any loss that has occurred. Previously, QCAT could not award compensation for the actions of former attorneys, administrators, or guardians once the instrument had been revoked, for example upon the death of the adult or upon the revocation of the instrument.

Such legislative changes are welcome and provide much needed avenues for redress. However, there continues to be a concerning lack of accountability for substitute decision-makers who exploit the interests of people with impaired capacity and make decisions in accordance with their own interests. Many people require advocacy or legal assistance to access legislative safeguards such as applying for compensation, yet

recent changes to the distribution of disability advocacy funding in Queensland have led to an effective *reduction* in the availability of disability advocates and their capacity to support people experiencing violence, abuse, neglect, and exploitation. Other barriers to advocacy exist. For example, some disability advocates have been prevented from speaking with a person's support coordinator by their guardian from the Office of the Public Guardian, due to concerns that the advocate's interaction with the support coordinator will drain the participant's NDIS funding.

Meanwhile, some people with reduced or impaired decision-making capacity are unable to articulate their need for independent advocacy and/or decision-making support. QAI is aware of one case where QCAT revoked the appointment of the Public Guardian for accommodation decisions for an adult who was living in a residential aged care facility at the age of 40, despite this being both age and culturally inappropriate. It was argued that no accommodation decisions were required because the adult lived in the facility permanently and was ineligible for community services due to their visa status. In the absence of the independent advocate speaking up for the rights of the adult to live in age and culturally appropriate accommodation, the interests of others, i.e. the government's absolved responsibility to source and provide an alternative option, risk usurping the interests of the adult with impaired capacity. Previously mentioned resource constraints at the Office of the Public Guardian also mean that allegations of abuse by substitute decision-makers can take up to 12 months to investigate, leaving many individuals vulnerable to ongoing abuse, particularly in situations where they are reliant upon the perpetrator for essential support.

A failure to consult with the person or maintain their positive relationships, as is required by the General Principles in the GA Act, is another way in which substitute decision-makers can violate the human rights of the person with reduced decision-making capacity and yet typically, these actions avoid repercussions. A lack of consultation is a reoccurring issue QAI has observed in situations where the Public Trustee of Queensland is appointed as the adult's financial administrator. QAI has heard from clients who receive administration services from the Public Trustee, that some Public Trustee officers have failed to inform them of decisions made, provide any reasoning for why decisions have been made or even consulted them about the need for a decision. Some clients have reported not even knowing who their Public Trustee officer is, and/or that it changes frequently. Getting in touch with the relevant Public Trustee officer can also be very challenging, with only a generic phone number or email address through which contact can be made. Requests for contact with Public Trustee officers also often go unanswered. In QAI's experience, Public Trustee officers often fail to return client calls, or calls from lawyers acting on their behalf.

It is also widely suspected that the Public Trustee of Queensland benefits financially from the management of its clients' financial affairs. In 2019-20, the Public Trustee kept \$12.9 million in interest earnings from the cash assets of its clients.<sup>50</sup> Further, a recent report by the Office of the Public Advocate found that "the effect of the Public Trustee's system of fees and rebates is that some clients who are able to pay fees subsidise a range of services and activities provided to others. Ultimately, this raises questions about whether the Public Trustee is acting in the interests of its administration clients and fulfilling its duties and obligations as a fiduciary."<sup>51</sup>

The lack of accountability of the Public Trustee is a commonly cited concern by many people with disabilities and their families and was recently the subject of a harrowing Four Corners report, '*State Control: Australians trapped, stripped of assets and silenced*'. In QAI's experience, complaints mechanisms can fail to produce

---

<sup>50</sup> Slater & Gordon, *A Recent Review of The Public Trustee Queensland* in 'Social Work & the Law: Winter 2021, p 8

<sup>51</sup> Public Advocate (2021) *Preserving the financial futures of vulnerable Queenslanders: Executive summary*, p 13

satisfactory outcomes or lead to the cultural change required of Public Trustee officers in how they engage with their clients. Whilst there has been recent government attention paid to the accountability of the Public Trustee, for example through the introduction of the Public Trustee Advisory and Monitoring Board, the creation of this Board was simply one of 32 recommendations for reform made by the Office of the Public Advocate in their 2021 report. It is therefore necessary but wholly insufficient by itself in terms of the changes that are required to improve the accountability of substitute decision-makers who neglect, abuse, or exploit adults with impaired capacity.

Notwithstanding the common barriers to accessing justice, comfort can at least be drawn from the presence of some, albeit limited, safeguards. People with disability subjected to substitute decision-making type arrangements in the NDIS however, have even fewer legislative or procedural safeguards. Many NDIS participants have 'nominee' arrangements, whereby a person is appointed in writing, at the request of a participant, or on the initiative of the NDIA, to act on behalf of, or make decisions on behalf of a participant for the purposes of the NDIS Act.<sup>52</sup> Nominees have a 'duty to ascertain the wishes of the participant and act in a manner that promotes the personal and social wellbeing of the participant'.<sup>53</sup> Whilst many nominees successfully fulfil this requirement, not all nominees perform their duties in accordance with the Operational Guidelines. Indeed QAI has encountered situations where nominees have failed to act in a manner that promotes the personal and social wellbeing of the participant, where nominees have exerted control over the participant and made decisions in accordance with their own interests. This is illustrated with the following case study:

#### **Case study**

Hannah\* is a young woman who sought advocacy assistance at a time of crisis. Hannah's father, whom she had appointed as her plan nominee, had decided to move her from the home where she had been living with her brother and five others for the past three years. Hannah didn't want to move and the proposed moving date was within that same week.

Hannah had been working with her support coordinator to identify an appropriate home in which she could live alongside a fewer number of her peers, but had not yet made up her mind and did not want to move to the home her father had hastily secured on her behalf, which she understood housed three older men and which was some distance from her formal supports with whom she'd built relationships over the years.

Hannah's father had not involved her in the decision-making process. He had not ascertained her wishes, and due to the nature of their relationship which was characterised by a history of trauma and abuse, Hannah was extremely anxious about upsetting him. Hannah's self-harming behaviour worsened as a result of the situation.

Hannah explained she had consented to her father being her plan nominee at a time when she was unwell and only had vague recollections of that time.

Hannah needed significant support from an independent advocate and her existing formal supports to be empowered and supported to make the decision to cancel the appointment of her father as her plan

<sup>52</sup> National Disability Insurance Agency, *Nominees Operational Guideline – Overview*; <https://www.ndis.gov.au/about-us/operational-guidelines/nominees-operational-guideline/nominees-operational-guideline-overview>

<sup>53</sup> National Disability Insurance Agency, *Nominees Operational Guideline – Duties of nominees*; <https://www.ndis.gov.au/about-us/operational-guidelines/nominees-operational-guideline/nominees-operational-guideline-duties-nominees>

nominee. Hannah wavered frequently during conversations with her independent advocate, particularly after being subject to verbal abuse from her father. Ultimately, the appointment of Hannah's father as her plan nominee was cancelled, however the risk that Hannah will be subject to the influence of her father and again appoint him as her plan nominee persists, jeopardising her right to choice and control as to how she lives her life.

*\*Name has been changed to protect confidentiality*

Despite nominees having comparable powers to a guardian, there are no formalised safeguards within the NDIS regulatory framework that minimise the risk of undue influence or exploitation of participants by nominees. For example, nominees are often appointed following casual conversations during planning meetings and can occur in the presence of the person who is being appointed as nominee. This can be challenging for participants who may feel pressured to agree with the suggested appointment to avoid an embarrassing or potentially threatening situation. Similarly, there is no current process by which nominee arrangements are regularly reviewed. A recent consultation paper by the NDIA suggested the possibility of introducing 'desktop reviews' of nominee arrangements.<sup>54</sup> However, this is unlikely to be sufficient and fails to address situations where participants are subjected to the undue influence of their nominees or have their correspondence intercepted by their nominees. Indeed, it is a clear example of the lack of understanding of decision-support needs of people with disability that seemingly pervades many of the systems people with disability frequently interact with.

Furthermore, the Agency has power to appoint nominees for participants at their own initiative yet does so without the transparency or accountability of a state/territory tribunal. For example, the Agency can appoint nominees in the absence of a participant having undergone an independent capacity assessment. The Agency is also arguably an interested party to the matter, standing to financially benefit from the appointment or removal of certain nominees and thus do not have the independence of a tribunal either. There are also no compensatory remedies for participants who have suffered harm as a result of a nominee's actions. The lack of safeguards around guardianship type arrangements in the NDIS is therefore a human rights issue that requires urgent attention.

## 5. Recommendations for change

Much can be done to better protect the human rights of people with disability and remove risks of violence, abuse, neglect, and exploitation. However, such is the prevalence of practices and attitudes that violate the human rights of people with impaired decision-making capabilities, that change on a significant scale is required. Merely altering some aspects of current legislative and policy frameworks is insufficient and will fail to seize the opportunity presented by the Disability Royal Commission to effect meaningful and long-lasting reform and considerably improve the lives of Australians with disability. This submission has outlined various ways in which Australia is barely implementing its own interpretative declaration on Article 12, let alone the model envisaged by the original contents of the Convention. QAI therefore makes the following recommendations:

---

<sup>54</sup> National Disability Insurance Agency (June 2021) *Consultation Paper: Supporting you to make your own decisions*

## Implement the supported decision-making model envisaged by the CRPD

- Whilst substituted decision-making is theoretically posited as the option of last resort, the lived experience of people with disability does not reflect this. Implement widespread policy reforms that directly target day to day practice and address the conflicting interests that often underpin actions of stakeholders.
- Seek advice from the Committee on the CRPD with regards to Australia's interpretative declaration on Article 12 and the extent to which it is compatible with the CRPD.
- Implement a nationally consistent supported decision-making framework as recommended by the Australian Law Reform Commission (ALRC) in their report *Equality, Capacity and Disability in Commonwealth Laws*.
- Address resource constraints limiting the ability of tribunals, statutory bodies, advocates, and legal representatives to engage in processes that are recognised to increase decision-making capacity and establish relationships that enable the views, will and preferences of people with impaired decision-making ability to be fully expressed and understood.

## Improve community understanding of decision-support needs of people with disability

Implement targeted education and awareness campaigns that place the discussion about decision-making support within a human rights framework, referencing in particular Australia's obligations under the CRPD and emphasising the rights of people with disability to receive support when making decisions. Emphasise the following points:

- Informal decision-making support arrangements should be maximised to the greatest extent possible, with formal substitute (or representative) decision-making arrangements genuinely only occurring as a measure of last resort and in situations where there is clear evidence of a current and significant risk to the individual.
- That there is always a presumption of decision-making capacity. Capacity must only ever be assessed when there is reason to believe there is impaired capacity, there is a need for a decision and there is a risk that in the absence of assessing capacity (for the purposes of establishing decision-support needs, including the potential requirement for a substitute decision-maker) the person's needs will not be met and their interests inadequately protected.<sup>55</sup> Moreover, decision-making capacity must only be assessed by appropriately trained clinicians.
- That medical assessments of cognition do not automatically equate to a determination that a person does or does not have legal decision-making capacity for a matter. Instead, the social context in which decision-making takes place must be considered and prioritised.
- The link between exercising decision-making autonomy, increased quality of life and inclusion within the community. Recognise the importance of 'dignity of risk' and the right for all people, including people with disability, to take chances and learn from their experiences. Decision-supporters need to

---

<sup>55</sup> *Guardianship and Administration Act 2000* (Qld), s 12.

be familiar with the types of barriers that people with impaired decision-making skills might encounter when making decisions. For example, people with intellectual disability often take a passive communication style, known as acquiescence, in order to mask their disability and avoid stigma associated with their impairment.<sup>56</sup> This may lead to the person agreeing to things that they are not comfortable with or do not fully understand.

- The need for decision-supporters to be self-aware and reflective of their own personal values and beliefs and recognise when they are influencing the decision-support process. Decision-supporters also need to have a 'positive perception of the ability of those they support to lead self-directed lives' as people are more likely to lead self-determined lives when those around them believe it is possible.<sup>57</sup>
- The complexity of some people with disability's decision-support needs. Among other things, effective decision-support requires knowledge of the person's context through the establishment of a respectful and supportive relationship based upon trust.

Alongside education and awareness campaigns, ensure targeted skill development of key community stakeholders, such as healthcare professionals who often resort to substituted as opposed to supported decision-making practices. Also include specific training for, and oversight of, people performing the roles of substitute (or representative) decision-makers.

### Reform Queensland's guardianship legal framework

In conjunction with reforms that would facilitate a nationally consistent supported decision-making framework as per the ALRC's recommendations, address aspects of Queensland's guardianship legal framework that contribute towards the unnecessary appointment of substitute decision-makers for people with impaired decision-making capabilities. Specifically:

- Introduce mandatory legal representation for all adults subject to guardianship and/or administration applications. This is particularly essential for adults under interim orders who are essentially, in practice, faced with the task of reversing the presumption of capacity. Address any practical and procedural barriers to the realisation of this right, including funding constraints. Ensure there is increased information for people with disability regarding their right to legal representation and the free legal services within their area.
- Introduce mandatory training for all substitute decision-makers in their obligations in relation to the General Principles under the GA Act.
- Introduce a threshold test, or Practice Direction, that ensures all applications for guardianship or administration appointments are screened to ensure that they meet a prescribed threshold, which not only stipulates compliance with form but ensures that they are accompanied by relevant, recent evidence that supports the application.

---

<sup>56</sup> WWILD Sexual Violence Prevention Association, *How to Hear Me*, [https://wwild.org.au/wp/wp-content/uploads/2020/09/How\\_To\\_Hear\\_Me\\_plus\\_covers\\_website-version-Final.pdf](https://wwild.org.au/wp/wp-content/uploads/2020/09/How_To_Hear_Me_plus_covers_website-version-Final.pdf), p 36

<sup>57</sup> Watson, J. (2016) *Assumptions of Decision-Making Capacity: The Role Supporter Attitudes Play in the Realization of Article 12 for People with Severe or Profound Intellectual Disability*, *Laws*, 2016, 5, 6; p 6

- Ensure that legislative powers to invoke interim orders are exercised extremely judiciously, given the significant human rights impact on a person whose voice and right of reply is yet to be heard. The power to make interim orders must only be exercised when there is a clear and substantiated risk of immediate harm. The adult concerned must be consulted and their views obtained, prior to making the order.
- Address the substantial funding constraints at QCAT that are directly contributing towards an increased use of interim orders.
- Address the lack of safeguards in place to filter out vexatious or frivolous applications, such as the broad standing of those who can commence an application for the appointment of a substitute decision-maker.
- Ensure that administrative appointments of the Public Trustee of Queensland have a statutory maximum period, after which time the appointment lapses and the applicant must re-apply to the tribunal for the Public Trustee's continued appointment. This reinforces that the onus of proof is placed upon those claiming that an adult does not have legal capacity to make their own decisions.
- Prevent third parties from refusing to accept informal decision-making arrangements due to internal risk mitigation policies.
- Remove or amendment to confidentiality provisions within the GA Act that limit the accountability of interested persons in situations of procedural abuse.
- Address the significant resourcing constraints at the Office of the Public Guardian that are limiting and delaying their ability to investigate situations of abuse, neglect and exploitation.
- Require guardians to provide a proper account of actions undertaken during the period of their appointment to QCAT, with clear guidelines in place to ensure this happens.
- Ensure greater transparency and accountability in all QCAT hearing processes.
- Work with First Nations communities to ensure that any reforms to Queensland's guardianship legal framework are culturally appropriate and cognisant of the unique experiences of First Nations Australians with disability.
- Ensure the unique and additional barriers experienced by Culturally and Linguistically Diverse communities with regards to decision-making support, such as cultural beliefs about the role of government and the need for independent interpreting services, are considered and reflected in approaches to decision-making support for people with impaired decision-making abilities.

### **Address the risks of exploitation by substitute decision-makers through enhanced safeguards**

Improve the oversight of substitute decision-makers and the extent to which they fulfil their legal duties under relevant state/territory guardianship laws. Specifically:

- Implement a national register of Enduring Power of Attorneys with appropriate safeguards, such as introducing a third party who is notified of activity on the national register.
- Ensure people with disability have access to ongoing and adequately funded independent disability advocacy services. In Queensland, disability advocacy funding is currently only funded until July 2023 and recent changes to the distribution of disability advocacy funding in Queensland have led to an effective *reduction* in the availability of disability advocates.
- Improve the accountability of Public Trustees. For example, in Queensland, ensure the implementation of the remaining recommendations for reform made by the Office of the Public Advocate in their 2021 report *'Preserving the financial futures of vulnerable Queenslanders: A review of Public Trustee fees, charges and practices'*.
- Fund an oversight body to proactively investigate allegations of abuse in Queensland that is separate to the Office of the Public Guardian, due to the potential conflict of interest in the Office of the Public Guardian being able to fulfil this role whilst also simultaneously acting as a guardian of last resort.
- Address the lack of safeguards that exist around nominee arrangements in the NDIS. For example.
  - Nominee appointments should not occur following casual conversations in plan review meetings but should follow a formal and separate process whereby the genuine wishes of the participant are obtained independently from discussions regarding their funding, and concerted efforts are made to ensure the participant is well-informed as to the scope of the nominee's role.
  - All nominees must be provided with formal training and education from the Agency with respect to their duties to build the capacity of participants, to ascertain the will and preferences of the participant and to avoid any conflicts of interest.
  - Regular review of nominee arrangements is necessary. This must occur periodically following meaningful engagement where the participant's preferences are obtained and will require NDIA agency staff to be demonstrably competent in communicating with people with varying communication needs, something that is currently lacking. It also requires competency in discussing nominee arrangements in a way that will leave open the possibility of identifying situations where the participant is being subject to undue influence, including situations where the participant is not aware of this.
  - Consider avenues of complaint and/or redress for participants whose nominee fails to act in accordance with their duties, causing harm to the participant.
  - Ensure the Agency does not automatically consider a participant's decision-support needs to be adequately met through the appointment of a nominee, in the knowledge that nominees are substitute decision-makers and as such, carry the risk of neglecting their obligations to support the participant via supported-decision making practices.
  - Introduce competency standards in supported decision-making for NDIS service providers. For example, competency in supported decision-making practices could become part of a provider's

---

registration requirements and/or regular auditing processes, where service providers are required to demonstrate proficiency in supporting participants to exercise their individual autonomy and can be held to account in the absence of such a commitment.

- Address the lack of safeguards against unsubstantiated guardianship and administration applications regarding NDIS participants initiated by NDIS service providers. For example, consideration of an additional step to be taken prior to the submission of an application to QCAT, such as requiring the NDIS service provider to liaise with the NDIA or NDIS Quality and Safeguards Commission. Service providers who are found to have made unsubstantiated applications to the Tribunal should also be held accountable.

## **Conclusion**

QAI thanks the Disability Royal Commission for the opportunity to contribute this submission. We are happy to provide further information or clarification of any of the matters raised upon request.