

Submission by



Queensland Civil and Administrative Tribunal Act review 2025–26

To the Attorney General and the Honourable David Thomas

January 2026

About Queensland Advocacy for Inclusion

Queensland Advocacy for Inclusion (QAI) is a Disabled Peoples Organisation. We are an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our purpose is to advocate for the protection and advancement of the 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 guides our work and values.

QAI has been engaged in systems advocacy for over thirty-five years, advocating for change through campaigns directed at attitudinal, law and policy reform.

QAI also provides individual advocacy services in the areas of human rights, disability discrimination, guardianship and administration, involuntary mental health treatment, criminal justice, National Disability Insurance Scheme (**NDIS**) access and appeals, and disability advocacy for young people with disability. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

Since 1 January 2022, QAI has also been funded by the Queensland Government to establish and co-ordinate the Queensland Independent Disability Advocacy Network (QIDAN).¹ QIDAN members work collaboratively to raise the profile of disability advocacy while also working towards attitudinal, policy and legislative change for people with disability in Queensland. This submission is also informed by QAI's experience coordinating QIDAN and engaging with Queensland disability advocates.

QAI contributed to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**DRC**) in several ways, including providing advocacy to people with disability involved in the DRC to access and share their experiences, preparing submissions and attending hearings. As part of this submission, we would like to bring to the QCAT Act Review Team's attention QAI's evidence provided to the DRC about the Queensland's guardianship framework, as it is relevant for this present review.²

¹ <https://qidan.org.au/>

² DRC (2022), *Statement of Matilda Alexander*:
<https://disability.royalcommission.gov.au/system/files/exhibit/STAT.0681.0001.0001.pdf>

QAI's recommendations

As a preface to our recommendations, we would like to draw attention to Article 12 (2) of the UN Convention on the Rights of Persons with Disabilities, to which Australia is a signatory.

States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

- 1) Introduce a right to free legal representation for adults who are subject to guardianship and administration matters before QCAT. We recommend that QCAT follow the Mental Health Review Tribunal's model of appointing legal representation in certain matters, with the ability for the adult to 'opt out' of having legal representation.
- 2) Adequately resource independent disability advocates to work with the adult to identify and build supports in their networks to maximise and embed enhanced capacity and to deliver a supported decision-making framework for adults subject to a guardianship and/or administration application.
- 3) Introduce a 'paramount consideration' being the rights of the adult in all guardianship and administration proceedings.
- 4) The adult subject to a guardianship and/or administration application, or the review of an appointment, should have the opportunity to choose how they will appear at the QCAT hearing – in-person, by telephone or by video conference.
- 5) Create opportunities for people with disability to fully participate in the QCAT proceedings, as per DRC Recommendation 6.11. QCAT should include the steps it is taking to maximise the participation of people with disability in proceedings in its annual report.
- 6) As per Article 12 (2) of the UNCPRD and DRC recommendation 6.9, ensure that guardianship and administration orders are only made as a last resort and in a way that is the least restrictive of a person's rights, autonomy and actions. This can be done by:
 - a) Legislating that an interim guardianship or administration order should only be able to be made where there is clear, cogent and current evidence of an immediate risk of harm. "On the papers" interim orders are incompatible with human rights and should not be allowed. The adult must be allowed to participate in a hearing before any order is made.

- b) Introducing guidance on who can complete a health professional report. The report must have been written for the purposes of the guardianship and administration proceedings and must answer specific questions about the adult's capacity as defined in the *Guardianship and Administration Act 2000 (Qld)*.
 - c) Restricting who can be an applicant in guardianship and administration proceedings and introducing a requirement to disclose any financial interest that the applicant may have in the adult, for example, where a disability service provider makes an application for a participant who uses their services.
 - d) Receiving evidence from the adult themselves with appropriate support to maximise their participation.
- 7) Introduce a requirement that sworn evidence of the notification of the subject adult, and confirmation of their views regarding the relevant application, is filed with the application.
 - 8) The Registrar must ensure that when hearing notices are sent, only parties who are relevant to the current application are notified and irrelevant parties from previous matters are not.
 - 9) Representatives should have access to information and evidence before QCAT, regardless of whether there is an existing confidentiality order in place.
 - 10) Establish panels of specialist members, as per recommendations 4.12 to 4.14 of the QHRC's Building Belonging report, which should apply to all of the QCAT Human Rights Division.³
 - 11) Create a specialist registry within QCAT that deals with guardianship and administration matters. Adequately resource this registry to respond to enquiries in a way that is accessible, fair, just, economical, informal and quick.
 - 12) Implement the recommendations made by the Office of the Public Advocate in the "Proceedings from a Roundtable on Litigation Guardianship".⁴
 - 13) Record and publish data on the number of matters that included legal and non-legal representation, and the number of in-person, remote and on-papers hearings.

³ Queensland Human Rights Commission (2022), *Building belonging: Review of Queensland's Anti-Discrimination Act 1991*: <https://www.qhrc.qld.gov.au/about-us/reviews/ada>

⁴ The Public Advocate, *Proceedings from a Roundtable on Litigation Guardianship* (November, 2024) https://www.justice.qld.gov.au/_data/assets/pdf_file/0008/820826/litigation-guardianship-issues-in-queensland-final.pdf

Introduction

We welcome the opportunity to contribute to the Queensland Civil and Administrative Tribunal Act Statutory Review 2025-26 (**the QCAT Review**). This review provides a genuine opportunity to look at QCAT's current operations and its legislative issues that impact QCAT's ability to perform its functions in an accessible, economical and timely manner.

QAI's Human Rights Advocacy Practice provides legal advice, assistance and representation for people with disability in the areas of guardianship and administration (including restrictive practices), disability discrimination and human rights. This includes representing people with disability at matters before the Queensland Civil and Administrative Tribunal (**QCAT**). QAI presently receives funding from the Department of Justice to provide legal assistance to people with disability. This funding does not prescribe the type of assistance we must provide, and there is no dedicated funding that requires us to provide legal representation for people with disability at matters before the QCAT, or to accept appointments under section 125 of the *Guardianship and Administration Act 2000* (Qld) (**GAA**). Working within a human rights framework, we provide legal information, advice, referral and representation for people with disability, prioritising persons with impaired capacity subject to restrictive practices, guardianship or administration proceedings or experiencing violence, abuse, neglect, exploitation or discrimination. Our current funding is sufficient for 4.7 full-time solicitors, as well as 1.3 full-time paralegals to provide administrative support. In addition, QAI also receives some funding from the Queensland Public Trustee (**QPT**) sufficient for a full-time solicitor and some part-time administrative support, to provide assistance to people under administration orders, which may include representation at administration matters before QCAT.

Below is a summary of QAI's assistance provided to people with disability interacting with guardianship and /or administration orders in the past five financial years:

Guardianship and administration	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025	TOTAL
QCAT Representations ⁵	10	5	5	15	23	65

⁵ QCAT Representations refer to cases where we acted as a legal representative for an adult at a QCAT hearing. Only a small number of the legal representation we provided would be s 125 of the GGA. Most of the time we have sought leave to legally represent someone before QCAT.

Guardianship and administration	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025	TOTAL
Legal Advice ⁶	100	119	125	154	191	767
Information & Referral ⁷	141	152	159	145	196	863

Guardianship and administration are the most common matters we assist people with before QCAT. We also assist people with restrictive practices matters before QCAT, however these numbers are much lower compared to guardianship and administration matters. In the past five years, we represented people at restrictive practice matters before QCAT in 3 instances, we provided legal advice 8 times, and we provided a total of 13 information and referrals.

Disability discrimination is another matter type we assist people with. The data below provides a snapshot of the assistance we provided in the last 5 years. We note that legal advice, and information and referral data may not necessarily measure QCAT involvement in such matters, as they include instances where we advised people at the Queensland Human Rights Commission (**QHRC**) and the Australian Human Rights Commission (**AHRC**). The numbers below demonstrate the need for assistance in the area of discrimination.

Disability discrimination	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025	TOTAL
QCAT Representations	0	0	0	2	4	6
Legal Advice	56	139	149	126	62	550
Information & Referral	48	96	136	179	194	680

Further data from the 2024-25 financial year reveals that of all people we assisted:

- 18.9% identified as Aboriginal and Torres Strait Islander
- 93.2% were people experiencing financial disadvantage
- 18.1% were people experiencing or at risk of homelessness
- 33.8% were people experiencing domestic and family violence
- 30.6% were people living in regional or remote areas of Queensland

⁶ Legal advice is a discrete service where the client is advised on a matter, but we do not act as their representative.

⁷ These are matters that fall within the guardianship and administration scope but are not necessarily related to people seeking representation at QCAT. For example, information can be provided to someone who needs help finding publicly available information (like factsheets or guidelines). Referrals are provided in cases where QAI cannot assist due to capacity or because the matter is outside our scope, e.g. the person seeking assistance is not a person with a disability.

This submission is grounded in the collective experience of QAI's solicitors, and it reflects the experiences of the disability advocacy sector across Queensland.

A right to free and independent legal representation

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.⁸ These principles specify 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 GAA were amended in November 2020 to align more closely with the United Nations' Convention on the Rights of Persons with a Disability (**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:⁹

- 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;
- 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
- 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.

The desirability of an automatic right to legal representation in guardianship proceedings was 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 subject to the guardianship order in guardianship proceedings.¹⁰ Several

⁸ 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.

⁹ *Guardianship and Administration Act 2000* (Qld), s 11B.

¹⁰ Australian Guardianship and Administration Council (June 2019), *Maximising the participation of the Person in guardianship proceedings: Guidelines for Australian Tribunals*.

organisations made submissions that the guidelines should be amended to give legal practitioners an automatic right to represent the person concerned without leave. The Law Council of Australia noted in their submission 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.¹¹

The lack of an automatic right to legal representation in Queensland's guardianship regime can be contrasted with 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**).¹² 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 (2%).¹³ In the 2024-25 financial year, over 10% of all MHRT hearings had a legal representative appointed for the patient.¹⁴

Guardianship is QCAT's second largest jurisdiction, accounting for the over 37% of QCAT's workload, following the minor civil disputes accounting for 52%.¹⁵ In QCAT's Annual Report 2024-25, it was acknowledged that the guardianship jurisdiction is a complex one requiring significant resources from both QCAT and the Registry, with a demand that is likely to increase.¹⁶

¹¹ 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.

¹² *Mental Health Act 2016* (Qld) ss 739(1), 740(6).

¹³ Queensland Mental Health Commission, *Mental Health Legislation: Submission to the Health and Ambulance Services Committee of the Queensland Parliament* (October 2015), p 25.

¹⁴ Mental Health Review Tribunal, *Annual Report 2024-2025*, p 30.

¹⁵ Queensland Civil and Administrative Tribunal Act, Statutory Review 2025-26. Background Paper 3, p 6. <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/a047e052-94d5-4ef8-9ffb-65af28f44d5d/background-paper-3-types-of-jurisdiction.pdf?ETag=85d800983f7355d070614cd0d962f46d>

¹⁶ QCAT Annual Report 2024-25, p 38.

In 2016, the Public Advocate recommended that the adult concerned be provided with representation in guardianship proceedings before QCAT.¹⁷ There has been a steady increase in the number of orders appointing a guardian or an administrator in the last five years.¹⁸ Yet, people navigating guardianship matters before QCAT continue without a right to legal representation.

At present, there is no data publicly available on the number of legal representations at QCAT, which limits our understanding of the current landscape. The Guardianship and administration – Issues paper 4 stated that in the 2024-25 financial year, there were 214 applications for leave to be represented, with a note that it does not necessarily mean applications were granted.¹⁹ This means that a small minority of persons faced with a guardianship and/or administration application may have had legal representation. This is concerning, having regard to the vulnerability of this cohort and the significant impact that the appointment of a substitute decision-maker has on the person's human rights.

The limited availability of free and independent legal assistance for guardianship matters is a fundamental barrier to the adult concerned accessing justice. Currently, community legal centres (**CLCs**) are not funded to provide separate representation for adults under section 125 of the GAA. It is our understanding that QAI and ADA Law are the only specialist CLCs who provide legal representation under section 125 of the GAA in Queensland. This makes it difficult for CLCs to take on these types of matters as they are resource intensive matters and assistance is best provided face to face. CLCs can find they are typically spending more hours on section 125 appointments than for other clients, especially if they are complex hearings that take several days. CLC contracts with government require us to perform a certain number of hearings per year (rather than being measured by hours spent on matters). From a funding perspective, we may appear to be less productive if we take on a complex two-day section 125 hearing than if we had assisted several clients with less complex and shorter hearings over those 2 days.

Other CLCs, as well as disability advocacy organisations, also provide free legal and non-legal assistance in this space when they can. The lack of free and independent legal services available

¹⁷ Office Public Advocate (Qld) (April 2016), *Decision-making support and Queensland's guardianship system: A systemic advocacy report*, Recommendation 15.

¹⁸ Queensland Civil and Administrative Tribunal Act Statutory Review 2025-26, Guardianship and administration Issues paper 4 (December 2025), p 42.

¹⁹ Ibid, p 18.

to meet present demand in the guardianship space exacerbates existing disadvantage experienced by people subject to guardianship applications. In our experience, the majority of these people are on the Disability Support Pension and cannot afford to pay for legal representation (assuming leave to be represented is obtained).

Further, there are significant concerns with both procedural and substantive fairness with many of these applications (which we will address in the next section), particularly when considered through the lens of the *Human Rights Act 2019* (Qld) (**HRA**), which makes independent, skilled legal representation particularly vital to achieving an appropriate outcome.

The funding constraints upon the community legal sector would be exacerbated if a right to legal representation is introduced. To avoid rendering a right to legal representation futile, any such amendment should be supported by increased funding to the sector as was recognised by the State government with the enactment of the MH Act 2016. Therefore, QAI recommends that a right to free legal representation is introduced, for all guardianship and administration matters before QCAT. Legal representation should be prioritised for cases where human rights are most at risk, including restrictive practices and hospital hearings. The restrictive practice legislation provides for the approval of practices that would otherwise amount to criminal offences, such as assault and deprivation of liberty, therefore a person who is facing that outcome should have an automatic right to legal representation. As an alternative, duty lawyers should be made available to represent people in these matters. It could cost around \$6 million over 5 years to fund 4 FTE solicitors to perform this work.

Importantly, we recommend that only the subject adult be allowed legal representation in guardianship and administration proceedings. Interested persons should not be allowed legal representation when they are not the subject of the proceedings.

Independent Disability Advocacy

In addition to establishing a right to legal representation, investing in independent disability advocacy is essential to ensuring people with disability can access supported decision-making. Independent disability advocacy extends beyond supporting people with disability to exercise will and preference. It plays a vital role in preventing, identifying and responding to violence, abuse, neglect and exploitation. Every day, disability advocates support people to elevate their

voices, navigate complex systems, and challenge decisions and practices that cause disadvantage.

Disability advocacy is effective when it is independent from service provision, disability-led, embedded in local communities and adequately resourced to deliver face-to-face support. In many cases, advocates are the first, and sometimes only, safeguard to identify neglect or abuse, particularly in regional, rural and remote communities where isolation is heightened and virtual models are insufficient.

Therefore, disability advocates are in a unique position to facilitate supported decision-making due to the inherent nature of our role. That is, advocates spend time building an independent, respectful and professional relationship that prioritises deeply understanding of the needs of the person with disability to ensure successful advocacy outcomes. This creates a safe space for advocates to empower people with disability through supported decision making which includes honouring the dignity of risk. Disability advocates use a range of strategies that are recognised to increase decision-making capacity. For example, we seek to understand the person's communication needs and assist them to receive information in accessible formats and we 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.²⁰

Disability advocates also recognise the importance of maintaining and preserving informal supportive arrangements, working collaboratively with a person's chosen supports in accordance with their wishes.²¹ For this reason, disability advocates can be great facilitators of Circles of Support for people who require supported decision-making. When there is sufficient funding for advocacy, they can use this model to support the person to choose a network of family, friends, and community members who can provide support depending on the type and context of the decision, which is essential to prevent a substitute decision making order from being made. Rather than relying on a single paid supporter, this approach builds the person's

²⁰ Queensland Advocacy for Inclusion (QAI) (2023), *Supported Decision-Making publication to the Office of the Public Advocate*: <https://qai.org.au/wp-content/uploads/2023/12/QAIs-submission-for-the-OPASupported-Decision-Making-publication-.pdf>

²¹ Ibid.

own capacity and strengthens the capability of their natural support network, leading to more sustainable and person-centred decision-making over time.

We recommend that people navigating guardianship and administration processes should receive support from independent disability advocacy in addition to a legal representative.

Procedural fairness

Paramount consideration

We recommend the introduction of a paramount consideration similar to section 60CA of the *Family Law Act 1975* (Cth). We recommend that, in any decisions made in guardianship and administration matters, QCAT must regard the rights of the adult as the paramount consideration. In this context, alternative dispute resolution should only be used to further the adult's choices and preferences, with appropriate safeguards, including legal representation and disability advocacy must be in place.

It is our opinion that it is only the subject adult who should be afforded procedural fairness in guardianship and administration matters, as no other interested parties are at risk of having their rights restricted.

Hearing on the papers vs In-person hearings

QCAT Practice Direction No. 8 of 2010 directs that certain kinds of matters are to be dealt with on the papers unless the allocated member recommends otherwise.²² Although, in our experience, other matters such as interim orders, are also commonly dealt with on the papers.

While hearing matters on the papers is often an efficient way of dealing with matters with minimal expense and inconvenience to the parties and the Tribunal, the practice is concerning in the guardianship jurisdiction given the significant constraints upon an adult's human rights that may flow from the orders made. Coupled with the fact that the adult concerned rarely has legal representation, the lack of an in-person hearing arguably deprives the adult of their right to a fair hearing and is contrary to General Principle 8 of the GAA, which is directed at maximising an adult's participation in decisions affecting the adult's life, as well as with the HRA.²³

²² https://www.qcat.qld.gov.au/_data/assets/pdf_file/0017/101249/Practice-Direction-8-of-2010-Directions-relating-to-guardianship-matters.pdf

²³ HRA, s 31.

Appendix B of Issues Paper 4 provides a list of all locations where guardianship matters are heard, which includes a number of regional and remote locations.²⁴ In our experience, it is important and beneficial to provide face to face assistance to people with disability for matters before QCAT. However, given the limitations in our funding in addition to the fact that we are not funded for section 125 appointments, representing clients who are located outside the metro area becomes more challenging and is usually done remotely. This is unfair to people with disability living in regional and remote areas, who may be able to attend hearings in person but have no access to in person and free support from a legal representative. For example, in the 2024-25 financial year, almost 30% of our legal representation services were delivered in person, and almost all of them took place in the Brisbane area. The other 70% of matters were delivered via telephone or in-person, with a mix of metro, regional and rural locations. Although, it is possible and convenient to provide remote assistance, many times it is not ideal, accessible or the preference of the adult seeking assistance. We also have concerns about the overuse of remote hearings and the risks of adults being influenced or under coercion, which are nuances that are usually not missed in face-to-face hearings.

The format of hearings should be decided based on the adult's choice and preference, and the adult should be supported to make that decision.

Evidence access

It has been our experience that in many cases adults who are subject to guardianship application orders do not have access to the evidence before the Tribunal within an adequate timeframe. Frequently, the evidence before the Tribunal is provided to the adult less than 7 days before the hearing, when it is provided at all. This creates a challenge for the person seeking assistance from community legal centres or disability advocacy organisations who rarely have capacity to assist the individual within 7 days. This undermines the principles of natural justice and procedural fairness. Adults subject to these proceedings should be given a meaningful opportunity to engage with the reports available to the Tribunal and participate in the process. QCAT needs to make sure everyone involved is properly informed and has the opportunity to respond. Procedural fairness must come before administrative convenience.

²⁴ Queensland Civil and Administrative Tribunal Act Statutory Review 2025-26, Guardianship and administration Issues paper 4 (December 2025), Appendix B.

When we are involved in QCAT matters, we have also experienced significant delays trying to access relevant information and documents to support the person with disability. As QCAT still relies on paper files for its matters (except for minor civil disputes matters where QCase is used), it usually takes a long time for us to contact QCAT and we need to follow up constantly to receive the documents necessary to support the person. Another significant factor is that parties do not serve documents to each other, resulting in numerous calls to the registry to request an update and a copy of new documents provided to QCAT. In some cases where we have requested a copy of the QCAT file from the registry and the file is archived, documents can take up to 3 months to be provided, and we might lose contact with the person in the meantime. The Registry should be adequately resourced to respond to enquiries for information and relevant documents as a way to fulfill its objects that are to be accessible, fair, just, economical, informal and quick.

Supporting the maxim of representatives as a last resort

Article 12 of the UNCPRD affirms that people with disabilities have the right to equal recognition as persons before the law and requires access to support in exercising their legal capacity. Any guardianship and administration applications threaten this right. There would be significant value in an increased screening process for guardianship and administration applications, prior to their acceptance. In addition to the narrow circumstances in which the Principal Registrar can reject applications,²⁵ there is a need for increased powers for the Registry to dismiss applications on the paper that are not supported by an appropriate evidentiary basis or to seek further particulars from the applicant prior to accepting the application. This would be an important step in reducing the number of frivolous and vexatious applications that proceed to hearing and would also reduce the significant workload of the Tribunal. Importantly, this should only apply to applications that seek to restrict the adult's rights and should not apply where the adult themselves is seeking relief from orders made about them.

Questions like “what steps have you taken to address the issues you are raising in this application?” can hold applicants accountable and scrutinise baseless applications. ADA Law and QAI have developed a Supported Decision Making checklist which includes some of the more frequent decisions that people need to make as they age or live with disability, and how

²⁵ QCAT Act, s 35(3).

they can find out about the range of services and supports they can access through government and non-government programs.²⁶ The booklet is designed to ‘pick and choose’ the areas that are relevant to decision making or finding out about the types of supports and services that are available for eligible people. Encouraging applicants to use a booklet such as this one or incorporating some of the content from this booklet into QCAT application form, will assist QCAT to assess applications.

In our experience, many guardianship order applications are initiated by NDIS Service Providers, despite the lack of comprehensive evidence presented. While at times these appointments may be necessary, they remain the legislated option of last resort. QAI is concerned that, contrary to the NDIS’ 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 GAA).²⁷

DRC recommendations 6.5 to 6.15, related to guardianship, focus on the awareness and use of supported decision-making, shifting away from substitute decision-making.²⁸ Relevantly, we fully endorse DRC recommendation 6.9 which proposes practical ways to ensure that representation orders are only made as a last resort and in a way least restrictive of a person's rights, autonomy and actions, as practicable in the circumstances. In our experience, there is an opportunity for QCAT to improve its processes, so each person’s circumstances are meaningfully considered before an order is made.

For instance, we consider that the strong powers under s 129 of the GAA 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. 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.

We also have concerns about the ways the presumption of capacity is tested at QCAT. It is not appropriate to direct the adult to obtain a health professional report about their own capacity

²⁶ <https://qai.org.au/wp-content/uploads/2023/06/Supported-Decision-Making-Guide-ADA-and-QAI.pdf>

²⁷ GAA, s 11B, General Principle 4.

²⁸ Disability Royal Commission, volume 6, p132.

when an application for a guardian or administrator is filed by someone else. The applicant should bear the onus to present evidence to rebut the presumption of capacity.

Another concern we have is that Health Professional Reports are prepared by people without the necessary qualifications and expertise to provide an expert opinion about an adult's decision-making capacity. As a result, irrelevant or inappropriate considerations are inadvertently taken into account and/or given inappropriate weight. An example of this is when Occupational Therapists provide reports in QCAT matters that were originally prepared for the NDIS, which in many cases emphasise what the adult cannot do and can be misinterpreted. Noting the gravity of the appointment of a guardian or administrator on an individual's independence and freedom of decision making, it is paramount that persons providing QCAT with opinions on an individual's decision-making capacity and other related matters are appropriately qualified and possesses relevant expertise.

The definition of a health provider in Schedule 4 of the GAA Act is vague and creates uncertainty about who can complete a Health Professional Report to QCAT in guardianship and administration matters. The definition states that a health provider means a person who provides health care, or special health care, in the practice of a profession or the ordinary course of business e.g. dentist. To avoid uncertainty, we recommend introducing guidance on:

- the qualifications an individual/health care provider is required to hold in order to complete a Health Professional Report, which can be used as evidence in a guardianship or administration hearing;
- the specific evidence and detail required in the Health Professional Report to satisfy QCAT that a guardianship or administration order is necessary, including information about the adult's care history and what level of supported decision-making has been in place to demonstrate effective communication between the health professional and the adult; and
- direction to QCAT members regarding:
 - the level of consideration that should be given to an individual's qualifications in order to determine how the Health Professional Report should be assessed and weighted as part of QCAT's decision whether or not to appoint a guardian or administrator; and

- the inclusion of a summary of those considerations in QCAT's reasons for its decision.

QCAT should not solely rely on evidence provided by Health Professionals though. As noted in the DRC Report, unfortunately in many instances, health professionals do not have a clear understanding of a person's disability.²⁹ Therefore, receiving evidence from the adult themselves as well as any relevant person is essential to understand the support networks that exist in the adult's life. Taking these steps are essential before reaching a conclusion that a substitute decision-making order is in fact necessary.

Additional registrar powers

Notification and service

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. In our 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 orders are being made and granted, in circumstances where the threshold requirements are not adequately established.

Currently, the QCAT Form 10 – Application for administration/guardianship appointment or review includes a section where the applicant must state whether the adult has been informed about the application. In our experience, this is insufficient to demonstrate the notice was in fact given and the adult understands what the application means. In numerous cases, people who seek our assistance have not been informed about the application until they receive a hearing notice which will occur in a couple of days. We have also encountered situations where young people who were subject to a Child Safety order have had a guardian appointed to commence once they are 18 years old, without their knowledge.

We propose the introduction of a requirement that affidavit evidence of the notification of the individual subject to the application, and confirmation of their views regarding the relevant

²⁹ DRC Recommendations 6.24 to 6.34 reflect the need for improvement in health professionals' knowledge, skills and attitudes to communicate effectively with people with disability.

application, is filed in support of the application. This would act as a safeguard against the incorrect completion of this part of the application and ensure that the adult is aware of the application and, in the case of matters heard on the papers, has the opportunity to consider and respond to the application prior to the making of the order.

We also recommend that the applicant must be willing to appear before QCAT to speak to their application. In circumstances where the applicant is unable or unwilling to appear before QCAT, the application should be dismissed.

Confidentiality

We have seen cases where QCAT hearing notices were shared to all relevant parties from a previous hearing, which raises concern about the privacy of the individual subject to the application. This is particularly problematic where circumstances change, like a Domestic and Family Violence Order might be in place, and the alleged perpetrator might still be a “relevant party” from a previous hearing, and a breach of conditions on the DVO could occur. We have seen cases where service providers who made an application in the past were kept in the records for a future application. We have also seen instances where a child safety officer who made an application for a guardian and administrator to be appointed was kept on the records and years later when the order review comes up, they were still listed as a relevant party and notified about the new hearing, even though the person was over 18 and no longer under the protection of Child Safety. The Registrar should check the matter, and whether all the relevant parties are in fact still relevant. New matters should not automatically include parties that were involved in previous matters.

We have also experienced difficulties accessing documents for matters that were referred to QCAT from the Magistrate Court due to confidentiality orders. While we understand the privacy protections required in some cases, not being able to access information or evidence because of confidentiality orders impacts our ability to represent our clients. Therefore, the Registrar should review the need to maintain confidentiality orders made by the Magistrate Court, and if that order needs to be maintained, there should be exceptions in place to allow representatives to access information and evidence before QCAT.

Confidentiality should be discretionary and take into account the views and wishes of the adult.

When negotiating settlements in Compulsory Conferences for discrimination matters, QCAT should inform parties of and encourage compliance with “Guideline on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints”.³⁰ These guidelines should be adapted to apply to all discrimination matters, not just sexual harassment.

QCAT as a specialist tribunal

In 2022, the QHRC’s Building Belonging report considered the powers of QCAT in the anti-discrimination space.³¹ Following consultation with the sector, the report did not recommend creating a specialist tribunal. Instead, it was recommended that:³²

- The tribunal should ensure that, wherever possible, members who deal with matters under the Act have demonstrated knowledge and experience in discrimination law.
- When considering appointments to the tribunals, the Queensland Government should have regard to the benefits associated with tribunal membership reflecting the diversity of the community that comes before them.
- The Tribunal should ensure that members undertake regular training on cultural competency.

QAI supports the requirement for specially trained members to decide guardianship and administration matters. We believe that a legally qualified member must constitute the panel but believe that a legal member could be greatly assisted by another member, or members, who have other relevant qualifications. This could include, for example, a medical doctor and an allied health professional.

The MHRT offers a model that could guide QCAT in this regard. We also refer to occupational regulation matters which QCAT currently oversees. For example, in medical regulation matters, a legal member may be assisted by members of the medical profession.

We also recommend that a specialist registry within QCAT be formed to administer the matters.

³⁰ Australian Human Rights Commission (2022), *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints*: https://humanrights.gov.au/_data/assets/file/0023/47345/Guidelines-Use-of-Confidentiality-Clauses-Resolution-Workplace-Sexual-Harassment-Complaints.pdf

³¹ Queensland Human Rights Commission (2022), *Building belonging: Review of Queensland’s Anti-Discrimination Act 1991*, p. 205-211: <https://www.qhrc.qld.gov.au/about-us/reviews/ada>.

³² Ibid, recommendations 14.2, 14.3 and 14.4, p 211.

We support the QHRC's position and ask for the implementation of recommendations 4.12 to 4.14 of the Building Belonging report, which should apply to all the QCAT Human Rights Division, and not be limited to anti-discrimination matters only.

Other issues

Litigation guardians

In November 2024, the Office of the Public Advocate (OPA) hosted a roundtable with various stakeholders, including QAI, to discuss problems with the operation of litigation guardianship and to identify potential solutions.³³ We propose the recommendations made by the OPA are implemented as part of the QCAT Act Review.

Data

QCAT's annual report should record how many adults are legally represented in guardianship and administration proceedings. QCAT should also capture and record the number of matters heard in person, by remote conferencing or decided on the papers.

Conclusion

QAI thanks the QCAT Review team for the opportunity to contribute to this consultation. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.

This submission is endorsed by QIDAN and Mackay Advocacy Inc.:



³³ The Public Advocate, *Proceedings from a Roundtable on Litigation Guardianship* (November, 2024) https://www.justice.qld.gov.au/_data/assets/pdf_file/0008/820826/litigation-guardianship-issues-in-queensland-final.pdf