

Office of the Public Advocate (Qld)

Decision-making support and Queensland's guardianship system

A systemic advocacy report

April 2016



Queensland
Government

The report is available online at www.publicadvocate.qld.gov.au. If you cannot access the report online or experience difficulty in reading the report electronically, please contact our Office for a hard copy.

Feedback on this report is welcomed. An electronic feedback form can be accessed at <https://www.surveymonkey.com/r/OPAPubForm>.

The Queensland Government is committed to providing accessible services to Queenslanders from all culturally and linguistically diverse backgrounds. If you have difficulty in understanding the report, you can contact us on telephone (07) 3224 7424 or by emailing public.advocate@justice.qld.gov.au and we will arrange an interpreter to effectively communicate the report to you.



Disclaimer

Any views or opinions expressed in this document do not necessarily reflect the views of the Department of Justice and Attorney-General or the Queensland Government.

Every effort has been made to ensure this document is accurate, reliable and up to date at the time of publishing. The Office of the Public Advocate will not accept any responsibility for loss caused by reliance on this information and makes no representation or warranty regarding the quality or appropriateness of the data or information.

This work is copyright, however material from this publication may be copied and published without permission on the condition that the meaning of the material is not altered.

The Office of the Public Advocate acknowledges the Jagera and Turrbal people as the traditional owners of the land upon which we work.

© The State of Queensland (Department of Justice and Attorney-General) 2016

Foreword

Many of us have relatives and friends who require support to live the kind of everyday life that many people in community take for granted.

Many people have the expectation that “it won’t happen to me”.

And yet, any one of us could be one step away from a catastrophic event resulting in an impairment that impacts our capacity for making decisions.

Addressing any potential barriers to the equal enjoyment of rights is central to an inclusive society, and no doubt what you would expect if it did happen to you!

Queensland’s guardianship system seeks to provide the necessary mechanisms by which to uphold a person’s right to legal capacity. However, contemporary directions in human services provide a timely impetus to consider how we might strengthen the framework within which this system operates, particularly in view of both historical and current systemic pressures that are placing strain on the ongoing sustainability of the system.

The service delivery landscape for people with impaired decision-making capacity has been progressively evolving for a number of years, with more recent reforms providing the foundation for a cultural shift that challenges historical assumptions and sets the scene for widespread societal change.

While it may take some years to see these overarching goals come to fruition, reforms such as My Aged Care and the National Disability Insurance Scheme provide clear signals about the direction being pursued by Government.

Gone are the days of Government ‘telling’ people what services they can and can’t have to address their needs. The focus is clearly shifting to enable people themselves to take over the reins and make their own choices about what will make a difference in their lives.

Current reforms are progressively being characterised by a strong rights focus whereby choice and control by the person are pivotal features. Similarly it is increasingly recognised in both word and practice that each person has the right, regardless of the nature of any impairment that they may have, to engage in decisions affecting their own life to the fullest extent of their capacity and to be able to determine what is in their own best interests.

While I wholeheartedly endorse this direction, it is possible (if not likely) that many people may need assistance to achieve these goals, particularly given that they may not have had the opportunity to take an active role in decision-making in the past.

There is a clear need to acknowledge the role of support in strengthening a person’s capacity to exercise choice in the pursuit of their goals. Further, there must be a focus on ensuring that the way in which such support is provided is least restrictive and maintains the person’s legal capacity to the greatest extent possible.

Current reforms, and the principles underpinning them, are well intentioned and uniquely positioned to effect positive changes in the lives of people with impaired decision-making

capacity. Conversely, however, they also create the potential for unintended consequences, many of which will be driven by the competitive marketplace that will increasingly characterise the future of service delivery.

Like the majority of community members, people with impaired decision-making capacity need services and supports from a range of areas including health care, housing, education, employment and training (just to name a few) across a multitude of sectors ranging from those under federal jurisdiction to state-based systems to local government, private industry and the community sector.

The reforms currently underway may not engender associated changes in these complementary systems despite their success, in many respects, hinging on them operating at optimal capacity. In view of this, we must ensure that we do not become complacent and assume that the reforms currently underway will be everything for everyone. Integral to the success of these reforms is the need for an ongoing focus on pursuing cohesion and integration between and across the full range of service systems that people access in their everyday lives.

The early stages of implementing the reforms have already given rise to unanticipated pressures, particularly (as is the focus of this Report) on systems such as guardianship. Similarly they have highlighted the risk that, without considered thought and complementary reform, such systems may be stretched beyond their limits.

The research undertaken by my Office highlights these tensions while also considering the opportunities that may avail themselves should Government be minded to progress the long anticipated reform of our guardianship system.

Doing so may not only address current issues of sustainability but, more importantly, will enable Queensland to strengthen the way in which we uphold rights by providing a broader range of options to enable people to maximise autonomy and maintain their legal capacity.

It is timely to pursue these opportunities now so that Queensland is able to address existing system pressures and appropriately position itself to promote the cultural and societal shifts needed to support the success of the broader reform agendas.

I thank all those who have contributed to the research that has culminated in this Report and trust that the Report will be of value to Government in pursuing the reform of Queensland's guardianship system. I look forward to Government's response to the Report, which will ideally lead to a more appropriate range of options for Queenslanders with impaired decision-making capacity.



Jodie Griffiths-Cook
Public Advocate
Office of the Public Advocate (Qld)

Acknowledgements

I would like to thank the Queensland Civil and Administrative Tribunal, in particular the Human Rights Division and Registry, the Office of the Public Guardian and the Public Trustee for their support over the course of undertaking this research. Each of these key agencies in Queensland's guardianship system assisted my office through the provision of data, organisational information and access to staff.

I thank the Tribunal members, executives, managers, team leaders, guardians, trust officers and other staff at the Tribunal, Office of the Public Guardian and the Public Trustee for participating in the interviews and surveys that form part of the evidence base for this report. Your thoughts and experiences provided a detailed and important understanding of various strategic and operational aspects of Queensland's guardianship system.

I would also like to acknowledge and thank the individuals and organisations who made a submission in response to the Issues Paper we released as part of this project. Your insights and experiences provided considerable value to the evidence base underpinning this report.

Finally, I would like to acknowledge and thank the members of the advisory group for their time and commitment to this project. The advisory group members contributed their expert knowledge, experiences and strategic advice throughout the research, particularly in relation to the stakeholder groups they represent. The contributions of advisory group members played an important role in shaping the research and I commend each member for their commitment to improving outcomes for people with impaired decision-making capacity.

This page has been left intentionally blank

Table of contents

Definitions	vii
Executive Summary	xi
List of recommendations	xxv
Part A: The current system.....	1
1 Introduction.....	1
1.1 Impaired decision-making capacity	1
1.2 The impact of a changing landscape	2
1.3 An investigation into decision-making support	3
2 Queensland’s guardianship system	6
2.1 The purpose of guardianship legislation	7
2.2 The principles.....	9
2.3 Supported decision-making and Queensland’s guardianship system	12
3 Pressures on Queensland’s guardianship system.....	13
3.1 Health, disability and aged care services	13
3.2 Administrative requirements of organisations	18
3.3 Societal and demographic trends	19
3.4 Impact on the current guardianship system	24
3.5 Forthcoming systems change	27
3.6 Sustainability of the current system	32
4 Recommendations	36
Part B: Enhancing the current system.....	37
5 Informal decision-making	37
5.1 Queensland’s guardianship system.....	37
5.2 Barriers to informal decision-making.....	38
5.3 Enabling informal decision-making	40
5.4 Commonwealth ‘nominee’ arrangements	42
5.5 Recommendation	42
6 Advance planning.....	43
6.1 Engagement in advance planning	44
6.2 Increasing the uptake of advance planning	46
6.3 Recommendations	53
7 Capacity.....	54
7.1 Determining capacity	55
7.2 Developing an appropriate legislative and procedural framework for assessing capacity	62
7.3 Ability, not capacity.....	66
7.4 Recommendations	66
8 Appointment of guardians and administrators	68
8.1 Circumstances leading to an application for a guardian or administrator	68
8.2 Unnecessary applications and appointments	72
8.3 Potential strategies for avoiding unnecessary applications and/or appointments	74
8.4 The least restrictive order	84
8.5 Towards least restrictive guardianship and administration orders	93
8.6 Recommendations	95

9	Decision-making by public guardians and administrators.....	96
9.1	Public decision-makers – roles and responsibilities	97
9.2	Participation and support in practice	99
9.3	Issues affecting guardians and administrators in supporting client decision-making	103
9.4	Enhancing decision-making support from public agencies	105
9.5	Recommendations	106
10	Monitoring and safeguards.....	107
10.1	Support networks.....	107
10.2	Information	107
10.3	Individual advocacy and support	108
10.4	Public appointments	109
10.5	Guardianship legislation.....	110
10.6	Queensland Civil and Administrative Tribunal	111
10.7	Reviewing the need for public guardianship and administration	111
10.8	Investigations of allegations of abuse, neglect and exploitation	116
10.9	Other independent statutory mechanisms	119
10.10	Recent developments	122
10.11	Recommendations	122
	Part C: Future directions	124
11	Less restrictive alternatives to guardianship and administration.....	124
11.1	Human rights and policy context	124
11.2	Unprecedented pressure on Queensland’s guardianship system	129
12	Contemporary approaches	130
12.1	Legislated regimes.....	130
12.2	Australian supported decision-making trials.....	134
12.3	Views of Queensland stakeholders	136
12.4	Recommendation	138
13	Conclusion	139
	Appendix One – Data collection	140
	Appendix Two – Advisory Group members	145
	Appendix Three – Queensland’s legislative framework for guardianship	147
	Appendix Four – Purpose, acknowledgements and principles of the <i>Guardianship and Administration Act</i>.....	154
	Appendix Five – Registration of enduring documents	159
	Appendix Six – Supported decision-making regimes in Canada and Europe	162
	Appendix Seven – Australian supported decision-making trials.....	171

Definitions

The following terms are used throughout this report. They may not equate to legal definitions or the definitions relating to other jurisdictions.

Administrator	An administrator may be appointed by the Tribunal/Court to make decisions about financial matters (e.g. managing day-to-day expenses, paying bills or other debts, carrying on a trade or business, and making investments) for a person with impaired decision-making capacity.
Adult	For the purposes of this report, ‘adult’ refers to a person aged 18 years or over who has been found by the Tribunal to have impaired decision-making capacity for a matter.
Attorney	An attorney is a person who has been appointed by the principal to make decisions regarding financial matters or personal matters (including health matters).
Convention	The United Nations <i>Convention on the Rights of Persons with Disabilities</i> .
Decision-making support	Support provided to a person to enable them to make decisions for themselves. Such support may involve helping the person to understand that a decision needs to be made and what their options and choices are, and/or communicating the person’s intentions to others. It may also involve helping other people understand that a person with disability has rights, a history, aspirations and goals, and is a person who may be capable of exercising their legal decision-making capacity with or without support.
Enduring document	An enduring document is an enduring power of attorney or an advance health directive. By way of an enduring document, a principal may appoint an attorney to make decisions on their behalf for when/if they lose capacity, and/or convey directions about their views or wishes for the future.
Guardian	A guardian may be appointed by the Tribunal/Court to make decisions about personal matters (e.g. accommodation, health care, supports and services, contact, employment) for a person with impaired decision-making capacity.
Guardianship legislation (Queensland)	Collectively, the <i>Guardianship and Administration Act 2000</i> and the <i>Powers of Attorney Act 1998</i> .

Guardianship system	Comprised of guardianship legislation and the agencies and entities that exercise powers, functions and roles under that legislation. The system is inclusive of both guardianship and financial administration.
Hearing	A decision-making process undertaken by the Tribunal that includes the consideration of documents submitted and/or the verbal and documented evidence of the attending parties or their representatives.
Informal decision-maker	A person, without formal legal authority, who makes decisions on behalf of a person who may have impaired decision-making capacity for a matter.
On the papers	A Tribunal decision made ‘on the papers’ considers the documents submitted in relation to a matter without the attendance of the parties to the matter or their representatives.
Order	A document outlining a Tribunal decision or direction. An order is legally binding unless it is overturned on appeal.
Principal	The person who made an enduring power of attorney or advance health directive, or the person for whom a statutory health attorney makes a decision.
Principles	Collectively, the eleven general principles and the health care principle contained in the <i>Guardianship and Administration Act 2000</i> and the <i>Powers of Attorney Act 1998</i> .
Queensland adult	A resident of Queensland who is aged 18 years or older.
Substitute decision-maker	A person formally appointed as a guardian or administrator by the Tribunal/Court; an attorney appointed under an enduring power of attorney or advance health directive; or a statutory health attorney making decisions on behalf of an adult with impaired decision-making capacity. A substitute decision-maker has legal authority to make decisions for the person for whom they are appointed.
Support network	A person’s support network may comprise members of the person’s family, close friends of the person and/or other people who provide support to the person.
Supported decision-making	An approach to decision-making that involves providing a person who experiences difficulty with one or more aspects of making a decision with the support they need to make their own decision. Under this process, the person in receipt of support retains their legal capacity to make decisions.

Supporter	A person may informally call upon a decision-making supporter to assist them with various aspects of making and actioning a decision. The person retains their legal capacity and right to make decisions.
Third party organisation	An organisation that a person interacts with or receives supports or services from. Examples of third party organisations include government departments, non-government service providers, private businesses or public companies.
Tribunal	The Queensland Civil and Administrative Tribunal (QCAT).

This page has been left intentionally blank

Executive Summary

Introduction

There is increasing recognition that the focus of decision-making support must shift from substitute decision-making to the supports that should be provided to enable people to make decisions for themselves and exercise their legal capacity. In many respects, this shift has its origins in the *Convention on the Rights of Persons with Disabilities* ('the Convention'), however more recently in Australia, the Australian Law Reform Commission's (ALRC's) report *Equality, Capacity and Disability in Commonwealth Laws* and contemporary discourse have continued to prompt advances in respect of this issue.

Despite this, it is likely that the practice of guardianship and administration will continue for the foreseeable future. The demand for guardianship and administration is increasing as a by-product of progressive reforms to human service systems and demographic trends and changes within society.

Considerable work is required to reduce reliance on state-based guardianship systems and encourage the use of supportive mechanisms to enhance the ability of people with decision-making limitations to make their own decisions. With this in mind, the Office of the Public Advocate explored the extent to which relevant provisions of Queensland's guardianship legislation are translated into practice, and sought to identify systemic barriers and enablers to protecting and supporting the right of a person to make their own decisions.

Queensland's guardianship system

Queensland's guardianship system facilitates the making of decisions for adults who are determined to have impaired decision-making capacity. It places obligations on those making decisions and exercising powers under the legislation including supporting a person's right to make their own decisions, or at least participate in the making of those decisions, even when they are subject to guardianship or administration.

While the explanatory section of the *Guardianship and Administration Act 2000* contains elements that support and uphold the right of a person to make their own decisions, they generally relate to adults with impaired capacity and anyone performing a function or exercising power under the Act. Arguably, the principles should not only apply to people with impaired decision-making capacity, but to all Queensland adults. Similarly, the rights and considerations that are legislated for adults with impaired capacity are generally applicable to the broader population.

Pressures on the guardianship system and the movement away from substituted to supported decision-making provide the impetus to examine how the purpose of the *Guardianship and Administration Act* might be best achieved. Further, contemporary discourse and community expectations in relation to the way that this Act is given effect have progressed from the time at which it came into force.

It is timely to give consideration to how the guardianship system, and its founding legislation, might better achieve its purpose and more effectively enable the exercise of legal capacity, particularly where adequate and appropriate supports are available for a person. Queensland's guardianship system could better promote and enable the exercise of legal capacity, decision-making support and appropriate informal decision-making. It could also better ensure that the guardianship system is only accessed when all other less restrictive supports have failed. Importantly, it must also continue to provide protections for the vulnerable people who require them (e.g. those experiencing or at risk of abuse, harm or exploitation).

Guardianship legislation should establish positive obligations in relation to upholding the decision-making rights of all Queensland adults. Expanding the focus of guardianship legislation in this way would enable Queensland to better uphold the principles of the Convention and achieve the ALRC's recommended shift towards supported decision-making. These legislative changes could prompt a cultural shift towards supported decision-making, mitigate some system pressures and reduce demand for guardianship and administration.

Despite some aspects of Queensland's guardianship legislation better reflecting support for decision-making autonomy than legislation in other Australian jurisdictions, Queensland's guardianship legislation also imposes limits to supported decision-making. Further, the limited awareness of the principles and issues associated with applying the principles hinder the effective implementation of the legislation.

Pressures on the system

Health, disability and aged care services

Much of the pressure on Queensland's guardianship system stems from the need for people with impaired decision-making capacity to negotiate access to multiple supports within a labyrinth of social services. There is increasing demand for case management to assist people with impaired decision-making capacity to navigate the complex array of social services in a way that meets their needs and goals. This results in increasing pressure on guardians, and to a lesser extent administrators, to perform advocacy and case management roles in addition to their role as a decision-maker. This can impact the timeliness in which decisions can be made and/or the number of people for whom a public decision-maker can make decisions.

Administrative requirements of organisations

The low cost and accessibility of the guardianship system make it an increasingly attractive option for organisations to manage risk and ensure legal authority. However, this can channel people into the guardianship system by inhibiting the informal decision-making arrangements of people who may have impaired decision-making capacity.

The Tribunal may be compelled to make appointments in response to the policies and requirements of organisations given that without an appointment, the needs of the person may not be adequately met and/or their interests protected. The overuse and sometimes misapplication of the guardianship system in this manner has a significant impact on a person's civil rights and is arguably a creep in the scope of Parliament's original intention for guardianship and administration.

Queensland's ageing society

Queensland's ageing population will generate an increased prevalence of age-related conditions, such as dementia, that can impair a person's decision-making capacity and result in the appointment of a guardian and/or administrator. The prevalence of dementia in Queensland may reach 215,272 by 2050.

The increasing interactions of older Queenslanders with the health system, particularly for people with dementia or who experience symptoms that may impact decision-making capacity, may stimulate demand for guardianship and/or administration. This primarily occurs as a result of a general increase in the number of health, service provision and other decisions to be made for the person; and hospitals or other service providers requiring authority to act (e.g. in relation to discharging patients).

While not unique to people who are ageing, many older Queenslanders are at high risk of social isolation and are more likely to have low social participation levels and an absence of informal support networks. Support networks are an important safeguard and can alleviate the need for guardianship and administration. A lack of support and/or social isolation is a key risk factor for abuse, neglect and exploitation and, when coupled with the need for a decision to be made, can be a trigger for guardianship and administration applications.

Unfortunately, there is a likelihood that ageism, an underlying cause of elder abuse, will increase alongside the ageing population. Increasing instances of elder abuse will continue to fuel applications for the appointment of guardians and administrators, the appointment of public agencies as substitute decision-makers and requests for investigations into potential abuse, harm and/or exploitation.

Another phenomena associated with Queensland's ageing society is the increasing number of ageing parents who are the primary carers of their adult son or daughter with disability. When a parent carer is no longer able to care for, or support the decision-making of, their son or daughter with disability, the person with disability may require guardianship and/or administration to access the supports and services they require. This will result in applications to the Tribunal and may also result in the appointment of a public decision-maker.

Impact on the guardianship system

Compared to other States and Territories, Queensland has the highest number of people subject to public guardianship and the third highest number of public administration orders.

There is an increasing number of applications for guardianship and administration, which affects the workload of the Tribunal's Human Rights Division registry and the time taken for matters to be heard by the Tribunal. The increasing pressure to manage growing demand and achieve cost efficiencies may gradually undermine the specialist nature of the Tribunal, which has the potential to impact application of the least restrictive principle, and lead to overly restrictive outcomes for individuals.

The system pressures are also evident in the growing number of public appointments, the high caseload within the Office of the Public Guardian (OPG), the number of public administration orders, and the increasing number of allegations and complaints regarding the suspected

abuse, neglect or exploitation of people with impaired decision-making capacity received by the OPG. The increasing demand for public guardianship will impose resourcing pressures on the OPG that, without additional funding, may become increasingly limited in its ability to meet the growing demand for its services.

Inadequate resourcing of agencies within Queensland's guardianship system may become a barrier to the effective implementation of guardianship legislation and upholding the rights of people with impaired decision-making capacity.

Contemporary system reforms

National Disability Insurance Scheme

The National Disability Insurance Scheme (NDIS) will bring significant benefit to the lives of people with disability. However, it is possible, if not likely, that the NDIS will also have a significant impact on people with impaired decision-making capacity and Queensland's guardianship system given that up to 89% of NDIS participants are identified as having some form of cognitive impairment.

Anecdotal evidence suggests that guardianship systems are being relied on in place of the less restrictive alternative of NDIS nominees. Jurisdictions that have trial sites involving adults with disability have reported a significant increase in involvement in the NDIS, either as advocates or guardians due to difficulties that people experience in navigating the planning process. The experience in trial sites also suggests that the NDIS may impact the breadth of some appointments, resulting in people losing legal capacity for a wider range of matters.

There will be ongoing decisions to be made for NDIS participants, which may extend the period of guardianship and/or administration for some people and notably increase the number of decisions to be made by guardians and administrators. It is also likely to intensify pressure on guardians to act as advocates and case managers in addition to decision-makers.

The most appropriate and least restrictive mechanisms should be used to support people with disability in gaining access to the NDIS and the planning process. This may not always be guardianship and administration.

Finally, the extent to which decision-making support and individual capacity building will be provided under the NDIS is unclear. Failure of the National Disability Insurance Agency to fund decision-making support via participant plans may impact the ability of some people to make their own decisions in the least restrictive manner. In turn, this could be a missed opportunity to prevent and/or minimise the need for guardianship and administration.

***Living Longer Living Better (My Aged Care)* reforms**

The *Living Longer Living Better* aged care reforms have placed, and will continue to place, considerable pressure on Queensland's guardianship and administration system through:

- the increased complexity of decisions and the pressure this places on public decision-makers;
- the increased attractiveness of having a public decision-maker appointed;

- a reluctance of potential private guardians and/or administrators to undertake a decision-making role, particularly in light of the potential financial and legal liability;
- greater time required for decision-making about aged care placements by public decision-makers (which is partially underpinned by the issue of potential legal liability); and
- the Public Guardian ceasing to make aged care placement decisions as the Statutory Health Attorney of last resort, which may increase applications for a guardian.

Other concerns include a trend towards hospital staff seeking the appointment of a guardian and/or administrator to make the aged care placement decision and thus facilitate the person's discharge from hospital, and emerging policy positions whereby aged care providers refuse to accept informal decision-making and require that people have a valid enduring power of attorney as a condition of entry. This will continue to result in an increasing number of applications for interim orders made to the Tribunal in relation to residential aged care placements. This pressure on the guardianship system is compounded by the unwillingness of aged care providers to offer interim placements.

The latest tranche of aged care reforms, involving the delivery of home care packages via a consumer directed care model, is expected to impact Queensland's guardianship system in a similar manner to the NDIS. Due to the prevalence of age-related conditions that can impair a person's cognition, many people may find the new service model difficult to understand and navigate. They might also experience difficulty in making and actioning decisions about their home care package.

For many people, social isolation coupled with declining cognition and the need to purchase home care supports, may stimulate demand for public guardianship and administration appointments. It may also channel people into the residential aged care system.

Reform of Queensland's mental health system

The *Mental Health Act 2016* has introduced consequential policy tensions as a result of its interface with Queensland's guardianship legislation. The *Mental Health Act 2016* introduces the concept of the 'less restrictive way', which seeks to replace current processes for the making and review of 'treatment authorities' (previously known as involuntary treatment orders). If a less restrictive way exists, this must be implemented instead of resorting to an order of involuntary treatment.

The less restrictive way approach involves obtaining consent from the personal guardian of a person to receive treatment and care for that person's mental illness. It will therefore rely heavily upon the guardianship system with a corresponding impact on its resources. This represents a significant policy change to the guardianship system, which was designed as a protective jurisdiction, not as a means by which to restrict the rights and liberties of people with mental illness who may be consistently objecting to treatment and require treatment or detention against their will to protect themselves and/or the community.

The *Mental Health Act 2016* is likely to introduce new pressures on the guardianship system, particularly for the Tribunal and the OPG. The reliance of the *Mental Health Act 2016* on guardianship will radically expand the decision-making role of guardians and attorneys in the mental health system.

It is also expected to result in increased applications to the Queensland Civil and Administrative Tribunal (QCAT) for appointments of guardians as well as existing appointments to be expanded to include additional types of matters. This will result in a commensurate increase in the number of appointment that QCAT must undertake. There may also be an increase in the number of hearings that QCAT conducts, to the extent that direction may be sought from the Tribunal in seeking recognition for enduring powers of attorney or making applications for directions.

This may further increase the number of people with general enquiries or those seeking assistance to navigate the guardianship system. This affects not only QCAT and the Public Guardian, both of which already receive a significant number of enquiries, but also other government departments and community organisations/legal centres that presently provide assistance to those people.

Sustainability of the system

The pressures on Queensland's guardianship system are building and prompt the question of the ongoing sustainability of the guardianship system in its current form. Sustainability of the system must be considered across a number of realms:

- the ongoing appropriateness of guardianship and administration in light of the national and international trends relating to supported decision-making and rights protection;
- the financial sustainability of the current guardianship system; and
- the appropriateness of the guardianship system bearing the cost for shortcomings in other human service systems.

For the foreseeable future, there will continue to be a need for substitute decision-making, particularly for people who experience profound disability or cognitive impairment. Whether the current level of reliance on guardianship and administration is needed and whether there might be other less restrictive ways to support a person with impaired decision-making capacity to make decisions is, however, worth considering in Queensland.

Enhancing the guardianship system

Informal decision-making

There are a number of barriers to informal decision-making. Most significant is the lack of recognition of informal decision-making by third party organisations. There appear to be three primary determinants that underpin this issue: privacy legislation; legal and fiduciary responsibilities; and organisational policies and practices.

In practice, the informal decision-making provisions in Queensland's guardianship legislation are outweighed by legislative requirements and the desire of many organisations to minimise risk. Of concern are the administrative requirements of organisations that are not required by law, but instead reflect a risk mitigation directive. Unfortunately, there is little incentive or insufficient commercial benefit for many organisations to change their current practices.

The failure of organisations to accept informal decision-making is a long-standing issue that has been recognised by the Queensland and Victorian Law Reform Commissions (QLRC and VLRC). The refusal of organisations to recognise informal decision-makers can have a significant effect on families who have relied on informal decision-making. It can also elevate the risk that the needs of the person who may have impaired decision-making capacity will not be met, and thus create a need for the appointment of a guardian or administrator.

Arguably, better enabling informal decision-making could mitigate some of the demand for administration and to a lesser extent, guardianship. Some of the barriers may be addressed by legislative change and others that require the attention of policy-makers and service providers.

Order to access information

The right of a guardian and/or administrator to access information makes an appointment an attractive option to penetrate the administrative requirements of organisations. An order to access information could provide a similar right to an informal decision-maker or decision-making supporter and enable the person who requires assistance to retain their legal capacity.

This, or any other mechanism/s that may be invoked, must be simple, straightforward and minimise the formalisation of informal decision-makers. Further formalisation will not only negatively impact on what is currently an unquantifiable but probably an extensively used informal mechanism, but would also do little to resolve the current resource burden on the guardianship system.

Education and awareness

The Tribunal and the OPG have undertaken work to educate organisations in various sectors (such as finance and aged care) about the legitimacy of informal decision-making. While their efforts and achievements are commended, a more strategic and coordinated approach is required to achieve a significant shift in the policies and practices of organisations within these sectors. An increased understanding about the legitimacy of informal decision-making may increase the readiness of some organisations to accept such arrangements, however as a single strategy, it will not facilitate the degree of change that is needed.

Advance planning

Engaging in advance planning can enable a person to maintain a degree of autonomy, is consistent with the least restrictive principle and plays a significant role in avoiding the need for guardians and administrators. However, only a minority of Queenslanders actively plan their own decision-making arrangements for the future.

A lack of awareness, knowledge and accessible information about enduring documents among the general and professional communities are key barriers to advance planning. Other barriers included the absence of a perceived need to plan, and/or a disinclination of people to plan for a time in life when they are vulnerable and may not be able to make their own decisions.

Increasing engagement in advance planning is an important public sector strategy to alleviate some of the pressure on the guardianship system and maximise the decision-making autonomy of Queenslanders. It requires government prioritisation, a coordinated approach

and an investment of resources. Arguably, the financial investment in strategies to change the culture around, and increase the uptake of, advance planning may be offset in the long-term by minimising the demand for resources to deliver public guardianship services.

The research conducted by the Office of the Public Advocate identified three key areas in which strategies could be implemented to address the barriers to greater engagement in advance planning: awareness and education; ensuring an accessible and uncomplicated process; and a registration system for enduring instruments. These findings are broadly consistent with the conclusions of the Communities, Disability Services and Domestic and Family Violence Prevention Committee in relation to the *inquiry into the adequacy of existing financial protections for Queensland Seniors*.

Capacity

Capacity and the way in which it is determined is an important aspect of Queensland's guardianship system. A finding of impaired capacity for a matter means that a person can no longer exercise their legal capacity for that matter and a substitute decision-maker such as an attorney, guardian or administrator may make decisions for them. This can have an obvious and significant impact on a person's autonomy.

Queensland's guardianship legislation incorporates a functional definition of capacity, which aligns with a modern understanding of disability. However, the legal definition is only one aspect of the process for determining capacity. Determining a person's capacity also involves applying the test in practice and, importantly, gathering and using evidence to inform the assessment process. While the definition of capacity in guardianship legislation may be consistent with a functional approach and the presumption of capacity clearly stated, further development of appropriate assessment processes is still needed.

Information relied upon

Commentators note a heavy reliance on the advice of medical and allied health professionals when assessing capacity. A further but related concern is the reliance placed on the potentially limited value of cognitive tests such as the Mini-Mental State Examination (MMSE).

Many argue that the general cognitive testing often relied upon by QCAT is inconsistent with the functional approach to capacity. This is particularly relevant to the first limb of the test of capacity, which is focused on whether the person understands the nature and effect of the decision. As a matter-specific test, the relevant issue is whether the person understands information about the matter in question, not their level of cognitive ability generally.

These issues point to the importance of considering broader evidence about capacity rather than simply relying on cognitive tests, as well as the importance of ensuring necessary support and access to information to enable the adult to make decisions. It also points to the importance of professionals with appropriate knowledge and expertise undertaking capacity assessments and the critical evaluation of medical and other expert evidence by QCAT.

There have been moves in other jurisdictions to adopt testing practices appropriate to the functional nature of capacity determinations and to either regulate the process for capacity assessments or promote the undertaking of capacity assessments by trained professionals.

Developing an appropriate framework for assessing capacity

There is a need for a holistic strategy that provides for a principled but flexible approach to capacity assessments, while mandating certain procedural safeguards for those subject to an assessment. Such a process must aim to maximise the capacity of the person involved.

To ensure a consistent and best practice approach to such assessments, guardianship legislation should include guidelines for assessing capacity. The QLRC proposed that guidelines should be contained in subordinate legislation, and be informed by wide and inclusive consultation with people and organisations with relevant qualifications and experience.

In the United Kingdom, the Code of Practice under the *Mental Capacity Act 2005* provides practical guidance on the steps to be taken to ensure that the person being assessed has been given relevant information about a decision in a way that is most beneficial to helping them to understand, and that all possible and appropriate means of communication are tried. Emphasis is placed on undertaking these steps in a way that reflects the person's individual circumstances and meets their particular needs. The Code of Practice also requires that before deciding that someone lacks capacity to make a particular decision, it is important to take all practical and appropriate steps to enable them to make the decision themselves.

Queensland's guardianship framework should include principles to guide assessments of decision-making capacity. Such principles would provide greater guidance about the approach that should be taken in implementing the legal test for capacity. Although the legal test is appropriate, the assessment process may not be carried out according to the underlying philosophy of either the test or the overarching legislation.

There is a growing emphasis on strength-based assessments for capacity, where capacity should relate less to the level of a person's cognitive capacity or functional ability, and more to the level of support available to a person to help them make the decision. The principle that a person must be supported to exercise legal capacity is now reflected in the recommendations of relevant law reform commission reports and legislation.

The *Guardianship and Administration Act* contains an acknowledgement that the capacity of a person with impaired capacity to make decisions may differ according to: the nature and extent of the impairment; the type and complexity of the decision to be made; and the support available from members of the person's existing support network. A complicating factor is that this acknowledgement only applies to a person with impaired decision-making capacity.

Appointment of guardians and administrators

Unnecessary application and appointments

Some of the guardianship and administration applications that come before the Tribunal are viewed to be unnecessary. Varied reasons underpinned the views expressed by stakeholders and included the existence of informal and less restrictive decision-making options, a lack of work done with or by families to resolve the issue/s at hand, and a lack of urgency for a decision to be made. Such issues would often be identified after an initial examination of the situation and the provision of information.

Potential strategies to avoid unnecessary applications and appointments include:

- providing information to parties about aspects of the guardianship system and potential less restrictive alternatives;
- strengthening the screening, scrutiny and case management of guardianship and administration applications;
- diverting appropriate applications to alternative dispute resolution;
- exploring the provision of informal decision-making support; and
- providing case management support to enable vulnerable people to navigate the human services system.

The least restrictive order

Queensland legislation requires that the right of a person with impaired capacity to make decisions should be restricted and interfered with to the least possible extent. Further, the principles require that a person's right to participate in decisions, and the need to preserve the person's right to make their own decisions, must be taken into account.

There are a number of ways that QCAT can ensure that guardianship and administration orders observe the least restrictive principle such as:

- not making a formal appointment i.e. dismissing or inviting the withdrawal of applications where the matter can be resolved by means that are less restrictive than a guardianship and/or administration order (e.g. through the statutory health attorney regime, enduring power of attorney documents, informal arrangements, etc.);
- restricting appointments to the matter/s for which the person has impaired capacity;
- appointing member/s of the person's support network in preference (where possible) to the Public Guardian or Public Trustee; and
- ensuring that appointments are made for the shortest time necessary and are subject to regular review.

QCAT can make orders subject to any terms that are considered to be appropriate. This gives the Tribunal significant scope and flexibility in relation to the breadth, length and structure of orders. The provision enables 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. Despite this, the research identified that these creative mechanisms for making the least restrictive order are not always be utilised.

There are examples of how such flexibility may work, particularly when guided by the general principles, to minimise the restrictiveness of orders and promote decision-making autonomy. The ability to make such orders could arguably be enhanced by increased use of screening processes in the registry, the involvement of the person in the proceedings, and the use of Alternative Dispute Resolution.

Decision-making by public guardians and administrators

The extent to which guardians and administrators are able to engage clients to participate in decision-making is impacted by: the effectiveness of training and development initiatives, available resources, high caseloads, tight deadlines for decisions, organisational culture, and for some, a mechanistic and task-orientated approach to decision-making. All these can prevent the proper application of guardianship legislation and constrain the rights of people with impaired decision-making capacity.

The degree to which the views and wishes of clients are sought rests heavily with individual guardians and administrators, and the manner and extent to which they engage with clients. Further, the participation and autonomy of a person subject to a public guardianship or administration order can be constrained by the requirement for decisions to be consistent with the proper care and protection of the person and, in the case of administration, the degree of discretionary funds available after fiduciary obligations have been met.

The Public Guardian and Public Trustee have a responsibility to provide or facilitate the necessary support to enable their clients to participate in decision-making. However, guardianship legislation does not require these agencies to develop the decision-making skills and ability of clients. They are therefore not charged with, or funded to undertake, the training or development of clients' decision-making skills. A stronger mandate and more resources could enable better identification of people who may benefit from support for decision-making, increased capacity to provide support for decision-making (including linking people with appropriate people to provide such support), and actively pursuing the review of orders to seek less restrictive or revocation of orders.

A strategy being trialled in other jurisdictions is to provide support to people, including those who are subject to public guardianship and/or administration, to develop their decision-making capacity. Australian trials of supported decision-making have shown that Australia can deliver on the intent of article 12 of the Convention by enhancing the legal capacity of some of the people subject to guardianship and administration. They also demonstrated that the provision of decision-making support can be a viable alternative to substitute decision-making undertaken by public agencies and a valuable addition to the decision-making that occurs under public guardianship and administration orders.

Given these results, there is arguably a need to provide both a greater imperative and mandate, as well as designated resources, to enable the principles underpinning Queensland's guardianship legislation to be fully realised.

Monitoring and safeguards

Support and information

Arguably, some of the best safeguards are those that exist in response to the specific needs of a person who may have impaired decision-making capacity, for example having a close network of people involved in the person's everyday life. The provision of timely and relevant information to people with impaired decision-making capacity, their support network and substitute decision-makers is an important proactive safeguard. There is no obligation to ensure that people who may have impaired capacity are provided with information about their

rights (with the exception of people subject to restrictive practices), despite the pursuit of different courses of action being partially dependent on the person knowing about and exercising their rights.

As identified by the research, there is limited awareness of the guardianship principles and the roles and responsibilities of attorneys, guardians and administrators. Increased knowledge may partially mitigate the likelihood of a person's rights being inadvertently or deliberately obstructed or denied, their disempowerment and/or the risk of abuse, neglect, harm or exploitation.

Support and advocacy services

It is essential that funded individual advocacy and support services remain independent and that the value of upholding this independence is not diminished. Individual advocacy can help ensure that systems and programs are transparent and accountable. Further, facilitating access to advocacy can reduce risk for vulnerable people and strengthen 'their voice'. Such advocacy and other supports are important and practical safeguards for people with impaired decision-making capacity, and can prevent the need for guardianship in some circumstances.

Many of the organisations that promote and protect the rights and interests of people with impaired decision-making capacity, such as those that provide support, advice, advocacy and legal services, face growing demand. Many organisations are limited by funding and geography. In addition, the awareness and accessibility of support services are critical factors in ensuring they are readily accessed by the people who require support and/or assistance.

Reviewing the need for public guardianship and administration

The growing number of reviews undertaken on the papers, and concerns about the lack of participation of the person subject to the order in that process, appear to be undermining the operationalisation of guardianship principles. The evidence base from which a Tribunal member makes a decision on the papers is different to that obtained via a hearing. Presumably, many of the papers reviews would include only limited, if any, evidence from the person subject to the order. This is a concern, particularly considering the Tribunal must give full consideration to the same issues considered as part of a new appointment.

Despite being a Tribunal with a different purpose and different evidential processes, evidence from the Mental Health Review Tribunal suggests that a person who attends a review hearing is ten times more likely to have their Involuntary Treatment Order revoked compared to those who do not attend a hearing. Arguably, the participation of the person in the review provides an opportunity for the Tribunal to conduct a more fulsome exploration of the circumstances and information relevant to their decision-making. It is feasible to suggest that this may also be the case in relation to the review of guardianship and/or administration appointments.

It has been suggested that some public appointments remain in place following a review 'just in case' future decisions were needed, despite the person's circumstances being stable, low risk and not likely to trigger any decisions to be made. Such a practice does not align with the philosophy and the least restrictive approach articulated in guardianship legislation and may deny a person their legal capacity when there is no immediate need to do so.

The OPG's Transitions Team actively supports some people subject to public guardianship orders to gain greater decision-making autonomy and/or transition to less restrictive decision-making supports. Arguably, a similar strategy should be implemented by the Public Trustee.

Investigating allegations of abuse, neglect and exploitation

The OPG may investigate complaints or accusations about a person who may have impaired decision-making capacity being neglected, exploited or abused, or having inappropriate or inadequate decision-making arrangements. However, there is a need to increase community awareness about the ability to report suspicions of abuse, neglect or exploitation of people with impaired decision-making capacity to the OPG.

The OPG also operates the Community Visitor Program, which involves independent community visitors attending 'visitable sites' to protect the rights and interests of the people who reside at the site. This includes residents who have impaired decision-making capacity. Importantly, Community Visitors act as independent 'eyes and ears' on the ground and are well-positioned to identify issues that others may not recognise.

The OPG's investigations and community visitor functions are important safeguards. They must be legislated and resourced appropriately to ensure their ability to adequately protect the rights and interests of people who may have impaired decision-making capacity. Further, the safeguards provided by the Community Visitor Program should be extended to all people with impaired decision-making capacity who live in cared or supported accommodation.

Future Directions

Supported decision-making is receiving ever-increasing legal articulation and recognition and should be viewed as being essential to evolving practice. Supported decision-making should be considered as a potential alternative to guardianship and part of the future best practice framework for assisting people with impaired decision-making capacity. Supported decision-making, and other less restrictive supports should always be identified and considered ahead of guardianship and administration.

The ALRC recommends shifting from substitute to supported decision-making and has proposed a set of National Decision-Making Principles and Guidelines to ensure that supported decision-making is encouraged. Importantly, the ALRC also noted that emphasis should be shifted from the 'best interests' approach to that of the 'will and preference' of the person.

A Queensland Parliamentary Committee recently reported that an over-reliance on substitute decision-making does not align with Australia's human rights obligations, which require supported and assisted decision-making in preference to substituted decision-making. Further, the Committee suggested that Government examine its current decision-making framework and identify opportunities to better support decision-making autonomy, in accordance with people's legal rights.

Considering the current human rights and policy context and the mounting pressures on the guardianship system, the appropriateness and sustainability of Queensland's guardianship system must be questioned. Consideration should be given to whether the current level of

reliance on guardianship and administration, particularly public guardianship and administration, is warranted. Consideration should be extended to whether there are other less restrictive ways to support a person with impaired decision-making capacity to make decisions and the existence of opportunities to better uphold the purpose of Queensland's guardianship legislation.

In 2015, Victoria became the first Australian jurisdiction to provide legal authority to people who provide decision-making support via the supportive attorney role. This reflects a more contemporary framework for decision-making support and article 12 of the Convention.

Most of the stakeholders who were either interviewed by, or made a submission to, the Office of the Public Advocate supported the concept of supported decision-making. Stakeholders held varied perspectives about the extent and way in which a model more actively promoting decision-making support should be adopted and/or formalised in Queensland. Perspectives ranged from disbanding the existing guardianship system and replacing it with a supported decision-making model, to offering a range of decision-making interventions and mechanisms to address the differing needs and circumstances of individuals. While it was generally acknowledged that there would continue to be some need for guardianship and administration, general consensus was that its use should be minimal and a true 'last resort'.

Conclusion

Current health, social and demographic trends are placing increasing and significant pressure on Queensland's guardianship system, some aspects of which are already under strain. In addition, the legal and policy landscape is being repositioned to enable people to exercise and maintain their legal capacity. There is a resultant need to examine the structure, mechanisms and delivery of decision-making supports in Queensland. While there is likely to be a continued requirement for substitute decision-making for some people, there is a need to afford serious and considered attention to other less restrictive ways to support a person with impaired decision-making capacity to make decisions.

There is a lot to be done to promote the uptake of supported decision-making in Queensland, both within the guardianship system and in the legal and human services systems. There are roles for both law and policy, however the greatest opportunities to advance supported decision-making sit in the practice realm. They exist in the everyday lives of people who experience difficulty with one or more aspects of making a decision. Family members, carers, service and support providers and others have the opportunity to positively support the decision-making of people who experience difficulty with an aspect or aspects of making and actioning a decision.

Without changes to Queensland's decision-making regime, the demands on Queensland's guardianship system will continue to grow. There is a clear need for the Queensland Government to reconsider the adequacy of the current range of responses and mechanisms in relation to people with impaired decision-making capacity. The Government needs to ensure that Queenslanders have access to appropriate and proportionate decision-making support when they need it and in a manner that is the least restrictive of their rights and legal capacity.

List of recommendations

Recommendation 1: The Queensland Government review and amend the explanatory sections and principles of the *Guardianship and Administration Act* to align with contemporary understandings of decision-making support. Consideration should be given to:

- introducing positive obligations in relation to decision-making and the provision of support to enable people to participation in decision-making about their own lives to the greatest extent possible; and
- ensuring that the guardianship system is only called upon after all other practical steps to support the person making their own decisions have been exhausted.

Recommendation 2: In support of recommendation 1, the Queensland Government should adopt the QLRC recommendation to amend the *Guardianship and Administration Act* to expressly require that the explanatory sections and principles of the Act must be applied by all persons and entities and not just by those performing a function or exercising a power under the Act.

Recommendation 3: The Queensland Government and relevant statutory agencies design and implement strategies to enhance awareness of the purpose, principles and philosophy of Queensland’s guardianship legislation among the community, but particularly among those in the community who may be likely to experience, or support someone who may experience, impaired decision-making capacity. Specific strategies should target:

- people with impaired decision-making capacity to ensure they are informed about their rights and know where to obtain support to exercise their rights;
- those who exercise a power or perform a function under guardianship legislation; and
- the relevant entities and organisations in the community, government and private sector. Community-based strategies should be educative and delivered in a manner that would not discourage individuals from providing decision-making support or becoming an informal decision-maker, attorney, guardian or administrator.

Recommendation 4: The Queensland Government introduce guidelines or a Code of Practice (or equivalent) to underpin the *Guardianship and Administration Act* and the *Powers of Attorney Act*. Such a resource should describe in plain language how the legislation works, in particular the underlying principles and how they should be implemented, and provide examples to promote greater consistency of practice. The document/s should be developed in conjunction with individuals and entities with relevant expertise, and not be limited to those working within government.

Recommendation 5: In the process of designing and implementing any future reforms that may impact people with, or at risk of experiencing, impaired decision-making capacity, the Queensland Government should ensure consideration for existing pressures on, as well as any inadvertent implications that may impact, the sustainability of the guardianship system. Appropriate strategies should be developed to mitigate any identified risks and/or impacts on the guardianship system.

Recommendation 6: The Queensland Government should give consideration to the creation of an authoritative mechanism such as an ‘order to access information’ or equivalent (akin to Commonwealth nominee arrangements) as a less restrictive alternative to guardianship and administration to assist people to support a person who may have impaired decision-making capacity to interact with third party organisations. In doing so, there must be due regard to ensuring that appropriate safeguards exist to protect the rights and interests of the people for whom the instrument is designed to serve.

Recommendation 7: The Queensland Government should enhance the process of advance planning by delivering online forms containing easy-to-understand explanatory notes and a series of standard and optional clauses, providing a central public website relating to advance planning, and making any necessary legislative amendments to improve the legislative safeguards for individuals.

Recommendation 8: The Queensland Government and relevant statutory agencies develop a contemporary communication strategy to increase awareness of, and knowledge about, advance planning and the roles and obligations of principals and attorneys. The strategy should include initiatives to increase general community awareness as well as targeted communications to specific groups (e.g. older Queenslanders, medical and health professionals, solicitors etc.).

Recommendation 9: The Queensland Government should require that attorneys, guardians and administrators are aware of their roles and obligations upon appointment or re-appointment. An online training program may be a useful tool to address the lack of awareness among decision-makers about their role and responsibilities. A similar program would also be of benefit to private guardians and administrators.

Recommendation 10: The Queensland Government should examine the benefits, issues and costs associated with establishing a registration scheme for enduring instruments in Queensland.

Recommendation 11: In view of the direction fostered by the Convention and the ALRC, the way in which ‘capacity’ is viewed in law and policy should be reconsidered to better reflect the spectrum of ‘ability’ and a focus on the supports that must be provided for a person to exercise their ‘ability’.

Recommendation 12: The Queensland Government should develop and introduce into legislation principles to underpin the process of assessing capacity. The principles should include (but not necessarily be limited to):

- a person’s capacity to make decisions should be presumed;
- a person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with support;
- a person should not be found to lack capacity unless information relevant to making the decision has been provided in a format appropriate to the individual person’s needs and circumstances; and
- when assessing a person’s capacity every attempt should be made to carry out the assessment at a time and in an environment that means the person’s capacity can be accurately assessed.

Recommendation 13: Alongside principles to guide capacity assessment, the Queensland Government should engage individuals and entities with relevant expertise to develop capacity assessment guidelines. The process of developing these guidelines should include a review of the evidence currently requested/recommended for capacity determinations, including whether cognitive tests such as the MMSE are appropriate, and should consider other evidence-based approaches to assessing capacity. Consideration should be given to including these in a Code of Practice, practice guidelines or equivalent instrument.

Recommendation 14: QCAT should comprehensively review the information and evidence that it requires to make well-informed capacity assessments and ensure that application forms and registry processes facilitate the gathering of appropriate information.

Recommendation 15: The Queensland Government should strengthen guardianship legislation to require that the person who is the subject of the capacity assessment participates in Tribunal processes associated with making a determination of the person's capacity, except in circumstances that would result in harm or have a detrimental impact on a person's wellbeing. All people who are the subject of a proceeding should be offered support and/or representation for the process.

Recommendation 16: The Queensland Government enhance QCAT's registry processes to ensure that, as far as possible, only those applications genuinely requiring a Tribunal hearing proceed accordingly. To enable this, consideration might be given to:

- improved screening of applications;
- contact with the person who is the subject of the application ahead of proceedings (where possible);
- contact with other parties/applicants ahead of proceedings to obtain further information and/or provide information to ensure the appropriateness of the application;
- involvement of an officer of the Public Guardian or Public Trustee in providing information and/or options to applicants;
- redirecting relevant matters to ADR;
- reviewing QCAT application forms for guardianship and administration matters to ensure that all relevant information is obtained, including information that confirms that the application is being made as a last resort (following all other practical attempts to assist the person by other less restrictive and more supportive means), and that assists to identify whether the matter might be resolved using ADR processes;
- undertaking an analysis of the benefits and costs of enhanced screening processes; and/or
- reviewing legislation to ensure that any barriers are appropriately mitigated.

Recommendation 17: QCAT should review its systems and processes to ensure that they appropriately recognise and attend to the specialist nature of capacity determination, its relationship to deciding guardianship and administration matters, and the potentially significant consequences that these processes have upon the rights of a person. Members presiding over such matters must have appropriate knowledge and expertise in hearing such matters, and means by which to promote and share their learnings about hearing processes and about the systems with which people who may have impaired decision-making interact. This will promote greater consistency in decision-making.

Recommendation 18: In applying a least restrictive approach to guardianship and administration, and seeking to ensure the sustainability of the guardianship system, QCAT should develop orders that include terms and conditions requiring the provision of decision-making support to the person subject to the order, with an expectation that the person will be assisted by their guardian or administrator to develop their decision-making skills and autonomy during the period of the order.

Recommendation 19: The Queensland Government must 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.

Recommendation 20: Wherever possible and appropriate, all agencies within Queensland's guardianship system must seek to develop, maintain and/or strengthen an adult's support network to minimise the extent to which the person and those who support the person are reliant on these agencies for purposes other than that for which they have been appointed.

Recommendation 21: The process of applying for a review of an appointment should be as simple and accessible as possible. In support of this, public guardianship agencies (QCAT, OPG and the Public Trustee) should develop easy-to-understand resources to inform people of the review process and where they can obtain support.

Recommendation 22: Public agencies must ensure that the views and wishes of a person subject to an order are included to the greatest extent practicable (with support from an expanded registry/screening process as per recommendation 16) in all reviews of guardianship and administration appointments, including those conducted on the papers.

Recommendation 23: The Queensland Government include the objective of improving the awareness of agencies that can be approached regarding concerns about the abuse, neglect and/or exploitation of people with impaired decision-making capacity in any strategies aimed at increasing the awareness and knowledge of the guardianship system.

Recommendation 24: The Queensland Government should ensure that there is adequate funding for independent advocacy (including legal advocacy) and representation services to meet future demand. Where advocacy and representation relates to Commonwealth programs, the Queensland Government should campaign for these accordingly. Further, funded advocacy and support services must remain independent and the value of upholding this independence must not be diminished.

Recommendation 25: The Queensland Government should develop strategies to increase family and community engagement and connectedness, inclusive of approaches that may link people to potential decision-making supports, particularly for people who are socially isolated.

Recommendation 26: Given the inaction since the QLRC's guardianship law review, the pressures on the guardianship system, and the move towards positive obligations in support of rights and autonomy, the adequacy of the current range of responses and mechanisms in relation to impaired decision-making capacity should be examined with a view to ensuring that Queenslanders have access to appropriate decision-making support when they need it and in a manner that is the least restrictive of their rights and legal capacity.

Part A: The current system

1 Introduction

1.1 Impaired decision-making capacity

Impaired decision-making capacity is a term used to describe a state of being in which a person experiences difficulty in following through the process of reaching a decision and putting the decision into effect. Impaired decision-making capacity may arise as a result of a number of conditions including but not limited to dementia, intellectual disability, acquired brain injury, mental illness, conditions associated with alcohol and drug use, or other conditions that may impair a person's cognition or decision-making ability.

In 2016, the Office of the Public Advocate estimates that up to 118,739 Queensland adults may experience impaired decision-making capacity.¹ Beyond the experience of the person themselves, the impacts of impaired decision-making capacity may be felt by members of their family and/or others who care for or support the person.

Some people have little or no advance notice that their decision-making capacity will become impaired, for example those who experience a stroke or acquire a brain injury in an accident. Others may have some warning that they may soon experience difficulty in making decisions, for example people in the early stages of dementia or other degenerative conditions. Further, some people experience life-long challenges with decision-making as a result of developmental disability, even though their need for decision-making support may be episodic.

“Decision-making disability is not just something that happens to other people. It has the potential to seriously disrupt the lives of members of all Queensland families. Anyone's partner can be involved in an accident; anyone's parent can develop dementia or have a stroke; anyone's young adult son or daughter can be injured.”²

A person's decision-making capacity can differ according to the nature and extent of their impairment; the type and complexity of the decision to be made; the context in which the decision is to be made (e.g. the level of urgency, available alternatives); and the level of assistance available from their support network.³ A person's need for decision-making support may be temporary or could fluctuate over time. In many instances, a person's decision-making capacity can also be developed over time with support and assistance. Section 7.1.1 further discusses capacity and the law.

Queenslanders with impaired decision-making capacity are not a homogenous group. The cohort comprises people of varying ages, life experiences and degrees of social and economic participation. Some people with impaired decision-making capacity experience social and

¹ Office of the Public Advocate (Queensland), *The potential population for systems advocacy* (12 February 2016) Queensland Government, 2 <http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/457539/fs02-potential-population-v5.00.pdf>.

² Queensland Law Reform Commission, *Assisted and substituted decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, Preface.

³ *Guardianship and Administration Act 2000* (Qld) s 5(c).

economic disadvantage and exclusion. Others are vulnerable to the risks of abuse, neglect and exploitation. It is critical that the rights and interests of people with impaired decision-making capacity, particularly those who are socially isolated, are promoted and protected at all times.

1.2 The impact of a changing landscape

In Queensland, there are a number of ways by which to maximise autonomy, preserve a person's decision-making capacity, and/or reduce the need for the formal appointment of substitute decision-makers. These include:

- the use of advance planning mechanisms, such as advance health directives, and general and enduring powers of attorney;
- involvement and recognition of family, friends, carers and others providing informal support and assistance to enable people to make their own decisions;
- guardianship and administration orders that are limited to the matters for which a person does not have the capacity to make decisions; and
- access to support and services that people who may have impaired capacity for a matter need, including case-management support.

Despite existing mechanisms, there are an increasing number of applications being lodged for guardianship and/or administration appointments in Queensland. This may be partially attributed to systemic reforms as well as to the existence of societal barriers to people maintaining and exercising their right to make their own decisions.

In recent times, the demand for guardianship and administration has been influenced by significant national and state reforms occurring across various sectors relevant to people with impaired decision-making capacity. Reforms of particular note for Queensland have been the regulation of restrictive practices, recent reforms in aged care, and the commencement of the National Disability Insurance Scheme (NDIS).

The increasing demand on the guardianship system in Queensland is expected to continue both as a by-product of progressive reforms to various service systems and due to our ageing population. Many commentators have expressed concern about the long-term sustainability of the Queensland guardianship system; a concern shared by the Public Advocate.⁴

Central to these concerns is the impact that these systemic and societal issues have upon the right of people to be autonomous and make their own decisions. The United Nations *Convention on the Rights of Persons with Disabilities* ('the Convention'), proclaims that the State must ensure that people receive the support that they need to exercise their legal capacity and make decisions for themselves.⁵ Taking appropriate measures to uphold the principles of the Convention and support people to exercise their right of legal capacity and may counteract the demand for guardianship and administration.

⁴ Office of the Public Advocate (Qld), *Decision-making support for Queenslanders with impaired capacity: An Issues Paper* (2014) 1.

⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) ('*Convention on the Rights of Persons with Disabilities*') art 5.

1.3 An investigation into decision-making support

In 2010, the Queensland Law Reform Commission (QLRC) delivered a report based on its extensive review of Queensland’s guardianship laws. Since the release of the QLRC report, academic and public discussion in respect of legal capacity has significantly advanced despite differing interpretations of the obligations arising from the Convention, particularly in respect of giving effect to positive obligations to support people’s rights and autonomy under article 12 of the Convention.

Emerging from the Convention, the Australian Law Reform Commission’s (ALRC’s) report *Equality, Capacity and Disability in Commonwealth Laws*,⁶ and contemporary discourse, there is increasing recognition that the focus of State-provided decision-making supports needs to shift from what a person cannot do to the supports that should be provided to enable people to make decisions and exercise their legal capacity.

While some argue for the abolition of formal substitute decision-making appointments, it is unlikely that this practice will be discontinued in the foreseeable future. There is, however, general agreement that the pressures on state-based guardianship systems must be alleviated.

Considerable work is required to reduce reliance on state-based guardianship systems and encourage the use of supportive mechanisms to enhance the ability of people with decision-making limitations to make their own decisions. This should be premised upon giving effect to the intention that the formal appointment of substitute decision-makers should only ever be a ‘last resort’ option for people requiring decision-making support.

With this in mind, the Public Advocate initiated research to explore the extent to which relevant provisions of Queensland’s guardianship legislation (i.e. the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*) were translated into practice.⁷ It also sought to identify systemic barriers and enablers to protecting and supporting the right of a person to make their own decisions.

While there is considerable discussion about the concept and delivery of ‘supported decision-making’ approaches, the focus of this report is on the provision of appropriate ‘decision-making support’. This is a subtle but important distinction.

“Supported decision-making’ is a relatively newly established term of reference underpinned by varying assumptions and models, thus making it subject to varying interpretations. The research underpinning this project uses the term ‘decision-making support’ as a means by which to strip away the models and conceptual assumptions and simply refer to the everyday processes whereby a person is supported or helped to make a decision. Importantly, however, the principles that underpin both forms of reference are the same.

⁶ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

⁷ While there are other Acts that are relevant to Queensland’s guardianship system (e.g. *Public Guardian Act 2014* (Qld), the *Public Trustee Act 1978* (Qld) and the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)), these Acts were not examined.

1.3.1 A phased approach

This research is part of a phased approach to the issue of decision-making support. There is a clear need for further research and evidence on how to best support people to maintain their decision-making autonomy and legal capacity, whether they receive support from their own support networks and/or from statutory agencies. Given the limited resources of the Office of the Public Advocate, more comprehensive research in this area of inquiry is beyond the current capacity of the Office alone.

To this end, the Office is a partner to a research project *Effective decision-making support for people with cognitive impairment* funded through an Australian Research Council Linkage Grant. This project commenced in July 2015 and aims to develop and evaluate the effectiveness of an education program that trains people who provide decision-making support so that the quality of their support improves and results in better outcomes for those people who require decision-making assistance. While the project will specifically explore this for people with intellectual disability or acquired brain injury who require decision-making assistance, the findings are expected to have applicability to a broader range of people with cognitive impairment.

It is hoped that the research that has been conducted by the Office of the Public Advocate will complement the work being undertaken or proposed to be undertaken by other agencies, organisations and universities across the country. Many of these research projects specifically focus on providing practical and effective decision-making support and exploring the types of decision-making support that work for different people in different circumstances.

1.3.2 Scope

The scope of this research was limited to examination of legislation, policy and practice for Queensland's statutory agencies involved in the delivery of guardianship and administration services to Queenslanders, namely the Queensland Civil and Administrative Tribunal (QCAT or the 'Tribunal'), the Office of the Public Guardian (OPG), and the Public Trustee.

The research focussed on Queensland's guardianship system as a whole, inclusive of both guardianship for personal matters and administration for financial matters. Within that broad scope there was no particular focus on specific matters (e.g. health matters, restrictive practice matters, sterilisation matters or legal matters), however they are discussed where relevant. Neither did the research specifically explore issues for sub-populations of the cohort.

1.3.3 Building knowledge and evidence

1.3.3.1 Foundation documents

In February 2014, the Office of the Public Advocate published a suite of documents that underpinned the research:

- *Decision-making support for Queenslanders with impaired capacity: A conceptual framework;*

- *A journey towards autonomy? Supported decision-making in theory and practice: A review of literature;*
- *Autonomy and decision-making support in Queensland: A targeted overview of guardianship legislation;* and
- *Autonomy and decision-making support in Australia: A targeted overview of guardianship legislation.*

1.3.3.2 Data collection

The research involved the collection of information and evidence as follows:

- organisational data from QCAT, OPG and the Public Trustee;
- Practice Directions relating to QCAT;
- organisational policy and procedural documents from the OPG and Public Trustee;
- interviews with QCAT members;
- interviews with executives and managers from the OPG and the Public Trustee;
- surveys of public guardians and administrators;
- public submissions in response to *Decision-making support in Queensland's guardianship system: An Issues Paper;*
- published decisions and transcripts relating to guardianship and administration matters heard by QCAT; and
- published contemporary literature and reports.

The primary and secondary evidence informing the report is referenced throughout this report. Interviews conducted by the Office of the Public Advocate are referenced with a code to ensure the anonymity of respondents.

Appendix One provides further detail about the collection of data.

1.3.3.3 Advisory group

The Public Advocate also established an external advisory group to provide expert knowledge and strategic advice throughout the project. The advisory group contributed to the research by: providing expert content, operational knowledge and strategic advice; facilitating access to stakeholders, data and other resources; and communicating the views of the stakeholder group they represent.

The advisory group was consulted collectively, and in some cases individually, at various stages throughout the project including the development of the foundation documents, methodology, Issues Paper and this report. The contributions of advisory group members played an important role in shaping the research.

Appendix Two outlines the membership of the Advisory Group.

2 Queensland's guardianship system

Broadly speaking, Queensland's guardianship system facilitates the making of decisions for adults who are determined to have impaired decision-making capacity in respect of a variety of health, personal and/or financial decisions. The term 'adult' is used in Queensland's guardianship legislation to describe a person aged 18 years or over who has been found by the Tribunal to have impaired capacity for a matter. The term 'adult' is therefore used in some sections of this report to be consistent with legislation.

Queensland's guardianship legislation comprises the *Guardianship and Administration Act 2000* ('*Guardianship and Administration Act*') and the *Powers of Attorney Act 1998* ('*Powers of Attorney Act*'). Together, these Acts provide a regime for decision-making for people who have impaired capacity for a matter.

The *Powers of Attorney Act* allows people to make decisions and/or arrangements that can be implemented in the future if they lose decision-making capacity. Primarily, such arrangements are made through an advance health directive or an enduring power of attorney. To validly execute these documents, a person must have the capacity to do so.⁸

Where a person does not have decision-making capacity and has not made arrangements under the *Powers of Attorney Act*, the *Guardianship and Administration Act* provides a system by which other people can, either formally or informally, act as a decision-maker for that person. Together these Acts provide for statutory health attorneys to make decisions about health care; decisions and arrangements for the future to be documented and given effect; guardians to be appointed by the Tribunal to make decisions about a range of personal matters; and administrators to be appointed to make decisions about financial matters. The *Guardianship and Administration Act* also allows for the decisions of informal decision-makers to be ratified by the Tribunal.

Under the *Guardianship and Administration Act*, a person is presumed to have capacity for a matter,⁹ unless otherwise rebutted. A person's capacity is assessed in relation to decisions about specific matters. A person may have capacity for some matters and not for other matters. For example, some adults may be found to have the capacity to make decisions about health care matters but not financial matters¹⁰ or accommodation matters, therefore the Tribunal may appoint an administrator to make decisions about financial matters, and a guardian to make decisions about accommodation matters only.

People who need assistance with decision-making may also access a variety of informal supports (for example, from family, friends or others) that are not part of the guardianship system. These supports are only minimally recognised in Queensland's guardianship legislation.

In essence, Queensland's guardianship legislation primarily provides a regulatory framework for substitute decision-making (that is where a person or entity makes a decision on behalf of another person who lacks capacity to do so). Some elements of the legislative framework place obligations on those making decisions and exercising powers under the legislation. Notably,

⁸ *Powers of Attorney Act 1998* (Qld) s 41.

⁹ *Guardianship and Administration Act 2000* (Qld) s 7(a).

¹⁰ *Ibid* s 5(c); Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 1, 11.

these obligations include supporting a person’s right to make their own decisions, or at least participate in the making of those decisions, even when they are subject to guardianship or administration.

Refer to Appendix Three for more detail on the legislative framework that underpins Queensland’s guardianship system.

2.1 The purpose of guardianship legislation

The purpose of the *Guardianship and Administration Act* is to “strike an appropriate balance between the right of an adult to the greatest possible degree of autonomy in decision-making; and [to] adequate and appropriate support for decision-making.”¹¹ This Act seeks to achieve its purpose by (amongst other things) presuming that adults have capacity for a matter, stating the principles to be observed by those performing a function or exercising a power under the *Guardianship and Administration Act* or the *Powers of Attorney Act*, and encouraging an adult’s support network to be involved in decision-making for the adult.¹²

The *Powers of Attorney Act* does not include introductory statements akin to the purpose articulated in the *Guardianship and Administration Act*. It notes, however, that this Act is to be read in conjunction with the *Guardianship and Administration Act* and that, in the event of an inconsistency, the *Guardianship and Administration Act* is to prevail.¹³

While the explanatory section of the *Guardianship and Administration Act* contains elements that support and uphold the right of a person to make their own decisions, they generally relate to adults with impaired capacity and anyone performing a function or exercising power under the Act.¹⁴

Arguably, the principles should not only apply to people with impaired decision-making capacity, but to all Queensland adults. Similarly, the rights and considerations that are legislated for adults with impaired capacity are generally applicable to the broader population. For example, the right of a person to make their own decisions, the right to adequate and appropriate support for decision-making, the right to make decisions that are interfered with to the least possible extent, and recognition that a person’s capacity differs according to the type and complexity of a decision, any impairments they have and their level of support.¹⁵

Pressures on the guardianship system and the movement away from substituted to supported decision-making provide the impetus to examine how the purpose of the *Guardianship and Administration Act* might be best achieved. Contemporary discourse and community expectations in respect of this have progressed from the time at which this Act came into force.

¹¹ *Guardianship and Administration Act 2000* (Qld) s 6.

¹² *Ibid* s 7.

¹³ *Powers of Attorney Act 1998* (Qld) s 6A(1); see also *Guardianship and Administration Act 2000* (Qld) s 8.

¹⁴ *Guardianship and Administration Act 2000* (Qld) ch 2.

¹⁵ *Ibid* s 5.

Consideration should be given to how the guardianship system, and its founding legislation, might better achieve its purpose and more effectively enable the exercise of legal capacity, particularly where adequate and appropriate supports are available for a person.

Arguably, Queensland’s guardianship system could better promote and enable the exercise of legal capacity, decision-making support and appropriate informal decision-making. It could better ensure that the guardianship system is only accessed when all other and less restrictive supports have failed.

Further, it must also continue to provide protections for the vulnerable people who require them (e.g. those experiencing or at risk of abuse, harm or exploitation). Such protections must be appropriate and proportionate to need.

Expanding the focus of the *Guardianship and Administration Act* will enable Queensland to better uphold the principles of the Convention and achieve the ALRC’s recommended shift towards supported decision-making.

There may be opportunity for Queensland’s guardianship legislation to establish positive obligations in relation to upholding the decision-making rights of all Queensland adults. This type of legislative change could significantly contribute to a cultural shift towards supported decision-making, as recommended by the ALRC. It may also help mitigate some of the pressures on the system, barriers to informal decision-making, and demand for guardianship and administration.

In 2014, the ALRC proposed a set of National Decision-Making Principles as an initial step to reforming commonwealth laws and legal frameworks, and those of Australian states and territories. The National Decision-Making Principles are underpinned by the following ideals:

- everyone has an equal right to make decisions and have those decisions respected;
- people should be given access to the decision-making supports they require;
- a person’s will and preferences must direct decisions that affect their lives; and
- the existence of appropriate and effective safeguards in relation to decision-making interventions.¹⁶

In line with an expanded focus of the *Guardianship and Administration Act* and the establishment of positive obligations, consideration should be given to the inclusion of provisions that obligate the provision of decision-making support, and therefore only allow access to the guardianship system as a true last resort. Examples of such obligations include:

- “a person must be allowed to make their own decisions about the matters that impact their life to the extent that they are able, and be supported to enable them to make such decisions for as long as they can”;¹⁷ and
- “a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success”.¹⁸

¹⁶ Australian Law Reform Commission, above n 6, 63-64.

¹⁷ Office of the Public Advocate (South Australia), ‘Annual Report 2012-2013’ (2013) 56.

¹⁸ *Mental Capacity Act 2005* (UK) c 9, pt 1 s 1(3).

2.2 The principles

The *Guardianship and Administration Act* and the *Powers of Attorney Act* contain eleven general principles and the health care principle (collectively, ‘the principles’).¹⁹ These principles, along with the purpose and acknowledgements, set the tone and articulate the underlying philosophy for Queensland’s guardianship system.

Importantly the principles must be applied or complied with²⁰ not only by substitute decision-makers when they make a decision on behalf of a person with impaired decision-making capacity,²¹ but also by any person or entity who performs a function or exercises a power under the guardianship legislation for a matter in relation to an person who has impaired capacity.²² The community is also encouraged to apply and promote the principles.²³

There are many elements of both the acknowledgements in the *Guardianship and Administration Act* and the general principles that are supportive of maximising a person’s autonomy and promoting supported decision-making.

Refer to Appendix Four for further information about the principles.

2.2.1 Awareness and application of the principles

The research findings indicated significant concern around the lack of awareness of the general principles, particularly by those in the community who must implement them when making decisions under guardianship legislation. A number of the Tribunal members who were interviewed and the stakeholders who responded to the Issues Paper expressed concern about the limited awareness of the principles of Queensland’s guardianship legislation.²⁴

Limited awareness of the principles is a widespread barrier to the implementation of guardianship legislation and upholding the rights of people who experience difficulty in making and enacting decisions.

There is scant practical guidance, education or training provided to guardians, attorneys and administrators about their role and obligations, nor about how to apply and implement the general principles and the health care principle.²⁵ Potentially serious implications may arise as a result of there being limited awareness about the principles. These include the obstruction or denial of important rights; disempowerment of the individual experiencing difficulty in making a decision; and risks of abuse, harm and exploitation.

¹⁹ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1; *Powers of Attorney Act 1998* (Qld) sch 1, pt1.

²⁰ *Guardianship and Administration Act 2000* (Qld) s 11(1); *Powers of Attorney Act 1998* (Qld) s 76.

²¹ *Guardianship and Administration Act 2000* (Qld) s 34; *Powers of Attorney Act 1998* (Qld) s 76.

²² *Guardianship and Administration Act 2000* (Qld) s 11; *Powers of Attorney Act 1998* (Qld) s 76.

²³ *Guardianship and Administration Act 2000* (Qld) s 11(3).

²⁴ Office of the Public Advocate interviews 4DL, 44Y, 5PJ, 5XW, 6Y2, 7TZ (2014); Professor Malcolm Parker, Submission No 2 to Office of the Public Advocate, *Decision-making support in Queensland’s guardianship system: An Issues Paper*, 18 November 2014, 1; Queensland Advocacy Incorporated, Submission No 4 to Office of the Public Advocate, *Decision-making support in Queensland’s guardianship system: An Issues Paper*, 4 December 2014, 4; Carers Queensland Inc., Submission No 5 to Office of the Public Advocate, *Decision-making support in Queensland’s guardianship system: An Issues Paper*, 4 December 2014, 3; Queensland Aged and Disability Advocacy Inc., Submission No 7 to Office of the Public Advocate, *Decision-making support in Queensland’s guardianship system: An Issues Paper*, 5 December 2014, 1, 6.

²⁵ Queensland Advocacy Incorporated, above n 24, 3.

Separate to there being limited awareness of the principles, many stakeholders expressed that they encounter difficulties when applying the principles, primarily because they are open to interpretation and can be applied in different ways.²⁶ This can therefore make it challenging to determine what ‘the right decision’ might be.

Some of the key challenges in applying the principles were identified to be:

- difficulties weighting and prioritising the principles, particularly when the principles can be applied in different ways to the same situation;
- managing the tension that exists between principles, including but not limited to, the tension between the views and wishes of the person and the obligation to act in a way consistent with their proper care and protection;
- ascertaining the views and wishes of the person; and
- implementing the wishes of a person when their wishes differ to, or conflict with, the wishes of the people in their family or support network.²⁷

It is concerning that the research also identified the principles may be applied as a justification mechanism for a decision that has been made, in addition to being part of the considerations that inform the decision-making process.²⁸

The broad nature of the principles was seen by some to be beneficial in terms of flexibility of application, however others found that the high level language of the principles created complications, particularly in trying to prioritise the principle/s that should take precedence in a particular situation.²⁹ Examples of complications and tensions evidenced by the research included:

- the views and wishes of a person not aligning with what may be interpreted by another person to be consistent with their proper care and protection;
- the requirement to presume that a person has capacity for a matter, even following a Tribunal decision that the person does not have the capacity for the matter and the appointment of a substitute decision-maker;
- cultural customs not aligning with the principles and/or other legislated obligations;
- maintaining the confidentiality of a person when it can negatively impact their existing relationships;
- the right of a person to refuse health care and the obligation to maintain the person’s health and wellbeing;
- the views and wishes of a person now may differ to what the person may have done when they had capacity for the matter; and
- the importance of upholding a person’s human rights when they have been deprived of their legal capacity to make decisions.³⁰

²⁶ JS [2013] QCAT 706, 80 (Restricted Transcript); Office of the Public Advocate interviews B9X, C2W, DRN, GHP, HB5, NH9 (2014); Office of the Public Advocate, Survey of Public Guardians (2014).

²⁷ Office of the Public Advocate interviews B9X, C2W, DRN, GHP, HB5, L5K, MDZ, NH9 (2014); Office of the Public Advocate, Survey of Public Guardians (2014); FPC [2012] QCAT 689, 41 (Restricted Transcript); JS [2013] QCAT 706, 80 (Restricted Transcript).

²⁸ Office of the Public Advocate interview NH9 (2014); Queensland Advocacy Incorporated, above n 24, 16.

²⁹ Office of the Public Advocate interviews C2W, GHP, HPK, MXS (2014).

³⁰ Office of the Public Advocate interviews B9X, DRN, GHP, MDZ, NH9 (2014).

There is a genuine and critical need for greater guidance to assist with the application of the principles due to the inherent tensions and challenges faced by those implementing guardianship legislation and the broader community.

A specific concern expressed by stakeholders in the application of the current general principles was the tension or contradiction that exists between rights and self-determination on the one hand and ensuring proper care and protection (often conflated with the term ‘best interests’) on the other.³¹

In particular, it was acknowledged that while some principles imposed obligations to act in a manner that is the least restrictive of the person’s autonomy, to provide the person with decision-making support, and to seek and take into account the person’s views and wishes, ultimately the decision-maker was obliged to act in accordance with the proper care and protection of the person.³²

The research evidenced support for providing greater guidance in relation to the intent and application of the principles.³³ Notably, half of the Tribunal members who were interviewed advised that they would like to see the *Guardianship and Administration Act* include greater guidance in respect of applying the general principles.³⁴ Some Tribunal members commented that they would benefit from the inclusion of examples in the Act.³⁵ This may assist with the interpretation of the principles, particularly where there might be conflict between the interpretation, prioritisation or application of the principles.³⁶

Queensland Aged and Disability Advocacy Inc. (QADA) conveyed that there was “a real need to make the General Principles as concrete as possible so these Principles can be implemented. The more room there is for ambiguity about the application of these Principles, the more difficult it is to implement them, or to use them as an advocacy tool to insist on arrangements which maximize an adult’s decision making autonomy, and less likely it is that stakeholders will feel obliged to facilitate supported decision making.”³⁷

Some research participants cautioned however against making legislation too prescriptive. For example, one interviewee warned that “one of the mistakes government makes is that there are times in which we want to nail down every little bit of legislation to within an inch of its life. The RP [restrictive practices] legislation is an obvious example of that and it creates so many unintended consequences...”³⁸

Providing practical examples is one way to provide greater guidance around the principles. Queensland Advocacy Incorporated (QAI) submitted that Queensland’s guardianship system be reformed to include a code of practice tailored to “all those who provide care for people with impaired capacity in a services capacity”.³⁹ The organisation suggested that the code of

³¹ Office of the Public Advocate interviews B9X, DRN, NH9 (2014); Office of the Public Advocate, Survey of Public Guardians (2014).

³² *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7; *Re JD* [2003] QGAAT 14, [35]; *Re SD* [2005] QGAAT 71, [39]; Queensland Aged and Disability Advocacy Inc., above n 24, 3.

³³ Office of the Public Advocate interview NH9 (2014); Office of the Public Advocate, Queensland Civil and Administrative Tribunal pre-interview questionnaire (2014); Queensland Aged and Disability Advocacy Inc., above n 24, 3; Queensland Advocacy Incorporated, above n 24, 16.

³⁴ Office of the Public Advocate, Queensland Civil and Administrative Tribunal pre-interview questionnaire (2014).

³⁵ Office of the Public Advocate interviews 7GT, 7TZ (2014).

³⁶ Office of the Public Advocate interviews 4DL, 7GT, 7TZ (2014).

³⁷ Queensland Aged and Disability Advocacy Inc., above n 24, 3.

³⁸ Office of the Public Advocate interview C2W (2014).

³⁹ Queensland Advocacy Incorporated, above n 24, 4.

practice promote a supported decision-making approach; provide practical guidance on how to support a person to make their own decisions; and outline expectations in terms of ensuring people are supported to make their own decisions (to the greatest extent possible). QAI also advocated for initiatives designed to ensure the successful implementation of the code of practice e.g. ongoing training, compliance reporting and penalty provisions for non-compliance.⁴⁰

The OPG also supported the development of guidelines and practical examples to improve the understanding and application of the principles, and highlighted the importance of education and access to support for decision makers. However, the OPG expressed concerns around the enforcement of guidelines being embedded in legislation foreseeing potentially unintended and undesirable consequences, for example deterring people from engaging with informal decision-making.⁴¹

2.3 Supported decision-making and Queensland's guardianship system

Although Queensland's guardianship system is based on a substitute decision-making model, Queensland legislation recognises the importance of decision-making support and imposes certain obligations on decision-makers and others exercising powers under guardianship legislation that are supportive of maintaining an adult's decision-making autonomy. Refer to Appendix Four for further information about the purpose, acknowledgements and principles of the *Guardianship and Administration Act*.

Of all Australian jurisdictions, Queensland's guardianship legislation has the most comprehensive set of rights and principles. However, legislation also imposes limits to supported decision-making⁴²

The *Guardianship and Administration Act* and *Powers of Attorney Act* impose some limits to supported decision-making. However ultimately, despite requirements in relation to recognising and taking into account a person's views and wishes and providing them with support to participate in decision-making, principle seven of the general principles also asserts the obligation for a substitute decision-maker to make decisions that are consistent with the person's proper care and protection (colloquially, doing so is often referred to as making decisions in the 'best interests' of the person).⁴³ Secondly, once a substitute decision-maker is appointed for a matter, at law the adult does not have the authority to make and execute decisions for that matter.⁴⁴

Nevertheless it must be recognised that together the sentiments in the acknowledgements section of the *Guardianship and Administration Act*, and the general principles of both the *Guardianship and Administration Act* and *Powers of Attorney Act* go a long way toward supporting a person's decision-making autonomy, and arguably go much further than comparable guardianship legislation in other jurisdictions.

⁴⁰ Ibid 4-5.

⁴¹ Office of the Public Guardian, Submission to Office of the Public Advocate via Advisory Group consultation process, 1 April 2016.

⁴² Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 82.

⁴³ See *Re JD* [2003] QGAAT 14.

⁴⁴ *Bergmann v DAW* [2010] QCA 143 (11 June 2010) [35].

3 Pressures on Queensland's guardianship system

As people with disability began to move out of institutions from the 1970s onwards, there were new demands, including the need to negotiate access to a complex system of social services. The “need was increasingly for brokers to negotiate access, advocates to demand services, and agents to provide legal approvals for decisions”.⁴⁵ There was also a need for accessible mechanisms for legally binding decisions to be made for people with impaired decision-making capacity for issues such as accommodation, health care and finances because in the absence of a legally appointed substitute decision-maker, decisions made by informal decision-makers could not be legally recognised.⁴⁶

These changes coincided with the growing disability rights movement and the recognition of people with disability as citizens with rights. As a result, the latter part of the twentieth century saw significant reforms including guardianship legislation being enacted in each state and territory throughout the 1980s and 1990s.

A number of systemic pressures, demographic trends and changes within society are continuing to increase the demand for guardianship and administration, including public guardianship and administration.

Many of the same pressures from decades ago, which provided the impetus for the development of statutory schemes for guardianship, as well as new pressures in response to changes in human services, are placing significant strain on the systems that were put in place to address these issues. These emerging pressures have arisen as a result of the way in which human and social services are structured, inclusive of disability, health and age care services, which have always promoted the need for guardianship. Further demographic and societal trends have put growing pressure on these services and on guardianship systems.

3.1 Health, disability and aged care services

People with impaired decision-making capacity access more support services than people with other types of disability.⁴⁷ Much of the pressure on the guardianship system stems from this, and in particular from the need for people with disability, older people and people with mental illness to negotiate access to multiple systems within a labyrinth of social services.

In turn, these services create their own pressures. First, there is a fragmented social service system characterised by significant gaps and a lack of integration and coordination. Further, many of these services have administrative requirements that inadvertently force people into guardianship and/or administration.

⁴⁵ T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 18.

⁴⁶ Shih-Ning Then, 'Evolution and Innovation in Guardianship Laws: Assisted Decision-Making' (2013) 35 Sydney Law Review 133, 138.

⁴⁷ Australian Bureau of Statistics, 2012, Microdata: Disability, Ageing and Carers, CURF and Survey TableBuilder, Australia, 2009, Cat No. 4430.0.30.002, ABS, Canberra.

3.1.1 Service gaps and a lack of integration and coordination

“Gaps in social service systems and the lack of a coordinated social service system contribute significantly to the demand for guardianship”⁴⁸

As illustrated in Table 1, the support needs of around 48,000 Queenslanders with impaired decision-making capacity who live in private households are not met, despite a large proportion accessing services provided by government, non-government and private organisations.

Table 1: Support needs of Queensland adults with impaired decision-making capacity living in private households

48,000 (approx.) Queensland adults with impaired decision-making capacity do not have their support needs met

28%	Only receive support from informal sources and do not have their support needs met
49%	Receive support from one sector and do not have their support needs met
19%	Receive support from two sectors and do not have their support needs met
4%	Receive support from three sectors and do not have their support needs met
5%	Do not receive any support at all

Sources: Australian Bureau of Statistics, Microdata: Disability, Ageing and Carers, CURF and Survey TableBuilder, Cat No. 4430.0.30.002, 2012; Australian Bureau of Statistics, Population Projections, Australia, 2012 to 2101, Cat No. 3222.0, 2012.

Notes: The three sectors are government, non-government and private. The table figures do not include people with impaired decision-making capacity who live in cared accommodation (e.g. in a group home, health establishment or institutional setting). The degree to which a person’s support needs were met is based on the variable “Extent to which need for assistance met”. The Queensland population has been projected to 2016 based on the Australian Bureau of Statistics Population Projections.

This not only suggests that the current combination of specialist interventions and mainstream services fails to meet the support needs of people with impaired decision-making capacity, but that there may be a paucity of services and numerous service gaps. This was recognised by a number of stakeholders as a significant contributor to the demand for guardianship. Interviewees spoke about service deficits (particularly in regional areas), service gaps, and the people with impaired decision-making capacity who experience difficulties in accessing support services i.e. ‘fall through the cracks’ of existing service systems.⁴⁹

Unfortunately, people who ‘fall through the cracks’ are victims of an inequitable and fragmented human services system. People are currently channelled into different service systems primarily on the basis of their diagnosis, with many of these systems lacking the sophistication to determine and provide an appropriate mix of services to adequately respond to the needs of the person.

The type, quantity and quality of support services available to a person can differ from system to system. This is the result of inflexible and narrowly defined service models that do not prioritise the desired outcomes of the person or focus on building an effective mix of supports to help them achieve their goals.

The shortfalls of these systems often lead to services being provided in an *ad hoc* manner that does not address the causal factors underpinning the person’s circumstances. Further, the

⁴⁸ Queensland Advocacy Incorporated, above n 24, 12.

⁴⁹ Office of the Public Advocate interviews B9X, C2W, NH9 (2014).

current approach centres more on impairment 'type' rather than a person's experience of their impairment. This approach will continue to exacerbate the exclusion and disadvantage experienced by people with impaired decision-making capacity and other vulnerable Queenslanders.

In addition, some people are excluded from service systems due to the rigid nature of service models, eligibility criteria, policies and procedures. A more inclusive and outcomes-focused approach to the delivery of human services would generate increased opportunities for improvement and integration within and across systems, thus enabling more appropriate support to be provided to vulnerable Queenslanders.

Six out of the ten Tribunal members who were interviewed indicated that providing adults with greater access to the social supports and services that they need could reduce the need for guardianship and administration appointments. Only two members indicated that they felt this would not be the case.⁵⁰

3.1.1.1 Need for case management/coordination

A significant gap in social services that is often filled by guardians, and to a lesser degree administrators, is the need for case management and/or coordination of services. Case management is needed to assist people with impaired decision-making capacity to navigate the complex array of social services in a way that meets their needs and goals.

Almost three-quarters (73%) of respondents to the survey of public guardians indicated that they sometimes informally act as a case manager for their clients, in addition to their role as decision-maker.⁵¹ There is some evidence to suggest that trust officers may also informally act as a case manager for their clients on occasion.⁵²

The increasing pressure on guardians to perform advocacy and case management roles in addition to their decision-making role, and the lack of an integrated and coordinated social services system, has flow on effects in that it may impact the timeliness in which decisions can be made and/or the number of people for whom a public decision-maker can make decisions.

3.1.2 Living Longer Living Better reforms

The *Living Longer Living Better* aged care reforms have triggered numerous concerns about the increased complexity of decisions for people entering residential aged care.

The Federal Government released the *Living Longer Living Better* aged care reform package on 20 April 2012, a 10-year plan to reshape aged care. The first tranche of reforms commenced in 2013. However, it was the 2014 changes that triggered particular concerns; these primarily related to the increased complexity of decision-making (particularly for the financial aspects of aged care placement decisions) and the resultant pressure placed on public trustees.⁵³

⁵⁰ Office of the Public Advocate, above n 34.

⁵¹ Office of the Public Advocate, Survey of Public Guardians (2014).

⁵² Office of the Public Advocate, Survey of Public Administrators (2014).

⁵³ Australian Guardianship and Administration Council, Submission to the Department of Human Services, *Discussion Paper – National Aged Care Reforms*, February 2015, 1.

Since the commencement of the changes, public trustee agencies have had to undertake a significant amount of work to ensure an understanding of the reforms themselves, as well as in preparing to make actual decisions for individuals under the new scheme. This has also been an issue for statutory guardians in that the complexity involved in assessing the financial implications associated with accommodation decisions has often limited their ability to make decisions in a timely manner.

Public guardians and administrators have reported having to obtain financial advice prior to making decisions on behalf of their clients in order to understand the options that may be available for an individual and in weighing up the appropriateness of options and the resultant financial impacts that may arise from each option.

For example, standard decisions to be made prior to entering aged care now include choosing between making Daily Accommodation Payments versus Refundable Accommodation Deposits versus a combination of these; and the ways in which asset structuring can be used to enable a more viable assessable financial position for the individual, as well as many other considerations that were not anticipated prior to these recent reforms.

Further, the binding and specific nature of the agreements that must be entered into to accept an aged care placement mean that if a person's care needs change, or if a resident wishes to move, a new contract is required and possibly a new raft of contract negotiations. If not undertaken in a timely manner, or if there is no support to do so, it is possible that this may result in people becoming stuck in overly restrictive arrangements. Conversely, insufficient funds may preclude a person from accessing a 'high care' arrangement.

The Living Longer Living Better aged care reforms will continue to place considerable pressure on Queensland's guardianship and administration system.

This has and will continue to impact the guardianship system in multiple ways including:

- the increased attractiveness of having the Public Guardian and/or Public Trustee appointed to navigate the complex decisions (particularly financial decisions) relating to residential aged care, particularly while there are a limited number of financial advisors with sufficient knowledge and expertise of the reforms;
- a reluctance of potential private guardians and/or administrators to undertake the role, particularly in light of the potential financial and legal liability for decision-makers (thus an increased likelihood of the Public Guardian and Public Trustee being appointed to facilitate entry to aged care);
- greater time required for decision-making about aged care placements by the Public Guardian and Public Trustee. This is partially underpinned by the issue of potential legal liability, consumes greater agency resources and may inhibit timely decisions for the person for whom the aged care placement decision is to be made, and for other people for whom the guardian and/or administrator needs to make decisions; and
- the Public Guardian ceasing to make aged care placement decisions as the Statutory Health Attorney of last resort. This may result in an increase in applications for a guardian, particularly by hospital workers.⁵⁴

⁵⁴ Ibid 1-2.

In circumstances whereby an aged care placement is being considered as an appropriate transition plan to support a person's move out of hospital (for example, after admission due to age-related medical issues), there is a concerning trend toward hospital staff seeking the appointment of a guardian and/or administrator to make the aged care placement decision and thus facilitate the person's discharge from hospital. This often occurs without consulting the person in the course of submitting the application for appointment.

There is also an emerging policy position whereby aged care providers require people to have a valid enduring power of attorney as a condition of entry. Ostensibly the reasoning for this is to provide a safeguard by ensuring that all people seeking placement have a mechanism in place to ensure decision-making continuity in respect of the person's placement should their capacity (especially for financial matters) become impaired. While making an enduring power of attorney is arguably a positive obligation, the process can take time, which may impact a person's ability to secure an aged care placement. Further, once an enduring power of attorney is in place, many services and facilities assume its immediate authority as opposed to recognising that it may not take effect until the person lacks decision-making capacity.⁵⁵

“The concept of supported or informal decision-making appears to be completely absent from the way in which providers operationalise the aged care reforms. There are often family members who are able to assist their family member to make aged care placement decisions and/or to make decisions on their behalf, but this appears to no longer be deemed sufficient.”⁵⁶

As a result of the time required to create an enduring power of attorney or secure a guardianship and/or administration appointment, there has been, and likely will continue to be, an increasing number of applications for interim orders made to the Tribunal in relation to residential aged care placements.⁵⁷ This pressure on the guardianship system is compounded by the unwillingness of aged care providers to offer interim placements.⁵⁸

One Tribunal member who was interviewed indicated that prior to these reforms, the Tribunal would receive up to 10 applications for interim appointments every day. “At least half or 60% of those are because someone is in hospital or is at home and can no longer remain safely at home and insists that they need an interim order so that they can be placed in care.”⁵⁹ In those situations, the Tribunal refused to make interim appointments as the matters could be handled informally.⁶⁰

With the introduction of these reforms, the same Tribunal member indicated that this approach (i.e. promoting the use of informal decision-making) will have to be re-thought “because they may not be able to go into care informally.”⁶¹

⁵⁵ Ibid.

⁵⁶ Ibid 2.

⁵⁷ Office of the Public Advocate interview DXC (2014).

⁵⁸ Australian Guardianship and Administration Council, above n 53, 2.

⁵⁹ Office of the Public Advocate interview R6R (2014).

⁶⁰ Ibid.

⁶¹ Ibid.

3.2 Administrative requirements of organisations

A person with impaired decision-making capacity cannot legally enter into agreements or contracts.⁶² Many organisations will therefore seek a person with legal authority to enter into an agreement or contract on behalf of a person with impaired decision-making capacity.

Alongside this issue is that of informal decision-makers and supporters wanting to communicate or access information with third party organisations to support a person who may have impaired decision-making capacity.

3.2.1 Privacy requirements and the need to access information

While privacy legislation is an important mechanism to safeguard the personal information of Queenslanders, it can channel people into the guardianship system by inhibiting the informal decision-making arrangements of people who may have impaired decision-making capacity. It is representative of a risk averse culture within organisations, many of which are fearful of legal liability.

The requirement of organisations for some form of ‘authority to act’ is a barrier to informal decision-making and one of the drivers for guardianship and administration.

One of the most significant issues driving guardianship and administration appointments is the requirement of third parties for a formal appointment before information will be provided or dealings undertaken with a member of the person’s support network on their behalf. This has been identified as the most commonly experienced barrier to informal decision-making.⁶³

The research indicated that the need to access information from, and/or provide information to, organisations on behalf of a person who experiences difficulties with these activities often leads to the appointment of a guardian and/or administrator.⁶⁴

The types of organisations that drive applications for guardianship and/or administration include residential aged care providers, financial institutions (e.g. banks, insurance companies), hospitals, a range of public utilities and service providers (e.g. telephone companies, electricity companies, disability support providers, real estate agents), and government agencies.⁶⁵ Refer to section 5.2 for further discussion about privacy legislation and requirements.

3.2.2 Other administrative requirements

The low cost and accessibility of the guardianship system make it an increasingly attractive option for organisations to manage risk and ensure legal authority.⁶⁶

⁶² *Bergmann v DAW* [2010] QCA 143 (11 June 2010).

⁶³ Office of the Public Advocate interviews B9X, DRN, 4DL, 44Y, 5CD, 5PJ, 5XW, 6NV, 6Y2, 6K6, 7GT, 7TZ (2014); Queensland Advocacy Incorporated, above n 24, 6.

⁶⁴ Office of the Public Advocate, above n 34.

⁶⁵ Office of the Public Advocate interviews FRY, GHP, HB5, HPK, JMF, KC8, K4R, MDZ, MXS (2014).

⁶⁶ D Tait and T Carney, ‘Too Much Access: The Case for Intermediate Options for Guardianship’ (1995) 30(4) *Australian Journal of Social Issues* 445.

Apart from accessing information, or communicating with a third party on a person's behalf, many service providers and other organisations will not take certain actions unless they have the certainty of a guardianship and/or administration appointment. For example, hospitals will often seek guardianship appointments in order to facilitate patient discharge processes, an Aged Care Assessment Team (ACAT) assessment, and/or entry to an aged care facility. The use of the guardianship system in this manner was a point of particular note that was made by many stakeholders.⁶⁷

The demands of organisations for legal authority to act can be a preferred risk management strategy⁶⁸.

As discussed, the demand for guardianship and administration is increasingly driven by the administrative requirements of residential aged care providers. In addition to aged care providers often requiring that the person seeking to enter care must have either an enduring power of attorney or a guardianship and/or administration order, many providers also call for appointments to sanction internal processes, such as the approval of client support plans.⁶⁹

The overuse and misapplication of the guardianship system has a significant impact on a person's civil rights as a result of a determination of a lack of capacity and an appointment of a substitute decision-maker.⁷⁰

Infringing a person's rights for the purposes of seeking authority for organisational policies and processes, such as approving disability or aged care support plans, is arguably a creep in the scope of Parliament's original intention for guardianship and administration. The Tribunal may be indirectly compelled to make appointments in response to the policies and requirements of organisations as a result of concern that, without an appointment, the needs of the person may not be adequately met and/or their interests protected.⁷¹

3.3 Societal and demographic trends

Various demographic, health and societal trends will also continue to impose pressure upon the guardianship system.

3.3.1 Health

A number of health conditions can impair a person's decision-making capacity. These include, but are not limited to dementia, stroke, intellectual disability, acquired brain injury and mental illness. Some of the people who experience these conditions may be subject to guardianship and/or administration, and/or require access to other forms of support to assist with decision-making. This is particularly relevant for those whose experience of these conditions is severe and persistent.

⁶⁷ Office of the Public Advocate interviews B9X, HB5, HPK, K4R, L5K (2014).

⁶⁸ Office of the Public Advocate interviews B9X, C2W, 5PJ (2014); Queensland Aged and Disability Advocacy Inc., above n 24, 2-3.

⁶⁹ Office of the Public Advocate interviews FRY, HB5, HPK, JMF, KC8, K4R, MDZ, MXS, QNC (2014).

⁷⁰ Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship?' (2013) 117 *Penn State Law Review* 1111, 1117.

⁷¹ *Guardianship and Administration Act 2000* (Qld) s 12(c).

The prevalence of these conditions in Queensland is noteworthy:

- one in five Queenslanders experience a mental illness or substance use disorder in any given year.⁷²
- half of all Queenslanders will be affected by mental illness or substance use disorder sometime during their life.⁷³
- just less than 1 in 5 Queenslanders have a disability, with around 236,200 people (of all ages) having a severe or profound disability.⁷⁴
- more than one in twelve Queenslanders are affected by acquired brain injury.⁷⁵
- more than 11,000 Queenslanders acquire a brain injury each year. Of these 4,000 will develop a serious disability.⁷⁶
- more than 9,000 Queenslanders are affected by stroke each year.⁷⁷
- an estimated 61,321 Queenslanders are living with dementia.⁷⁸

While only a small proportion of people who experience these conditions are subject to guardianship and administration, the prevalence of some of these conditions is increasing. In turn, the numbers of people who experience impaired decision-making capacity as a result of these conditions is also likely to increase. For example, international literature recognises that acquired brain injury is a leading and increasing cause of disability world-wide.⁷⁹ It is also anticipated that the number of people with an acquired brain injury in Queensland will grow each year as more people survive brain injuries sustained through accidents, stroke, assaults and a range of other causes.

3.3.2 Ageing society

Arguably one of the most significant societal and demographic trends is Australia's ageing population, which was described by the House of Representatives Standing Committee on Legal and Constitutional Affairs as "an inescapable demographic destiny".⁸⁰

⁷² Queensland Mental Health Commission, *Improving mental health and wellbeing: Queensland Mental Health, Drug and Alcohol Strategic Plan 2014-2019* (9 October 2014) Queensland Mental Health Commission, 5 <http://www.qmhc.qld.gov.au/wp-content/uploads/2014/10/QMHC-Mental-Health-Drug-and-Alcohol-Strategic-Plan-2014-2019_web.pdf>.

⁷³ *Ibid.*

⁷⁴ Queensland Government, *Disability statistics* (4 February 2015) Queensland Government <<https://www.qld.gov.au/disability/community/disability-statistics/>>.

⁷⁵ Australian Institute of Health and Welfare as cited in Queensland Government, *Acquired brain injury: How common is ABI?* (21 October 2014) <<https://www.qld.gov.au/disability/community/acquired-brain-injury/>>.

⁷⁶ Queensland Health, *Acquired Brain Injury Outreach Service (ABIOS): What is ABI?* (12 September 2013) Queensland Health <https://www.health.qld.gov.au/abios/asp/what_is_abi.asp>.

⁷⁷ Stroke Association of Queensland, *Stroke Association of Queensland Inc.*, Givenow.com.au <<https://www.givenow.com.au/strokeassocqld>>.

⁷⁸ Deloitte Access Economics, *Dementia Across Australia: 2011-2050* (9 September 2011) Alzheimer's Australia 17 <<https://fightdementia.org.au/research-and-publications/reports-and-publications/access-economics-reports>>.

⁷⁹ Brain Injury Australia, Submission No 371 to the Australian Government Productivity Commission, *Disability Care and Support*, 16 August 2010, 1.

⁸⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, The Parliament of the Commonwealth of Australia, *Older people and the law* (2007) vii.

3.3.2.1 Dementia

The ageing population phenomenon will inevitably increase the prevalence of age-related conditions, such as dementia, that can impair a person's decision-making capacity.

The National President of Alzheimer's Australia commented that "dementia is without question the single biggest health issue facing Australia in the 21st century".⁸¹ Forecasts by Deloitte Access Economics estimate that, in the absence of new medications to treat dementia, the prevalence of dementia in Queensland will be 73,470 in 2020 and will reach 215,272 by 2050.⁸²

A diagnosis of dementia does not automatically imply that a person has impaired decision-making capacity, however there is a likelihood that at some point in time, a person living with dementia will experience difficulty in making some decisions and/or in managing their affairs.

3.3.2.2 Demand for health services

The ageing population will also impact the health system through increased demand for allied health services; the management and treatment of age-related conditions and chronic diseases; hospitalisations (illness, fall injuries etc.); and home-based supports.

Increasing interactions with the health system, particularly for people with dementia or those who experience symptoms that may impact decision-making capacity, may generate demand for guardianship and/or administration in two ways: a general increase in the number of health, service provision and other decisions to be made for the person; and hospitals or other service providers requiring authority to act (e.g. in relation to discharging patients).

3.3.2.3 Social isolation

It is estimated that approximately 20% of older Australians are socially isolated.⁸³ Many older Queenslanders are at high risk of social isolation⁸⁴ and are more likely to have low social participation levels and an absence of informal support networks.

These issues, however, are not unique to older Queenslanders and can also be experienced by people with disability, mental illness, acquired brain injury, or other conditions that may result in impaired decision-making capacity. As seen in Table 2, various degrees of social isolation can be experienced by people with impaired decision-making capacity.

⁸¹ Ita Buttrose, National President, Alzheimer's Australia as cited in Deloitte Access Economics, above n 78, 7.

⁸² Deloitte Access Economics, above n 78, 17.

⁸³ Andrew Beer, 'Worse than Cigarettes and Drink: The Impact of Social Isolation on Older Australians' 2013 in Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into the adequacy of existing financial protections for Queensland's seniors* (2015) 53.

⁸⁴ Beyond Blue, *Research projects: Social isolation in older adults* (2015) Beyond Blue
<<https://www.beyondblue.org.au/resources/research/research-projects/research-projects/social-isolation-in-older-people>>.

Table 2: Social participation of Queensland adults with impaired decision-making capacity living in private households

93,000 (approx.) Queenslanders with impaired decision-making capacity living in private households

54%	Cannot leave their home as often as they would like
40%	Go without any cultural or leisure activities
15%	Go without any social participation away from their home
7%	Have had no social contact in their own homes within the previous three months
2%	Do not leave their home at all

Source: Australian Bureau of Statistics, Microdata: Disability, Ageing and Carers, CURF and Survey TableBuilder, Cat No. 4430.0.30.002, 2012; Australian Bureau of Statistics, Population Projections, Australia, 2012 to 2101, Cat No. 3222.0, 2012.

Notes: The table categories are not mutually exclusive. The table figures do not include people with impaired decision-making capacity who live in cared accommodation (e.g. in a group home, health establishment or institutional setting). The Queensland population has been projected to 2016 based on the Australian Bureau of Statistics Population Projections.

Support networks are an important safeguards for people with impaired decision-making capacity and can alleviate the need for guardianship and administration.

“The absence of family, friendship or other caring or cooperative social relationships at any stage of life, but particularly when people are least able to care for themselves, can have a serious impact on personal wellbeing as well as on wider social cohesion.”⁸⁵ When coupled with the need for a decision to be made, it can also be a trigger for guardianship and administration applications. Some people with impaired decision-making capacity do not have access to people who can provide informal support for decision-making.

Social isolation is a key risk factor for abuse, neglect and exploitation.

In the final Annual Report of the Office of the Adult Guardian (prior to the establishment of the OPG), the Adult Guardian commented that, “given the growing percentage of the aged persons in our community with consequent capacity issues arising from diseases such as Dementia, etc. there is always likely to be a need for the continued existence of a body such as OAG to act as guardian of last resort for individuals who have no family or other support network. In my time as Adult Guardian I have been constantly saddened by the number of aged and infirm persons [particular those residing in nursing homes] who are identified as having no family, friends or visitors particularly in the last years of their life.”⁸⁶

In 2015, the Communities, Disability Services and Domestic and Family Violence Prevention Committee commented that “a coordinated response to social isolation requires a multi-disciplinary response underpinned by a shared commitment and collaborative processes across government agencies and community organisations”.⁸⁷ The Committee placed importance upon the inclusion of specific and measurable programs as part of future policies and strategies.⁸⁸

⁸⁵ Australian Bureau of Statistics, *Measures of Australia's Progress 2010: Is life in Australia getting any better? Summary Information*, Cat No. 1370.0 (13 November 2013) Australian Bureau of Statistics, 7 <[http://www.abs.gov.au/Ausstats/free.nsf/vwLookupSubject/1370.0~2010~MAP%20downloads%20\(8\)~13700_Sep2010_Brochure.pdf/\\$File/13700_Sep2010_Brochure.pdf](http://www.abs.gov.au/Ausstats/free.nsf/vwLookupSubject/1370.0~2010~MAP%20downloads%20(8)~13700_Sep2010_Brochure.pdf/$File/13700_Sep2010_Brochure.pdf)>.

⁸⁶ Office of the Adult Guardian, ‘Annual Report 2013-2014’ (2014) 7.

⁸⁷ Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into the adequacy of existing financial protections for Queensland's seniors* (2015) 58.

⁸⁸ Ibid.

In March 2016, the Queensland Government announced that it will develop a whole of government strategy for seniors.⁸⁹ The strategy “will address concerns regarding social isolation and active engagement and participation of older Queenslanders”⁹⁰ and is based on the World Health Organisation’s Age-Friendly Cities and Age-Friendly World models.⁹¹ Age-friendly communities ensure that “people are free from age-related barriers that prevent their participation and inclusion”.⁹²

While older Queenslanders are expected to be the main beneficiaries of the age-friendly approach, the Queensland Government has advised that it will benefit people of all ages.⁹³ Broader community participation, cohesion and inclusion strategies are needed to tackle the varying degrees of social isolation experienced by many vulnerable members of the community, including those with disability, mental illness, acquired brain injury and other conditions. Such strategies will help mitigate risks to their wellbeing and interests, including the risks of abuse, neglect, harm and exploitation.

3.3.2.4 Ageism

Unfortunately, there is a likelihood that ageism may also increase alongside the ageing population. Ageism includes “negative or positive stereotypes, prejudice and/or discrimination against (or to the advantage of) elderly people on the basis of their chronological age or on the basis of a perception of them as being ‘old’ or ‘elderly’”.⁹⁴ Research commissioned by the Age Discrimination Commissioner found that ageism and age discrimination were widespread and commonly experienced by older Australians. It also found that ageist attitudes were deeply ingrained and evident in all aspects of Australian society.⁹⁵

Ageism has been described as “the underlying cause of abuse, mistreatment and exploitation of older persons,”⁹⁶ also known as elder abuse. Older people with a cognitive impairment or impaired decision-making capacity are among the most vulnerable to elder abuse. Increasing instances of elder abuse will continue to fuel applications for the appointment of guardians and/or administrators, the appointment of public agencies as substitute decision-makers, and requests for investigations into potential abuse, harm and/or exploitation by the OPG.

⁸⁹ The Honourable Coralee O’Rourke, Minister for Disability Services, Minister for Seniors and Minister Assisting the Premier on North Queensland, ‘Palaszczuk Govt takes action on protecting seniors from financial abuse’ (Media Statement, 1 March 2016).

⁹⁰ Queensland Government, *Queensland Government Response to Communities, Disability Services and Domestic and Family Violence Prevention Committee Report No. 2: Inquiry into the adequacy of existing financial protections for Queensland’s seniors* (2016) 4.

⁹¹ Department of Communities, Child Safety and Disability Services, *Queensland: an age-friendly community* (26 February 2016) Queensland Government <<https://www.communities.qld.gov.au/communityservices/seniors/queensland-an-age-friendly-community>>.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Iversen, T.N., Larsen, L. & Solem, P.E. (2009). A conceptual analysis of ageism. *Nordic Psychology*, 61, 4-22 as cited in Townsville Community Legal Service Inc., Submission No 1 to Communities, Disability Services and Domestic Violence Prevention Committee, *The adequacy of existing financial protections for Queensland Seniors*, 8 May 2015, 7.

⁹⁵ Australian Human Rights Commission, Fact or fiction? Stereotypes of older Australians Research Report 2013 (June 2013) Australian Human Rights Commission <<https://www.humanrights.gov.au/our-work/age-discrimination/publications/fact-or-fiction-stereotypes-older-australians-research>> as cited in Townsville Community Legal Service Inc., above n 94, 8.

⁹⁶ Townsville Community Legal Service Inc., above n 94, 6.

3.3.2.5 Ageing carers

Australian Institute of Family Studies has reported that the number of parents aged over 65 years who are the primary carers of their adult son or daughter with disability has been increasing.⁹⁷ This trend will continue alongside the ageing population.⁹⁸

When a parent carer is no longer able to care for, or support the decision-making of, their son or daughter with disability, the person with disability may require guardianship and/or administration to access the supports and services they require. This will result in applications to the Tribunal and may also result in the appointment of a public decision-maker.⁹⁹

To mitigate the impact of ageing carers on the guardianship system, future planning should be actively encouraged. This planning should include the preparation of enduring documents that may be executed at a future point, if needed. This planning can be difficult to undertake,¹⁰⁰ however may minimise the need for guardianship and/or administration.

3.3.3 Family structures and conflict

The increasing diversification and complexity of family structures, along with the prevalence of family conflict, will continue to stimulate demand for guardianship and administration. Changes in relationships and family structures (e.g. marriage separation and divorce, re-marriage, blended or step-families) can alter a person's informal support network, which as this research shows, is a common trigger for guardianship and/or administration applications.

3.4 Impact on the current guardianship system

The challenges detailed above suggest a need for concern in relation to the sustainability of the guardianship system in Queensland. There is an increasing number of applications for guardianship and administration, which affects the workload of the Tribunal's Human Rights Division registry and the time taken for matters to be heard by the Tribunal. The system pressures are also evident in the growing number of public appointments, the high caseload within the Office of the Public Guardian (OPG), the number of public administration orders, and the increasing number of allegations and complaints regarding the suspected abuse, neglect or exploitation of people with impaired decision-making capacity received by the OPG.

3.4.1 Queensland Civil and Administrative Tribunal

The Tribunal is the gatekeeper of the guardianship system. It is responsible for decisions about capacity, whether people will be made subject to guardianship and/or administration appointments, whether less restrictive alternatives can be used and whether orders are continued or revoked. The Tribunal is the front line response to the increasing demand for guardianship and administration.

⁹⁷ Lixia Qu, Ben Edwards and Matthew Gray, *Ageing parents of carers of people with disability – Report October 2012*, (2016) Australian Institute of Family Studies <<https://aifs.gov.au/publications/ageing-parent-carers-people-disability/1-introduction>>.

⁹⁸ Ibid; Office of the Public Advocate interview C2W (2014).

⁹⁹ Office of the Public Advocate interview FRY (2014).

¹⁰⁰ Senate Community Affairs References Committee, Parliament of Australia, *Disability and ageing: Lifelong planning for a better future* (2011) as cited in Lixia Qu, Ben Edwards and Matthew Gray, above n 97.

The number of applications for guardianship and administration matters lodged with QCAT has been steadily increasing. Around 10,400 guardianship and administration applications were received by QCAT in 2014-15, a 16% increase on 2009-10 (9,002 lodgements).¹⁰¹ This growth will almost certainly continue.

A dilution of the specialisation afforded by the Tribunal to guardianship and administration matters may undermine the least restrictive principle and lead to overly restrictive outcomes.

In recent years, the increasing pressure to manage growing demand and achieve cost efficiencies may be gradually undermining the specialist nature of the Tribunal. Some of those interviewed by the Office of the Public Advocate conveyed concern about the impact that some efficiency measures have had upon the consideration and outcome of some guardianship and administration matters. Concerns were centred on the reduction in the number of members who preside over hearings from three members to one member and the gradual loss of members with professional backgrounds. Those who raised the issue were concerned that those changes have resulted in a deficit of the expertise needed to appropriately consider matters, ensure a consistent approach by members, and make certain that interventions are the least restrictive for the person at the centre of the application.¹⁰²

3.4.2 Public Guardian

As at 30 June 2015, the OPG was guardian for over 2,300 Queensland adults.¹⁰³ The total number of guardianship clients serviced by the OPG in the 2014-15 financial year was over 2,900. In that period, the OPG received 775 new appointments and closed 617 matters.¹⁰⁴

In comparison to other States and Territories, Queensland has the highest number of people subject to public guardianship.¹⁰⁵

A large part of the 11% increase in OPG clients between 2013-14 and 2014-15 was attributed by the OPG to new appointments resulting from the residential aged care reforms.¹⁰⁶ The Office also reported an increase in the proportion of appointments being interim in nature. A large number of interim orders were for the purpose of residential aged care placements.¹⁰⁷

Over the last five years, the number of new guardianship appointments each year has consistently surpassed the cessation of appointments.¹⁰⁸ As a result, the overall number of Queenslanders subject to public guardianship continues to steadily increase.

¹⁰¹ Queensland Civil and Administrative Tribunal, 'Annual Report 2010-2011' (2011) 12; Queensland Civil and Administrative Tribunal, 'Annual Report 2014-2015' (2015) 16.

¹⁰² Office of the Public Advocate interviews DXC, JMF, MDZ, MXS (2014).

¹⁰³ Office of the Adult Guardian, above n 86, 20.

¹⁰⁴ Office of the Public Guardian, 'Annual Report 2014-2015' (2015) 38.

¹⁰⁵ Data current as at October 2015. Data was submitted to the Australian Guardianship and Administration Council by members for their November 2015 meeting. Data for the Australian Capital Territory was not available.

¹⁰⁶ Office of the Public Guardian, above n 104, 37.

¹⁰⁷ Ibid 38.

¹⁰⁸ Office of the Adult Guardian, 'Annual Report 2009-2010' (2010) 8; Office of the Adult Guardian, 'Annual Report 2010-2011' (2011) 19; Office of the Adult Guardian, 'Annual Report 2011-2012' (2012) 18-19; Office of the Adult Guardian, 'Annual Report 2012-2013' (2013) 20-22; Office of the Adult Guardian, above n 86, 20; Office of the Public Guardian, above n 104, 38.

“The Office of the Public Guardian is like the emergency ward of guardianship and you need to be properly funded in order to do that work.”¹⁰⁹

Similarly to the demand for Tribunal services, there is a high likelihood that the demand for public guardianship will increase as a result of the current and emerging pressures on the guardianship system. In turn, this will impose additional resourcing pressures on the OPG.

Without additional funding, there is a risk that the OPG will become increasingly limited in its ability to meet the growing demand for its services as the last resort substitute decision-maker for people with impaired capacity. It may also be a barrier to the effective implementation of guardianship legislation and upholding the rights of people with impaired capacity.

In the year ended 30 June 2015, almost all (92%) of guardianship appointments made to the Public Guardian were matter specific, with the remaining 8% being plenary appointments.¹¹⁰ Therefore, the majority of people who were subject to a guardianship order made to the Public Guardian retained their legal authority for some types of matters.

3.4.3 Public Trustee

In 2014-15, the Public Trustee provided public administration services to 8,403 clients, which represented a 14% increase over the past five years.¹¹¹ While several hundred administration appointments made to the Public Trustee conclude each year, the growth in new and continued appointments has consistently exceeded the number of appointments that have been ceased.¹¹²

Queensland has the third highest number of public administration orders of all states and territories.¹¹³

The Public Trustee reported that the expected increase in demand for services “is the result of the effect of the ‘Baby Boomer’ generation reaching retirement age. This generation controls much larger and more complex asset structures than any previous generation and are expected to live longer than previous generations. These factors will continue to drive an increase in clients requiring assistance in managing their financial affairs”.¹¹⁴

In contrast to public guardianship appointments, almost all (96%) of the administration orders made to the Public Trustee were plenary. Only 4% of orders were limited to particular types of financial matters.¹¹⁵ This means that the majority of people subject to an administration order made to the Public Trustee had no legal authority for any financial matters.

¹⁰⁹ Office of the Public Advocate interview DRN (2014).

¹¹⁰ Office of the Public Guardian, above n 104, 38.

¹¹¹ The Public Trustee, ‘Annual Report 2009-2010’ (2010) 15; The Public Trustee, ‘Annual Report 2014-2015’ (2015) 8.

¹¹² The Public Trustee of Queensland, ‘Annual Report 2010-2011’ (2011) 19; The Public Trustee of Queensland, ‘Annual Report 2011-2012’ (2012) 10; The Public Trustee of Queensland, ‘Annual Report 2012-2013’ (2013) 10; The Public Trustee of Queensland, ‘Annual Report 2013-2014’ (2014) 9; The Public Trustee of Queensland, ‘Annual Report 2014-2015’ (2015) 8; The Public Trustee, Customised data request for the Office of the Public Advocate, 12 February 2016.

¹¹³ Data current as at October 2015. Data was submitted to the Australian Guardianship and Administration Council by members for their November 2015 meeting.

¹¹⁴ The Public Trustee, ‘Annual Report 2013-2014’ (2014) 6.

¹¹⁵ The Public Trustee, Customised data request for the Office of the Public Advocate, 7 October 2014.

3.5 Forthcoming systems change

3.5.1 National reforms in disability and aged care

Without changes to Queensland's decision-making regime, the current trends will see the demands on Queensland's guardianship system continue to grow. In addition there are a number of significant system reforms that will soon impact on, or in some cases are already impacting, Queensland's guardianship system.

3.5.1.1 National Disability Insurance Scheme

The NDIS will commence in Queensland in July 2016 as part of a phased implementation and will be fully implemented by 30 June 2019. It is estimated that more than 90, 000 Queenslanders will be supported by the Scheme once it is fully implemented.¹¹⁶

The NDIS will fundamentally change the way that disability services are delivered in Queensland. It will replace the role of the State Government in the provision of disability services.

Under the NDIS, eligible participants will receive funding on an individual basis to purchase necessary and reasonable supports associated with their disability. Using a variety of arrangements – either managing their allocated funding directly, having the agency manage it on their behalf, having a broker/plan manager, or a combination of the above – people with disability will decide what supports and services they need and will directly purchase those supports and services.¹¹⁷

This is a significant change to current service arrangements in Queensland where most organisations (primarily not-for-profit non-government organisations) are 'block-funded' for the provision of supports and services to eligible Queenslanders with disability. There is also a significant amount of unmet need, with many Queenslanders who are currently eligible for disability services not receiving supports and services because of a lack of available funds.

Not only will there be a significant increase in the number of Queenslanders accessing supports and services for their disability, but Governments will no longer be purchasing disability services. The primary relationship will be between the person with disability and the provider of supports;¹¹⁸ this relationship may be contractual in nature.

People with disability will also, however, have more choice and control about their disability services – including deciding the services and supports that they need and the provider from whom they purchase them.

¹¹⁶ Department of Communities, Child Safety and Disability Services, *Our role* (5 April 2016) <<https://www.communities.qld.gov.au/gateway/reform-and-renewal/disability-services/national-disability-insurance-scheme-in-queensland/our-role>>.

¹¹⁷ National Disability Insurance Scheme, 'Managing your supports and NDIS funding' <http://www.ndis.gov.au/sites/default/files/documents/managing_your_supports2.docx>.

¹¹⁸ National Disability Insurance Scheme, 'Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework: Consultation Paper', 4.

The NDIS is likely to have a significant impact on people with impaired decision-making capacity and Queensland's guardianship and administration system.

Data from the December 2015 quarterly NDIS report confirmed that 89% of NDIS participants may have some form of cognitive impairment.¹¹⁹ While the *National Disability Insurance Scheme Act 2013* (Cth) allows for a plan nominee to be appointed to act on behalf of the participant in the preparation and review of the participant's plan and the management of funding and supports under the plan,¹²⁰ there is some confusion about how this scheme will work with the state-based guardianship systems.

Currently NDIS nominees are appointed by the Chief Executive Officer of the National Disability Insurance Agency (the 'NDIA'). While the Chief Executive Officer must have regard to whether the participant has a court-appointed decision-maker or a participant-appointed decision-maker and any relevant views of a court-appointed decision-maker or a participant-appointed decision-maker,¹²¹ there continues to be a possibility that a nominee and a guardian could be appointed for the same matters.

Anecdotal evidence suggests that state guardianship systems are being relied on in place of the less restrictive alternative of NDIS nominees.

The anecdotal evidence from NDIS launch sites indicates that that very few (if any) nominees have been appointed for participants. Instead, reliance is placed on state guardianship systems. The current jurisdictions that have trial sites involving adults with disability (such as Victoria, New South Wales and the Australian Capital Territory) have all reported a significant increase in involvement in NDIS, either as advocates or guardians.¹²² For example, the New South Wales Public Guardian reported that, "we are involved in the planning process for over 70 clients who are participants in the scheme. We attend meetings with our clients and the NDIS planners, contribute to the planning and consent to the plans developed. We dedicate a lot of time and energy to making sure our clients understand what is involved in being a participant and that the plans developed reflect their goals, objectives and aspirations."¹²³

The Victorian Office of the Public Advocate reported a significant increase in individual advocacy with the commencement of the NDIS trial site in the Barwon region¹²⁴ and anticipates that demand for advocacy "will be of increasing importance to people with disability in the NDIS trial site and beyond given the new and greater opportunity participants will have to exercise choice and control over the services they wish to access. Many of the prospective participants and current participants have never had this opportunity, and appropriate supports and advocacy options are required to ensure participants are interacting

¹¹⁹ National Disability Insurance Agency, *Quarterly Report to COAG Disability Reform Council 31 December 2015* (2015) National Disability Insurance Scheme, 56 <<http://www.ndis.gov.au/sites/default/files/documents/Quarterly-Reports/Report-to-the-Disability-Reform-Council-Q10-1.pdf>>. Data excludes NDIS participants from South Australia (as they are under 18 years of age) and includes NDIS participants with a primary disability of autism and related disorders, cerebral palsy, developmental delay, down syndrome, global developmental delay, intellectual disability, psychosocial disability, 'other intellectual/learning' and 'other neurological'. Deafness/hearing loss, multiple sclerosis, 'other physical' and 'other sensory/speech' were not included in the group of primary disabilities which may lead to cognitive impairment.

¹²⁰ *National Disability Insurance Act 2013* (Cth) s 78(2).

¹²¹ *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.14(b)(iii), 3.14(b)(v)(C).

¹²² New South Wales Public Guardian, 'Public Guardian Advocacy Report 2014' (2014) 8; Public Advocate of the ACT, 'Annual Report 2013-14' (2014) 23; Office of the Public Advocate (Victoria), 'Annual Report 2013-14' (2014) 19.

¹²³ New South Wales Public Guardian, above n 122, 8.

¹²⁴ Office of the Public Advocate (Victoria), above n 122, 19.

with the NDIS in a way that promotes their inclusion.”¹²⁵ It is the view of the Victorian Office of the Public Advocate that “the NDIS planning process is extremely difficult to navigate for people with cognitive impairment, unless they have either advocacy or guardianship support”.¹²⁶ It is anticipated that the provision of advocacy services in relation to accessing the NDIS will mitigate any significant increase in the demand for guardianship.¹²⁷

The Public Advocate in the Australian Capital Territory reported that the agency supported 29 clients to access the NDIS in the last 12 months, which placed additional demands on resources. It was estimated that an additional 60 clients will require similar support in the coming year.¹²⁸

Support and advocacy will be needed for many Queenslanders with impaired decision-making capacity to access the NDIS. The absence of support and/or advocacy may result in an influx of applications to the Tribunal for the appointment of guardians and administrators.

With the lack of other less restrictive alternatives with appropriate safeguards, it seems likely that tribunals may be minded to appoint guardians and administrators for people with impaired decision-making capacity.¹²⁹

It also seems that the involvement of guardians may assist NDIS participants to achieve the best possible outcomes in terms of levels of funding and activating their plans to access services. The New South Wales Public Guardian reported that “Every plan we’ve consented to has resulted in clients receiving equal or greater funding than they had before and we have seen positive outcomes and improvements in people’s lives.”¹³⁰

It is a concern that the appointment of the Public Guardian may become an attractive option for securing NDIS participation and the appointment of the Public Trustee to negotiate and provide formal authority for service contracts.

The NDIS may also increase the breadth of some guardianship appointments, resulting in people losing their legal capacity for a wider range of matters. Anecdotal evidence from interstate trial sites suggests that in order to effectively access the scheme, many people require guardianship for health matters, in addition to service provision and/or accommodation matters.

Once granted participant status in the NDIS, there are ongoing decisions to be made, for example, reviewing and finalising contract documents, selecting service providers and managing the financial aspects of the NDIS package. This may extend the period of guardianship and administration for some people and notably increase the number of decisions to be made by guardians and administrators. In addition, it is likely to intensify pressure on guardians to act as advocates and case managers in addition to decision-makers.

¹²⁵ Office of the Public Advocate (Victoria), ‘Guardianship and the National Disability Insurance Scheme’ (2015) 12.

¹²⁶ Office of the Public Advocate (Victoria), ‘Annual Report 2014-15’ (2015) 10.

¹²⁷ Office of the Public Advocate (Victoria), above n 125, 12.

¹²⁸ Public Advocate of the ACT, ‘Annual Report 2014-15’ (2015) 38.

¹²⁹ For example see the decision of the NSW Civil and Administrative Tribunal in *KCG* [2014] NSWCATGD 7 [67-68].

¹³⁰ New South Wales Public Guardian, above n 122, 8.

This issue is recognised by the Victorian Office of the Public Advocate who commented that “the NDIS process is also problematic at the implementation stage when a person is required to choose service providers. Despite plans being completed for all participants with whom OPA was involved in mid-2014, in many instances implementation of those plans is yet to occur and issues around consent, the role of support coordinators and the intersection with providers remain to be resolved”.¹³¹

There is no doubt that the NDIS will bring significant benefits to the lives of people with disability. However it is important that the most appropriate and least restrictive mechanisms are used to support people with disability gain access to the NDIS and the planning process. Guardianship and administration may not always be the least restrictive way to achieve this.

There is potential for the NDIS to have an enormous impact on the guardianship system in terms of demand, timeliness of decision-making, and the ways in which public substitute decision-makers perform their role.

Further, the extent to which decision-making support and individual capacity building will be provided under the NDIS is unclear. Failure of the NDIA to fund decision-making support via participant plans may impact the ability of some people to make their own decisions in the least restrictive manner. In turn, this could be a missed opportunity to prevent and/or minimise the need for guardianship and administration.

Supporting a person with impaired decision-making capacity to make their own decisions in as many aspects of life as possible can be a time consuming process. At present, particularly in accommodation services, supporting people to make their own choices and decisions is often part of the daily support provided under a support package. Under the NDIS, however, all the supports and services provided to a person will need to be identified, assessed and costed during the construction and evaluation of participant plans.

The NDIA will only fund supports, services and activities that are included in participant plans. It is therefore important that activities such as the provision of decision-making support are included in those plans. Failing to account for the cost of supporting a person to make their own choices may result in service and support practices that seek to hasten activities and decisions to achieve completion and, in doing so, potentially disregard the person’s preferences. This approach would undermine the principles of ‘choice and control’, potentially override personal autonomy, and may fail to seize opportunities to develop a person’s decision-making ability.

Securing sufficient support for decision-making for a person will therefore depend on the degree to which participants (potential and accepted), nominated support people and NDIA Planners are aware of and understand the participant’s specific decision-making needs. It will also depend on the inclusion of such supports in participant plans as ones which are ‘reasonable and necessary’ for the social and economic participation of the person in their community.

The full impact of the NDIS on Queensland’s guardianship system will not start being realised until the implementation of the scheme commences in 2016.

¹³¹ Office of the Public Advocate (Victoria), above n 126, 10.

3.5.1.2 *Living Longer Living Better (My Aged Care) reforms*

From July 2015, home care packages funded by the federal government commenced delivery via a consumer directed care model. Consumer directed care affords individuals greater choice and control in relation to the design and delivery of the services they receive.¹³²

Under the consumer directed model of care, eligible people will receive funding on an individual basis to purchase the home care supports and services they require.¹³³ Akin to the NDIS, the primary relationship will be between the older person and the provider of supports.

The latest tranche of aged care reforms is expected to impact Queensland's guardianship system in a similar manner to the NDIS.

Due to the prevalence of dementia and other age-related conditions that can impair a person's cognition, many people may find the new service model difficult to understand and navigate. Further, they might experience difficulty in making and actioning decisions in relation to their home care package.

Older people are at greater risk of social isolation¹³⁴ and are therefore less likely to have informal support networks. For many people, this coupled with declining cognition and the need to purchase home care supports, may stimulate demand for public guardianship and administration appointments. It may also channel people into the residential aged care system.

3.5.2 State reform of the mental health system

In September 2015, the Queensland government introduced the *Mental Health Bill 2015* into Queensland parliament. The Bill has been debated in Parliament and was passed on 18 February 2016. The new *Mental Health Act 2016* will repeal the *Mental Health Act 2000*, which currently provides for the involuntary assessment and treatment of people with a mental illness.¹³⁵

Although the *Mental Health Act 2016* has been passed, it is yet to commence. The commencement date is likely to be set sometime in 2016.

The *Mental Health Act 2016* introduces the concept of the 'less restrictive way',¹³⁶ which seeks to replace the current processes for making and reviewing 'treatment authorities' (previously known as involuntary treatment orders). The Act makes it clear that, if a less restrictive way exists, it should be implemented instead of resorting to an order of involuntary treatment.¹³⁷

¹³² Department of Social Services, Australian Government, *Consumer Directed Care (CDC) (July 2015) My Aged Care* <<http://www.myagedcare.gov.au/aged-care-services/home-care-packages/consumer-directed-care-cdc>>.

¹³³ iCareHealth, *Changes underway for home care sector*, Telstra Health <<http://www.icarehealth.com.au/blog/changes-underway-for-home-care-sector/>>.

¹³⁴ Beyond Blue, above n 84.

¹³⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 17 September 2015, 2003 – 2006 (Cameron Dick).

¹³⁶ *Mental Health Act 2016* (Qld) s 13.

¹³⁷ *Ibid* s 15, ch 2.

There are consequential policy tensions between the *Mental Health Act 2016* and existing guardianship legislation.

The less restrictive way includes obtaining consent from the personal guardian of a person to receive treatment and care for that person's mental illness.¹³⁸ The less restrictive way will therefore rely heavily upon the guardianship system with a corresponding impact on its resources.

This represents a significant policy change to the guardianship system in Queensland, which has been primarily a protective one focused on making decisions to ensure the proper care and protection of adults who lack capacity to make decisions about certain matters for themselves. It has not been designed to restrict the rights and liberties of people with mental illness who may be consistently objecting to treatment and require treatment or detention against their will to protect themselves and/or the community.

Parliament's endorsement of the *Mental Health Act 2016* is likely to introduce new pressures on the guardianship system, particularly for QCAT and the OPG.

There is likely to be an increase in applications to QCAT for appointments of guardians as well as existing appointments to be expanded to include additional types of matters, such as health care or legal matters. This would likely result in a commensurate increase in the number of appointments that QCAT may make. There may also be an increase in the number of hearings that QCAT conducts, to the extent that direction may be sought from the Tribunal in seeking recognition for enduring powers of attorney or making applications for directions.

This may further increase the number of people with general enquiries or those seeking assistance to navigate the guardianship system. This affects not only QCAT and the Public Guardian, both of which already receive a significant number of enquiries, but also other government departments and community organisations/legal centres that presently provide assistance to those people.

The reliance of the *Mental Health Act* on guardianship will radically expand the decision-making role of guardians and attorneys in the mental health system.

Enacting the *Mental Health Act 2016* will trigger an urgent and critical need for greater education for those who will need to understand mental health treatment. This will be essential for attorneys, guardians and nominated support people to enable them to understand and navigate the system.

3.6 Sustainability of the current system

The pressures on Queensland's guardianship system have been building over recent years and, along with recent federal reforms to disability and aged care services, are likely to have a significantly greater impact in coming years. This brings into question the ongoing sustainability of the guardianship system in its current form.

¹³⁸ Ibid s 13(1)(c).

The sustainability of the guardianship system must be considered across a number of realms:

- the ongoing appropriateness of guardianship and administration in light of the national and international trends relating to supported decision-making and rights protection;
- the financial sustainability of the current guardianship system; and
- the appropriateness of the guardianship system bearing the cost for shortcomings in other human service systems.

In the foreseeable future, it is highly likely that there will always be some level of need for substitute decision-making, particularly for people who experience profound disability or cognitive impairment. Whether the current level of reliance on guardianship and administration is needed and whether there might be other less restrictive ways to support a person with impaired decision-making capacity to make decisions is, however, worth considering in Queensland. In accordance with this, there exists opportunities to introduce changes that may better uphold the purpose of Queensland’s guardianship legislation.

3.6.1 Strengthening legislation and practice

Greater guidance must be provided to better enable the implementation of general human rights principles under guardianship legislation.

Aside from the need for general awareness and the provision of practical guidance, as evidenced by this research, decision-makers also require assistance dealing with some of the inherent tensions or contradictions in the legislation. The most significant tension is between a rights-based approach and an approach consistent with ensuring proper care and protection.

3.6.1.1 Proper care and protection vs rights and autonomy

While it is important to ensure that people with impaired decision-making capacity are protected from abuse, neglect and exploitation, and that their support needs are met in a way that ensures their optimal mental, physical and social wellbeing, the potentially subjective nature of making decisions in accordance with a proper care and protection approach has not always delivered this outcome.

In some ways, poor outcomes resulting from this approach can be attributed to the history of the *parens patriae* jurisdiction. It is a jurisdiction that was principally guided by its paternalistic exercise with respect to children, and the state’s increasingly interventionist role in this regard.¹³⁹ It is, by its nature, a risk averse approach that, arguably, may well have a higher threshold than a ‘best interests’ approach to decision-making.

Any person or entity performing a function or exercising power under the *Guardianship and Administration Act* or *Powers of Attorney Act* “must do so in a way consistent with the adult’s proper care and protection”.¹⁴⁰ Specifically in relation to health care matters, legislation requires that decisions are made in the best interests of the person.¹⁴¹ The concepts of ‘best interests’ and ‘proper care and protection’ are often blurred, particularly in light of

¹³⁹ *Re Eve* 31 DLR (4th) per Forest J [1986].

¹⁴⁰ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1 s 7(5).

¹⁴¹ *Ibid* sch 1, pt 2 s 12(1).

contemporary discourse and case law that suggests that the ‘best interests’ approach includes the examination of medical, psychological and social circumstances, as well as the views of the person for whom a decision is being made.¹⁴²

The tendency to conflate the application of a proper care and protection approach to decision-making with best interests suggests a need for better differentiation. For example, while ‘proper care and protection’ may rightly rely upon good medical practice or other evidence-based judgement, such evidence may be need to be accorded greater weight than the particular views, wishes and needs of the person.¹⁴³ By contrast, in some circumstances, it may be that the person’s ‘best interests’ are served by supporting a decision that is consistent with their wishes in order to have them bear the consequences of putting that decision into effect. This may, however, present a conflict for an appointed substitute decision-maker in that the level of risk could be considered unacceptable if decisions need to be made in a way that is consistent with the person’s proper care and protection.

It can potentially be argued that a ‘proper care and protection’ approach might be more objective than a ‘best interests’ approach given that in some areas of decision-making (e.g. health), evidence and/or recognised good practice may exist to guide the decision that needs to be made. As previously stated, however, the way in which this approach is operationalised often sees it conflated with ‘best interests’ and applied in an unsystematic way without any unpacking of relevant considerations, including the values and principles applied in the decision-making process. Professor Ian Kennedy has commented that:

“The best interests approach of family law allows the courts to atomise the law, to claim that each case depends on its own facts. The court can then respond intuitively to each case while seeking to legitimate its conclusion by asserting that it is derived from the general principle contained in the best interests formula. In fact, of course, there is no general principle other than the empty rhetoric of best interests; or rather, there is some principle (or principles) but the court is not telling. Obviously, the court must be following some principles, otherwise a toss of a coin could decide cases. But these principles, which serve as pointers to what amounts to the best interests, are not articulated by the court. Only the conclusion is set out. The opportunity for reasoned analysis and scrutiny is lost.”¹⁴⁴

Without careful guidance, education, training and advice, however a rights-based approach could be similarly fraught. The kind of cultural change that is needed will be difficult to achieve without a holistic strategy. In the House of Lords’ review of the United Kingdom’s *Mental Capacity Act 2005* it was found that while this Act was mostly held in high regard, it suffered from a lack of awareness and a lack of understanding. The House of Lords Select Committee commented that “the prevailing cultures of paternalism (in health) and risk-aversion (in social care) have prevented the Act from becoming widely known or embedded. The empowering ethos has not been delivered. The rights conferred by the Act have not been widely realised. The duties imposed by the Act are not widely followed.”¹⁴⁵

¹⁴² Ben White, Fiona McDonald and Lindy Willmott, *Health Law in Australia* (Thomason Reuters, second edition, 2014) 247-252.

¹⁴³ House of Lords Select Committee (United Kingdom) on the *Mental Capacity Act 2005*, *Mental Capacity Act 2005: Post-Legislative Scrutiny*, House of Lords Paper 139 (2014).

¹⁴⁴ Ian Kennedy ‘Patients, Doctors and Human Rights’ as cited in Robert Blackburn and John Taylor (eds), *Human Rights for the 1990s: Legal, Political and Ethical Issues* (Mansell, London, 1991).

¹⁴⁵ House of Lords Select Committee (United Kingdom) on the *Mental Capacity Act 2005*, above n 143, 6.

To mitigate against this, supporters and other decision-makers must be provided with clear legislative and non-legislative guidance about how to apply a rights-based approach, including how to evaluate and weigh different considerations such as dignity of risk. In addition to statutory guidance, formal guidelines or codes of practice that support the relevant legislation should also be developed to provide practical guidance to decision-makers in implementing a rights-based approach.

3.6.1.2 Promoting consistency of practice

As with most systems of support, particularly those involving a myriad of individuals and entities for its operation, the interpretation and application of Queensland's guardianship legislation is often inconsistent.

In the United Kingdom, the *Mental Capacity Act 2005* (UK) is accompanied by a Code of Practice. The United Kingdom's Code of Practice¹⁴⁶ describes in plain language (with case studies and examples) how this Act should work in practice, providing guidance to those who make decisions under the Act. In particular, guidance is provided on how to apply the statutory principles. For example, in relation to principle 2 under the *Mental Capacity Act 2005*, which states that "a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success", the Code of Practice suggests numerous practical ways in which a person can be supported, including:

- using different forms of communication (e.g. non-verbal communication);
- providing information in a more relevant and accessible form (e.g. use different formats, only include relevant information);
- making the person feel at ease (e.g. time of day, location, circumstances);
- treating a medical condition that may impact the ability of the person to make a decision; and
- providing programs to improve a person's decision-making capacity (e.g. helping a person learn decision-making skills).¹⁴⁷

In a review of the *Mental Capacity Act 2005* (UK) by the House of Lords Select Committee, it was found that while the Code was seen to be a valuable resource, it also needed to be part of a broader awareness strategy, targeting a wide range of audiences "ranging from medical practitioners to local authorities, legal professionals, families, carers and people who may lack capacity."¹⁴⁸

Arguably such a comprehensive strategy is also needed in Queensland and should comprise both formal mechanisms (such as a Code of Practice) as well as targeted information made readily available to those who regularly make decisions and implement Queensland's guardianship legislation including private and public guardians and administrators, attorneys and health professionals.

¹⁴⁶ *Mental Capacity Act 2005* (UK) ss 42-43; Department for Constitutional Affairs (United Kingdom), *Mental Capacity Act 2005 Code of Practice* (2007).

¹⁴⁷ Department for Constitutional Affairs (United Kingdom), above n 146, 22, 29.

¹⁴⁸ House of Lords Select Committee (United Kingdom) on the *Mental Capacity Act 2005*, above n 143, 63.

4 Recommendations

Recommendation 1: The Queensland Government review and amend the explanatory sections and principles of the *Guardianship and Administration Act* to align with contemporary understandings of decision-making support. Consideration should be given to:

- introducing positive obligations in relation to decision-making and the provision of support to enable people to participation in decision-making about their own lives to the greatest extent possible; and
- ensuring that the guardianship system is only called upon after all other practical steps to support the person making their own decisions have been exhausted.

Recommendation 2: In support of recommendation 1, the Queensland Government should adopt the QLRC recommendation to amend the *Guardianship and Administration Act* to expressly require that the explanatory sections and principles of the Act must be applied by all persons and entities and not just by those performing a function or exercising a power under the Act.

Recommendation 3: The Queensland Government and relevant statutory agencies design and implement strategies to enhance awareness of the purpose, principles and philosophy of Queensland’s guardianship legislation among the community, but particularly among those in the community who may be likely to experience, or support someone who may experience, impaired decision-making capacity. Specific strategies should target:

- people with impaired decision-making capacity to ensure they are informed about their rights and know where to obtain support to exercise their rights;
- those who exercise a power or perform a function under guardianship legislation; and
- the relevant entities and organisations in the community, government and private sector. Community-based strategies should be educative and delivered in a manner that would not discourage individuals from providing decision-making support or becoming an informal decision-maker, attorney, guardian or administrator.

Recommendation 4: The Queensland Government introduce guidelines or a Code of Practice (or equivalent) to underpin the *Guardianship and Administration Act* and the *Powers of Attorney Act*. Such a resource should describe in plain language how the legislation works, in particular the underlying principles and how they should be implemented, and provide examples to promote greater consistency of practice. The document/s should be developed in conjunction with individuals and entities with relevant expertise, and not be limited to those working within government.

Recommendation 5: In the process of designing and implementing any future reforms that may impact people with, or at risk of experiencing, impaired decision-making capacity, the Queensland Government should ensure consideration for existing pressures on, as well as any inadvertent implications that may impact, the sustainability of the guardianship system. Appropriate strategies should be developed to mitigate any identified risks and/or impacts on the guardianship system.

Part B: Enhancing the current system

5 Informal decision-making

Under Queensland's guardianship legislation, an informal decision-maker is a person who is not a formally appointed substitute decision-maker, but who makes decisions on behalf of a person who may have impaired decision-making capacity for a matter. The role of informal decision-maker is often undertaken by a member of a person's support network.

Many informal decision-makers provide unpaid care for their family member or friend and assume their role by virtue of necessity. They also commonly have an intimate understanding of the person for whom they care, including their likes and dislikes, views and wishes, support needs, aspirations, concerns and relationships with other people.¹⁴⁹

Many people probably engage in informal decision-making without any awareness of the legislative recognition that it has under Queensland's guardianship legislation. In many ways this is a positive thing.

Informal decision-making is a practice that can prevent people from needing to interact with the formal aspects of the guardianship and administration system.

Many decisions are, and in theory could be, made by an informal decision-maker without the need for the appointment of a guardian, administrator or attorney. As such, informal decision-making is consistent with the least restrictive approach to a person's rights and potentially a useful mechanism to mitigate the growing demand for guardianship and administration.

The extent to which informal decision-making is undertaken was not something that this research explored. However, the extent to which the legislative mechanisms that support informal decision-making in Queensland's guardianship legislation are used, and any barriers to informal decision-making, were considered.

5.1 Queensland's guardianship system

The *Guardianship and Administration Act* recognises that decisions for a person can be made informally by their existing support network,¹⁵⁰ which may include members of the person's family, close friends, and other people recognised by the Tribunal as providers of support to the person.

Apart from the general principles,¹⁵¹ and provision for the Tribunal to ratify or approve a decision of an informal decision-maker,¹⁵² there is no legislative framework for informal decision-making in Queensland's guardianship legislation.

¹⁴⁹ Carers Queensland Inc., above n 24, 5.

¹⁵⁰ *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

¹⁵¹ *Ibid* s 11(1).

¹⁵² *Ibid* s 154(1).

Consistent with the principle of the least restrictive approach and providing support for decision-making, it could be inferred that informal decision-makers are obliged to support a person to participate in the decision-making process and undertake decision-making on behalf of that person to the minimum extent necessary. Yet despite these obligations, which are consistent with other decision-making mechanisms in Queensland's guardianship legislation, informal decision-making generally represents a form of substituted decision-making.

5.1.1 Ratification of decisions made by informal decision-makers

In support of informal decision-making, the *Guardianship and Administration Act* provides QCAT with the power to ratify a decision of, or approve a proposed use of power by, an informal decision-maker.¹⁵³ The evidence gathered for this research indicated that such orders are not often sought.¹⁵⁴

Ratification of informal decisions is a legal mechanism that supports informal decision-making, however it seems to do little to address the barrier associated with third-party organisations not accepting informal decision-making.

The circumstances in which the ratification of a decision may be pursued are likely to be limited. In terms of personal decisions, ratification may be sought to prove that past decisions made by an informal decision-maker were appropriate i.e. to legitimise past decisions that were made informally or legitimise an existing informal decision-making arrangement and/or to provide protection from personal liability for informal decision-makers.

It is not surprising that this authorisation mechanism is not commonly used. There are risks associated with, and barriers to, organisations accepting or actioning a decision made by an informal decision-maker prior to ratification by the Tribunal.

While this research did not specifically explore the frequency or situations in which ratification is sought, it is reasonable to assume that there is likely to be low awareness about the ratification mechanism among professionals and the community.

5.2 Barriers to informal decision-making

Informal decision-making occurs for many people, and it is when these arrangements break down or are impeded that people often come in contact with the guardianship system.¹⁵⁵ This can occur due to a sudden change in the person's situation due to, for example, an admission to hospital, a formal diagnosis of dementia, relationship breakdown, a need for residential aged care, or a change in the person's financial situation, such as an inheritance.¹⁵⁶ In such circumstances, an application may be made to the Tribunal for a guardian and/or administrator, often prompted by others who become involved in the person's life.

¹⁵³ Ibid s 154(1); Office of the Public Advocate interview JMH (2014).

¹⁵⁴ Office of the Public Advocate interview HPK; Queensland Civil and Administrative Tribunal, Customised data request for the Office of the Public Advocate, 20 January 2016.

¹⁵⁵ Office of the Public Advocate interviews B9X, DXC, FRY, GHP, HB5, HPK, JMF, KC8, K4R, L5K, MDZ, MXS (2014); Queensland Aged and Disability Advocacy Inc., above n 24, 2; Mr and Mrs Semple, Submission No 8 to Office of the Public Advocate, *Decision-making support in Queensland's guardianship system: An Issues Paper*, 1 April 2015.

¹⁵⁶ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6NV, 6Y2, 6K6, 7TZ, 7TZ (2014).

The most significant barrier to the practice of informal decision-making, as identified by the research, is the lack of recognition of informal decision-making by third party organisations. There appear to be three primary determinants that underpin this issue: privacy legislation; legal and fiduciary responsibilities; and organisational policies and practices.

The *Privacy Act 1998* (Cth) and the *Information Privacy Act 2009* (Qld) regulate the use, storage and disclosure of personal information about individuals.¹⁵⁷ They provide a level of confidence that third-party organisations will appropriately handle and communicate sensitive and personal information. When applied diligently, privacy legislation imposes limits on the information that can be shared with third party organisations without having obtained consent from the person who is the subject of that information or without having some other form of authority (e.g. a Tribunal order) to act on behalf of the person.

However, it also constrains informal decision-making arrangements and is a conduit for formal substitute decision-making interventions. The research identified that the most commonly experienced barrier to informal decision-making is accessing information from, and/or providing information to, organisations on behalf of a person who experienced difficulty with such activities.¹⁵⁸

Some organisations and institutions have legal, regulatory and fiduciary obligations that may also inhibit the extent to which informal decision-making is considered acceptable. In this context, organisations may require legal and commercial certainty through agreements or contracts. As a person with impaired decision-making capacity for a matter cannot legally enter into agreements or contracts in respect of that matter,¹⁵⁹ organisations will seek to ensure that any person entering into an agreement or contract on behalf of that person has appropriate legal authority to do so.

The third form of causation involves administrative requirements of organisations that are not required by law, but instead reflect a policy and/or risk mitigation directive. Residential aged care providers were identified through the research as organisations that commonly do not recognise informal decision-making and can have excessive administrative requirements.¹⁶⁰ Unfortunately, there is little incentive and/or insufficient commercial benefit for many organisations to change their current practices.¹⁶¹

In practice, the informal decision-making provisions in Queensland’s guardianship legislation are outweighed by legislative requirements and the desire of many organisations to minimise risk.

The failure of organisations to accept informal decision-making is a long-standing issue. In 2010, the QLRC reported that “the authority of an adult’s informal decision-makers is not always recognised by service providers, medical practitioners and others who provide services to the adult”.¹⁶²

¹⁵⁷ Office of the Australian Information Commissioner, *The Privacy Act*, Office of the Australian Information Commissioner <<http://www.oaic.gov.au/privacy/privacy-act/the-privacy-act>>.

¹⁵⁸ Office of the Public Advocate interviews B9X, DRN, HPK, JMF, KC8, K4R, MDZ, MXS (2014); Queensland Advocacy Incorporated, above n 24, 6.

¹⁵⁹ *Bergmann v DAW* [2010] QCA 143 (11 June 2010).

¹⁶⁰ Office of the Public Advocate interviews FRY, HB5, KC8, K4R, MDZ, MXS (2014).

¹⁶¹ Office of the Public Advocate interview DRN (2014).

¹⁶² Queensland Law Reform Commission, above n 10, vol 3, 13 [14.38-14.39].

The Victorian Law Reform Commission (VLRC) reported that the “growing concern with risk management throughout the community is challenging the utility of informal decision making”.¹⁶³ These situations are often also exacerbated by a power imbalance between the service provider and the people accessing services.

The refusal of organisations to recognise the authority of informal decision-makers can have a significant effect on families who have routinely relied on informal decision-making.¹⁶⁴

The refusal of informal decision-making by third party organisations can elevate the risk that the needs of the person who may have impaired decision-making capacity will not be met,¹⁶⁵ and thus create a need for the appointment of a guardian or administrator despite informal decision-making having worked well until that point. As a result, some family members welcome a guardianship and/or administration appointment as it removes some of the impediments to their family member receiving the care and support that they require.¹⁶⁶

5.3 Enabling informal decision-making

Arguably, better enabling informal decision-making could mitigate some of the demand for administration and to a lesser extent, guardianship. Some of the barriers may be addressed by legislative change and others may require the attention of policy-makers and service providers.

The QLRC recommended amending the *Guardianship and Administration Act* to allow informal decision-makers to make an application to the Tribunal for an order that a person with control or custody of certain information should provide it to the informal decision-maker.¹⁶⁷ QAI supported the QLRC’s view that informal decision-makers would benefit from greater access to information relevant to the decisions they are making. QAI emphasised that the process of applying for authorisation “must be minimalistic, expeditious and user-friendly”.¹⁶⁸

Carers Queensland supported the introduction of some form of authoritative instrument that would enable an authorised informal decision-maker to act on a person’s behalf or as a co-decision-maker. Carers Queensland also indicated their support for the establishment of a national register of people with authority to act as an informal decision-maker as well as a register of those who have been formally appointed as a substitute decision-maker.¹⁶⁹

The VLRC proposed new forms of decision-making assistance, however recommended that “informal decision-making arrangements should continue to operate in many circumstances as an important adjunct to new guardianship laws”.¹⁷⁰ The VLRC recommended that informal decision-making arrangements should be continued (without the need for a formal decision-maker) when they are operating fairly and effectively.¹⁷¹

¹⁶³ Victorian Law Reform Commission, above n 42, xxii [24].

¹⁶⁴ Office of the Public Advocate interview 5PJ (2014).

¹⁶⁵ Office of the Public Advocate interview GHP (2014).

¹⁶⁶ Office of the Public Advocate interview K4R (2014).

¹⁶⁷ Queensland Law Reform Commission, above n 10, vol 1, cxi [rec 30-13].

¹⁶⁸ Queensland Advocacy Incorporated, above n 24, 6.

¹⁶⁹ Carers Queensland Inc., above n 24, 5.

¹⁷⁰ Victorian Law Reform Commission, *Guardianship*, above n 42, xxv [41].

¹⁷¹ *Ibid.*

5.3.1 Tribunal order to access information

In response to the concerns of stakeholders about the lack of recognition and authority of informal decision-makers, the QLRC recommended that the *Guardianship and Administration Act* be amended to empower QCAT to make a new type of order that requires a person or entity to give an informal decision-maker access to an adult's information.¹⁷² The proposed new order would enable an informal decision-maker to access information that "the adult would have been entitled to if the adult had capacity and which is necessary to make an informed decision,"¹⁷³ for example, "personal information about the adult for whom the informal decision-maker is making decisions".¹⁷⁴

The need for some form of authoritative mechanism to facilitate informal decision-making has been clearly recognised by the QLRC.

The right of a guardian and/or administrator to access information¹⁷⁵ makes an appointment an attractive option, particularly to penetrate the administrative requirements of organisations. An order to access information could provide a similar right to an informal decision-maker or decision-making supporter and enable the person who requires assistance to retain their legal capacity.

The 2010 QLRC report did not provide further detail about how the new provision would be incorporated into the *Guardianship and Administration Act*, nor did it include detail about the issues requiring consideration as part of enacting the recommendation. Although it was not confirmed, it is presumed that a person would retain their legal capacity irrespective of whether a person in their support network was granted an order for access to information.

Consideration could be given to making it an offence for a person or third-party organisation not to comply with such an order. As highlighted by one interviewee, "banks will not deal with parties without an order. It mainly comes down to the banks, and even with an order the banks don't recognise it in some circumstances."¹⁷⁶

While the principles underpinning the proposed order are to be commended, a key consideration is how such an order would maximise the decision-making autonomy of people who may have impaired capacity. In particular, given the time delay involved in obtaining an order it may be of little practical assistance on a day-to-day basis. Further, it must be remembered that, as recognised by the ALRC, some aspects of informal decision-making are actually restrictive in the sense that decisions are still made on a substitute basis by others.¹⁷⁷

Any mechanism/s that may be invoked should be simple, straightforward and minimise the formalisation of informal decision-makers. Further formalisation will not only negatively impact on what is currently an unquantifiable but probably an extensively used informal mechanism, but would also do little to resolve the current resource burden on the guardianship system.

¹⁷² Queensland Law Reform Commission, above n 10, vol 3 20-21 [14.63], vol 4, 512 [30-13].

¹⁷³ Ibid vol 4, 512 [30-14].

¹⁷⁴ Ibid vol 4, 512 [30-16].

¹⁷⁵ *Guardianship and Administration Act 2000* (Qld) s 44.

¹⁷⁶ Office of the Public Advocate interview JMF (2014).

¹⁷⁷ Australian Law Reform Commission, above n 6, 101 [4.54].

5.3.2 Education and awareness

The Tribunal and the OPG have undertaken work to educate organisations in various sectors (e.g. finance and aged care) about the legitimacy of informal decision-making.¹⁷⁸ While these efforts are commended, a more strategic and coordinated approach is required to achieve a significant shift in the policies and practices of organisations within these sectors.

Various stakeholders were supportive of further education and awareness raising with respect to informal decision-making. QADA is a proponent of providing practical information to educate individuals and organisations about the legitimate use of informal decision-making.¹⁷⁹ The Office of the Public Advocate in South Australia has published an information sheet to this effect entitled *Informal arrangements for people with impaired decision-making capacity*.¹⁸⁰

An increased understanding about the legitimacy of informal decision-making may increase the readiness of some organisations to accept such arrangements however, as a single strategy, it will not facilitate the degree of change that is needed.

Information and guidance in relation to informal decision-making could be included in a Code of Practice (or equivalent), as recommended earlier in this report.

5.4 Commonwealth ‘nominee’ arrangements

Commonwealth laws enable people to appoint a ‘nominee’ to undertake certain actions on their behalf when interacting with commonwealth agencies such as Centrelink and the National Disability Insurance Agency.¹⁸¹ For example, under the NDIS a correspondence nominee can prepare, review or replace the plan of an NDIS participant. They can also manage the supports and funds associated with a participant plan.¹⁸²

While nominee arrangements can support a person to interact with certain Commonwealth Government agencies, the powers and responsibilities of a nominee are confined to the agencies with which nominee arrangements are in place.

5.5 Recommendation

Recommendation 6: The Queensland Government should give consideration to the creation of an authoritative mechanism such as an ‘order to access information’ or equivalent (akin to Commonwealth nominee arrangements) as a less restrictive alternative to guardianship and administration to assist people to support a person who may have impaired decision-making capacity to interact with third party organisations. In doing so, there must be due regard to ensuring that appropriate safeguards exist to protect the rights and interests of the people for whom the instrument is designed to serve.

¹⁷⁸ Office of the Public Advocate interviews C2W, HPK (2014).

¹⁷⁹ Queensland Aged and Disability Advocacy Inc., above n 24, 3.

¹⁸⁰ Office of the Public Advocate (South Australia), *Informal arrangements for people with impaired decision-making capacity* (April 2015) Office of the Public Advocate (South Australia) <http://www.opa.sa.gov.au/resources/information_sheets>.

¹⁸¹ *National Disability Insurance Scheme Act 2013* (Cth); *Social Security Act 1991* (Cth).

¹⁸² National Disability Insurance Scheme, *What are nominees and guardians under the NDIS?* National Disability Insurance Scheme <<http://www.ndis.gov.au/families-carers/what-are-nominees-and-guardians>>.

6 Advance planning

Queensland’s guardianship system provides a number of options to promote a person’s decision-making autonomy and minimise the need to resort to a formally appointed substitute decision-maker. One of these options is advance planning, which is enabled by the *Powers of Attorney Act*. This Act provides for people to make decisions and/or set up arrangements that can be implemented in the future should their decision-making capacity become impaired. In Queensland, such arrangements include advance health directives and enduring powers of attorney and are collectively known as ‘enduring documents’.

“There is a preference, and there ought to be a preference, which may be elevated to a human right, that people be able to determine, even in advance, what they would like to happen.”¹⁸³

Engaging in advance planning can enable a person (the principal) to maintain a degree of autonomy by:

- making legally recognised choices about the type and nature of health care that they would like to receive in the event that they lose the capacity to make such decisions;
- appointing a person (attorney) of their own choosing to make personal, health care or financial decisions for them, should the need arise;
- outlining how the power provided under the enduring document can be exercised; and/or
- detailing any other wishes they may have in relation to particular matters.

Advance planning is consistent with the least restrictive principle and plays a significant role in avoiding the need for guardians and administrators.

Enduring documents fill a “legal ‘gap’ by formally recognising the need for assistance in the grey area when a person is between having capacity and being considered to have incapacity. It also gives increased legal recognition to what is accepted in practice: that there is a sliding scale of decision-making capabilities, and not being at the top of the scale does not mean your legal right to make decisions should be denied”.¹⁸⁴

A person may specify terms, conditions and other information about the exercise of power in an enduring document.¹⁸⁵ This means that the principal can limit or restrict an attorney’s power to particular matters and therefore preserve as much of their autonomy as possible. Importantly, enduring documents can “give flexibility to the fluctuating capacity of adults”,¹⁸⁶ particularly those who suffer an acute episode/s of psychiatric illness.¹⁸⁷ A person who experiences fluctuating capacity can give direction in relation to particular matters through an enduring document at a time when they have capacity to make those decisions.

¹⁸³ Office of the Public Advocate interview DRN (2014).

¹⁸⁴ Shih-Ning Then, above n 46, 148.

¹⁸⁵ *Powers of Attorney Act 1998* (Qld) s 32(1)(b), s 35 (1)(d).

¹⁸⁶ Office of the Public Advocate interview 44Y (2014).

¹⁸⁷ The Mental Health Legal Centre Inc., *Advance Directives Project: Information for Clinicians*, Federation of Community Legal Centres (Victoria) <http://www.communitylaw.org.au/mentalhealth/cb_pages/images/AD_Clinicians_Info_Feb09.pdf>.

Overall, the necessity to have, and value of, advance planning mechanisms in Queensland was supported by those interviewed for the research.¹⁸⁸ People who provide informal decision-making support, often family members or carers, can be “confronted with a substitute decision-making crisis that could have been mitigated through appropriate advance planning.”¹⁸⁹ This was confirmed by some Tribunal members, who commented on the low incidence of enduring documents among the people that appear before them.¹⁹⁰ Many stakeholders also suggested that there should be a greater focus on advance planning to reduce reliance on guardianship and administration.¹⁹¹

6.1 Engagement in advance planning

While there is a paucity of evidence about enduring documents in Australia, recent national research has provided some insights.¹⁹² It generally showed low rates of advance planning, with just over half (59%) of Australians having a will in place to direct the distribution of their assets once they die, and only 30% of Australians having an enduring power of attorney for financial matters in preparation for a time when they may experience impaired capacity for such decisions. Fewer Australians (14%) had an advance directive in place (known in Queensland as an advance health directive).¹⁹³ The research did not include prevalence figures for enduring powers of attorney for personal matters.

Only a minority of Queenslanders actively plan their own decision-making arrangements for the future.

According to the research, 79% of Queenslanders (who were 35 years or older) had a will,¹⁹⁴ 39% had an enduring power of attorney for financial matters,¹⁹⁵ and 19% had an advance health directive.¹⁹⁶ The recent national prevalence research showed that the strongest predictor of a person having an advance (health) directive in place was the completion of other advance planning documents.¹⁹⁷ Australians who had made an enduring power of attorney for financial matters were nine times more likely to also have made an advance (health) directive. Australians who had prepared a will were 2.5 times more likely to have an advance (health) directive, when compared to those without a will.¹⁹⁸

¹⁸⁸ Office of the Public Advocate interviews B9X, C2W, DRN, DXC (2014); Office of the Public Advocate, above n 34; Queensland Advocacy Incorporated, above n 24, 1, 5; Carers Queensland Inc., above n 24, 4; Queensland Aged and Disability Advocacy Inc., above n 24, 5.

¹⁸⁹ Carers Queensland Inc., above n 24, 4.

¹⁹⁰ Office of the Public Advocate interviews 6K6, 5CD (2014).

¹⁹¹ Office of the Public Advocate interviews B9X, DRN, C2W, KC8 (2014); Carers Queensland Inc., above n 24, 4; Office of the Public Advocate, above n 34.

¹⁹² B. White et al, ‘Prevalence and predictors of advance directives in Australia’ (2014) 44(10) *Internal Medicine Journal* 975; B. White et al, *Making a will? Why not plan your end-of-life care too* (14 October 2014) *The Conversation* (Australia edition) <<https://theconversation.com/making-a-will-why-not-plan-your-end-of-life-care-too-32562>>.

¹⁹³ B. White et al, *Making a will? Why not plan your end-of-life care too* (14 October 2014) *The Conversation* (Australia edition) <<https://theconversation.com/making-a-will-why-not-plan-your-end-of-life-care-too-32562>>.

¹⁹⁴ Jill Wilson and Cheryl Tilse, *Will Making in Queensland 2012 Report to the Office of the Public Trustee of Queensland*, (2015) University of Queensland Social Work and Human Services: Families and generational asset transfers: making and challenging wills in contemporary Australia, 16 <<http://www.uq.edu.au/swahs/Will%20making%20in%20Queensland.pdf>>.

¹⁹⁵ Cheryl Tilse, Jill Wilson, Ben White and Linda Rosenman, *Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia. Report to Industry Partners March 2013* (2015) University of Queensland Social Work and Human Services: Families and generational asset transfers: making and challenging wills in contemporary Australia, 8 <<http://www.uq.edu.au/swahs/Report%20to%20Industry%20Partners%20March%202013.pdf>>.

¹⁹⁶ Jill Wilson and Cheryl Tilse, above n 194, 16.

¹⁹⁷ B. White et al, above n 193.

¹⁹⁸ B. White et al, ‘Prevalence and predictors of advance directives in Australia’ (2014) 44(10) *Internal Medicine Journal* 975, 978.

6.1.1 Factors contributing to the low rates of advance planning

A lack of awareness, knowledge and accessible information about enduring documents among the general and professional communities are key barriers to advance planning.

As evidenced by the research, the most commonly mentioned contributing factor to the low level of advance planning in Queensland was a lack of awareness and understanding about enduring documents.¹⁹⁹ Other key issues are the absence of a perceived need to plan and a disinclination of people to plan for a time in life when they are vulnerable and may not be able to make their own decisions.²⁰⁰ A lack of available and accessible information was also identified as a factor, particularly for older Queenslanders.²⁰¹

The QLRC reported that “barriers to the uptake of enduring powers of attorney include a lack of knowledge about power of attorney provisions, fear of exploitation, family dynamics and difficulties in thinking about future incapacity or advance planning”.²⁰² Other process-related barriers to engaging in advance planning, as identified by the research, included difficulty choosing an attorney,²⁰³ the requirement for a medical practitioner or the Tribunal to determine when power under the document is exercised²⁰⁴ and the need for a medical practitioner to verify the enduring document (particularly for younger or middle-aged adults who are not in regular contact with their doctor).²⁰⁵

Specific barriers in relation to medical practice included:

- the poor levels of knowledge among medical professionals about guardianship law;²⁰⁶
- a lack of adequate support for advance planning discussions as part of medical practice;²⁰⁷
- the desire of medical practitioners to provide quality patient care and the perception that an advance health directive may prevent the provision of such care;²⁰⁸ and
- a perception among medical practitioners that, in relation to palliative care, “patients should be treated, whatever the burdens this may entail, and the perception of death as a medical failure, with the related... lack of commitment to and skill in diagnosing dying, turning from curative to palliative care when appropriate, and recognising futility of continued treatment”.²⁰⁹

¹⁹⁹ Office of the Public Advocate interviews JMF, DRN, SGK, MXS (2014); Seniors Legal and Support Service, Submission No 6 to Office of the Public Advocate, *Decision-making support in Queensland's guardianship system: An Issues Paper*, 4 December 2014, 1.

²⁰⁰ Office of the Public Advocate interviews DRN, LSK (2014); Queensland Aged and Disability Advocacy Inc., above n 24, 5; Professor Malcolm Parker, above n 24, 1; Karen Kline, Submission No 1 to Office of the Public Advocate, *Decision-making support in Queensland's guardianship system: An Issues Paper*, 10 October 2014, 2-3.

²⁰¹ Office of the Public Advocate interview GHP (2014).

²⁰² Queensland Law Reform Commission, above n 10, vol 3, 124 [16.9].

²⁰³ Office of the Public Advocate interview DRN (2014).

²⁰⁴ Office of the Public Advocate interview GHP (2014).

²⁰⁵ Office of the Public Advocate interview DRN (2014).

²⁰⁶ Professor Malcolm Parker, above n 24, 1-2.

²⁰⁷ Ibid 2.

²⁰⁸ Ibid; Cheryl Tilse, Jill Wilson, Anne Louise McCawley et al., *Enduring documents: Improving the forms, improving the outcomes*. Report to the Department of Justice and Attorney-General (2011) 15 as cited in University of Queensland, Submission No 10 to Communities, Disability Services and Domestic Violence Prevention Committee, *The adequacy of existing financial protections for Queensland Seniors*, May 2015.

²⁰⁹ Professor Malcolm Parker, above n 24, 2.

6.2 Increasing the uptake of advance planning

Increasing engagement in advance planning is an important public sector strategy to alleviate some of the pressure on the guardianship and administration system and maximise the decision-making autonomy of Queenslanders.

Increasing the uptake of advance planning and enduring documents requires the prioritisation of government, a coordinated approach and an investment of resources. Some stakeholders felt that the government should be doing more, for example by making an ongoing commitment of resources across agencies.²¹⁰ Arguably, the financial investment in strategies to change the culture around, and increase the uptake of, advance planning may be offset in the long-term by minimising the demand for resources to deliver public guardianship services.

The research identified three key areas in which strategies could be implemented to address the barriers to greater engagement in advance planning: awareness and education; ensuring an accessible and uncomplicated process; and a registration system for enduring instruments.

These research findings are consistent with the conclusions of the Communities, Disability Services and Domestic and Family Violence Prevention Committee, who considered that there is a need for a more coordinated whole-of-government approach to:

- awareness and education campaigns targeting issues relating to decision-making capacity and the benefits of advance planning;
- exploring options for integrating advance planning within existing financial educational programs; and
- the simplification of processes and paperwork relating to advance planning documents.²¹¹

The Committee reported that long term planning activities, particularly those relating to finance, have “the potential to deliver significant benefits to Queenslanders”²¹² in terms of enhanced individual autonomy. Subsequently, the Committee recommended that the Queensland Government “develop a coordinated, whole-of-government strategy to encourage long-term financial planning and pro-active independent decision-making, including improved uptake of powers of attorney, advanced care directives and will-making”.²¹³

6.2.1 Awareness and education

The most commonly identified strategy among stakeholders was to increase the level of awareness of, and education about, enduring documents.²¹⁴

As one stakeholder explained, people “really do not know the kind of peril that that can occur if the planning doesn’t occur. So it’s insufficient- or it seems to me that education would have to play a focal role in terms of explaining both the process but also the reason for it.”²¹⁵

²¹⁰ Office of the Public Advocate interviews DRN, MDZ (2014).

²¹¹ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 87, 74.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Office of the Public Advocate interviews L5K, C2W, DRN (2014); Karen Kline, above n 200, 3.

²¹⁵ Office of the Public Advocate interview DRN (2014).

Research undertaken by the University of Queensland identified that attorneys desired more information about how to undertake their role, when and how to activate and terminate the role of attorney, and where to access advice and support.²¹⁶ This suggests that many attorneys may be ill-informed and poorly supported.²¹⁷

In its 2012 report on guardianship, the VLRC reported that greater community education was particularly required in the areas of:

- encouraging people to make enduring documents;
- clarification of the different types of instruments and appointments available;
- the responsibilities of the person making the document and those whom the document appoints; and
- the responsibilities of other parties who interact with enduring documents.²¹⁸

The Commission also emphasised that “education will only be effective if it is targeted and delivered in a way that is relevant, simple and accessible”.²¹⁹ One interviewee suggested that awareness and education campaigns should aim “to recalibrate in people’s minds the priority and importance of [advance planning]. So, when I say that people are conscious of it, people aren’t truly conscious of its importance. They just have a general view that it is desirable.”²²⁰

In 2015, Queensland’s Communities, Disability Services and Domestic and Family Violence Prevention Committee echoed calls to improve substitute decision-makers’ knowledge and understanding of their roles and obligations. The Committee recommended that the Queensland Government consider legislative amendments to “expressly provide that attorneys demonstrate explicit and actual knowledge of an attorney’s duties and responsibilities before they are appointed as an attorney”.²²¹ The Committee also recommended that substitute decision-making paperwork “more clearly communicates to the parties involved the implications of the arrangements”.²²² The Queensland Government supported both of these recommendations in principle and indicated that options to address these issues would be examined.²²³

In addition to improving the profile and knowledge of enduring documents within the general community, there is also a need to improve the level of knowledge among health, disability, aged care, legal, finance and other professionals.²²⁴

People in key professions are likely to have opportunities to discuss the benefits and creation of enduring documents with their clients within the context of the service/s in which they provide. For example, the professional who is assisting a person to make a will should enquire whether their client has enduring documents and suggest their creation where appropriate.

²¹⁶ Cheryl Tilse, ‘Substituted and assisted decision making for and with older people: Practices, protection and empowerment’ (Speech delivered at the SLASS State Conference, Brisbane, 30 May 2013).

²¹⁷ Cheryl Tilse, ‘The past, present and future of elder financial abuse’ (Speech delivered at the Seniors’ Legal and Support Service State Conference, Brisbane, 9 June 2015).

²¹⁸ Victorian Law Reform Commission, above n 42, 67 [5.94].

²¹⁹ *Ibid* 67 [5.96].

²²⁰ Office of the Public Advocate interview DRN (2014).

²²¹ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 87, 147.

²²² *Ibid* 145.

²²³ Queensland Government, above n 90, 12-13.

²²⁴ Queensland Aged and Disability Advocacy Inc., above n 24, 5; Seniors Legal and Support Service, above n 199, 1-2; Victorian Law Reform Commission, above n 42, 67 [5.97].

Suggesting that clients in certain circumstances engage in advance planning may be considered to be part of ‘good practice’ in multiple professions. As such, training about the benefits of enduring documents and techniques in how to raise the issue with clients should be provided to relevant professionals.²²⁵

There is also a need to educate the frontline staff of relevant organisations (e.g. financial institutions) about the authority of enduring powers of attorney. Some attorneys face unnecessary barriers to exercising their legal authority, which may be mitigated by greater acceptance of powers of attorney by organisations.

There are examples of well-delivered tools and education programs having been developed in both the government and non-government sectors.²²⁶ There are also examples of productive collaboration between agencies. Despite this, and the fact that different initiatives are funded by the Commonwealth and State Governments, there is an undeniable absence of strategic direction and coordination.

The creation of an online training package emerged as a plausible strategy during the conduct of the research. An educative online program could inform and educate potential and current attorneys, private guardians and private administrators about their role, responsibilities and upholding the principles.²²⁷

Ideally, the approach to generating awareness and educating individuals should be a holistic and coordinated initiative that includes both broad strategies and others that target specific sectors of the community. The barriers, triggers and information needs in relation to advance planning for older Queensland adults are likely to be different to adults who are young or middle-aged. Similarly, the communication mechanisms are likely to be different.²²⁸

In March 2016, the Queensland Government announced that it will develop a program that promotes awareness of powers of attorney.²²⁹ The scope and specifics of the program are still to be articulated.

6.2.2 Accessible process

Strategies to encourage advance planning should also focus on delivering an accessible and straightforward process.²³⁰ The process of creating and updating enduring documents can be a barrier to advance planning if it is not easily accessed, understood and utilised.

The VLRC noted the importance of personal substitute decision-making appointments and that the process of doing so needs to be “as simple and accessible as possible”.²³¹ Similarly, the QLRC also noted the need for a simple and inexpensive process.²³²

²²⁵ Queensland Aged and Disability Advocacy Inc., above n 24, 5.

²²⁶ Office of the Public Advocate interview 8LN (2014); Seniors Legal and Support Service, above n 199, 1; Carers Queensland Inc., above n 24, 4; Queensland Aged and Disability Advocacy Inc., above n 24, 1; Uniting Care Community, Submission No 14 to Communities, Disability Services and Domestic Violence Prevention Committee, *The adequacy of existing financial protections for Queensland Seniors*, 29 May 2015, 1-2.

²²⁷ Office of the Public Advocate interview DRN (2014); Queensland Advocacy Incorporated, above n 24, 16.

²²⁸ Office of the Public Advocate interview GHP (2014).

²²⁹ The Honourable Coralee O’Rourke, above n 89.

²³⁰ Office of the Public Advocate interviews DRN, C2W (2014).

²³¹ Victorian Law Reform Commission, above n 42, xxv [42-43].

²³² Queensland Law Reform Commission, above n 10, 177 [16.222].

The availability of relevant, concise and easily understood information about enduring documents must be made available through multiple channels. Information needs to be tailored and provided to both individuals and professionals.²³³

Further, in order for enduring documents to be accessible to all Queenslanders, the provision of information and tools must be approached in a manner that is easy-to-understand. A large study in Chicago revealed that people with low literacy levels were disempowered when it came to advance planning and advance health directives.²³⁴

The research conducted by the Office of the Public Advocate revealed the need for aids and/or tools to facilitate the process of creating an enduring document. These included:

- a range of standard and optional clauses for inclusion in an enduring power of attorney or advance health directive (with the ability to use or adapt the standard clauses);
- an interactive online form to complete an enduring power of attorney or advance health directive (similar to the online forms used by various Commonwealth and State agencies); and
- a central website that provides information about enduring documents (including information about the need to have the documents, how to create/update the documents, the roles and responsibilities of various parties, how the documents are activated and deactivated, relevant warnings, etc.).²³⁵

Consideration should also be given to ensuring the accessibility of information and resources for people who may be at the lower end of the threshold for capacity. Given that the capacity threshold for making an enduring document simply requires that the principal is able to understand the nature and effect of the power that they are giving to an attorney, many people who might require support with aspects of decision-making, even those with life-long developmental disabilities, may have sufficient capacity to develop an enduring document. Attention must therefore be given to ensuring that information is developed in plain English and accompanied by pictorial symbols, and/or that guides for families/carers explain relevant concepts in a way that enables them to easily interpret them for the principal.

6.2.2.1 Online forms

It is common for people to complete legal documentation via online forms. A number of documents that used to be considered complex are now available to the public as online forms e.g. insurance policies and claims. Many companies and government agencies also enable their clients to complete forms online e.g. Medicare, Centrelink, Australian Taxation Office, financial institutions and health insurance providers.

Enabling enduring documents, particularly the enduring power of attorney instrument, to be developed online may improve the accessibility and ease with which an enduring document can be made. Ideally, the online form would include explanatory notes to help people understand the form, some standard clauses, and prompts to enable people to consider optional protective clauses that they may also like to include.

²³³ Office of the Public Advocate interview DXC (2014).

²³⁴ Katherine R. Waite et al, 'Literacy and Race as Risk Factors for Low Rates of Advance Directives in Older Adults' (2013) 61(3) *Journal of American Geriatrics Society* 403.

²³⁵ Office of the Public Advocate interviews DRN, DXC (2014).

The inclusion of standard clauses is not a new concept, however it has not been utilised in Queensland in relation to enduring documents. There are likely to be some legal complexities that require attention during the creation of electronic enduring documents with standard and optional clauses, however these might be resolved by those with specialist knowledge.²³⁶

The QLRC recommended that the approved short and long form enduring power of attorney documents “should be re-drafted by a multidisciplinary team with experience in relation to the users of the forms as well as the law”.²³⁷ The QLRC recommended the provision of explanatory notes to help inform individuals and the re-drafting of some clauses.²³⁸

6.2.2.2 Aligning enduring documents to common personal events

Linking the completion of enduring documents to common personal events (such as applying for a car licence or home loan, establishing a superannuation account or applying for entry into aged care) could potentially increase the uptake of advance planning. For example, lending institutions could encourage or insist that a person creates an enduring power of attorney as part of the home loan process.²³⁹ The feasibility of such strategies requires further consideration and would require the engagement of government departments, private sector institutions and other key stakeholders.

6.2.3 Register of enduring instruments

Establishing a mechanism to enable the registration of enduring instruments is a potential strategy to facilitate increased engagement with advance planning. The practice of registering enduring instruments is variable across jurisdictions (see Appendix Five) however the VLRC reported that “a register would be a highly effective means of encouraging people to appoint others to assist them with decision-making”.²⁴⁰ Some Queensland stakeholders expressed similar views.²⁴¹ One interviewee commented that “if the government wants to encourage advance planning, they need to decide about creating a public searchable register”.²⁴²

It was suggested that a mechanism should be devised to help maintain knowledge of who has enduring documents and that without such a mechanism, enduring documents are not being given their maximum effect as the details of their existence are not always known.²⁴³ Some people have up to four or five enduring power of attorney documents, which can create challenges in identifying the most appropriate and current document, as it may not be the document that is presented for use.²⁴⁴ While it is not a requirement to register an enduring document in Queensland, if there is a likelihood that an enduring power of attorney may be used in transactions involving the acquisition or sale of land, the document must be registered with the Land Titles Office.²⁴⁵

²³⁶ Office of the Public Advocate interview DRN (2014).

²³⁷ Queensland Law Reform Commission, above n 10, vol 3, 166 [16.176].

²³⁸ Ibid 166 [16.178-16.179].

²³⁹ Office of the Public Advocate interview MDZ (2014).

²⁴⁰ Victorian Law Reform Commission, above n 42, 362 [16.89].

²⁴¹ Office of the Public Advocate interview B9X (2014); Cheryl Tilse, above n 217; Carers Queensland Inc., above n 24, 6.

²⁴² Office of the Public Advocate interview B9X (2014).

²⁴³ Ibid.

²⁴⁴ Cheryl Tilse, above n 217.

²⁴⁵ Department of Justice and Attorney-General, Enduring Power of Attorney Short Form ver 2-1/06/02, Queensland Government <<https://publications.qld.gov.au/dataset/0e798d96-9ba6-4aa0-95cd-5a017a0589a9/resource/94c27605-28ad-4e71-846b-04b0d66ef3b8/download/enduringpowerofattorneyshortformform2.pdf>>.

Queensland's recently passed *Mental Health Act 2016* includes provision for the creation of a records system for keeping electronic records of advance health directives, enduring powers of attorney for a personal matter, and appointments of nominated support persons (who can receive notices and request psychiatrist reports under the *Mental Health Act 2016*).²⁴⁶ If these enduring documents relate to the person's future treatment and care for a mental illness or the appointment of a nominated support person, then the administrator of an authorised mental health service must keep a record of this upon request.²⁴⁷

If an advance health directive or power of attorney is made later, if the attorney resigns, or if the appointment of a nominated support person is revoked or the nominated support person resigns, the person who requested that such records be kept must inform the authorised mental health service of this change. A copy produced from the records system is proof of the advance health directive or enduring power of attorney for a personal matter.²⁴⁸

At a broader level, the lack of consistency across jurisdictions in the extent to which they provide recognition for enduring documents developed in another state or territory is another issue that must be addressed. Further, while the notion of a national register for enduring documents has been the subject of advocacy efforts for many years, including having support from the Australian Guardianship and Administrative Council, this has not yet gained sufficient traction to see it progressed.

6.2.3.1 Potential benefits

The rationale for establishing a register extends beyond aiding an increase in the uptake of enduring documents. Depending on the scope and parameters of the mechanism, the potential benefits of a register for Queensland may include:

- verification of the existence and/or validity of the instrument;²⁴⁹
- some confidence about whether a person can exercise their legal capacity;²⁵⁰
- increased recognition of a person's wishes through the identification of the instrument²⁵¹ and the likelihood that the instrument will be observed and acted upon;
- the identification of whether powers under an instrument are full or limited to specific matters, terms and/or conditions;²⁵²
- some confidence that a substitute decision-maker is appropriately exercising power under an instrument (and a form of safeguard to help prevent abuse of power);
- a greater level of assurance for third parties (hospitals, financial institutions, etc.) that they are liaising with the most appropriate person in relation to a matter;²⁵³

²⁴⁶ *Mental Health Act 2016* (Qld) s 225(1).

²⁴⁷ *Ibid* s 226.

²⁴⁸ *Ibid* ss 227-230.

²⁴⁹ Queensland Law Reform Commission, above n 10, vol 3, 172 [16.203]; Office of the Public Advocate interview FRY (2014).

²⁵⁰ *Bergmann v DAW* [2010] QCA 143 (11 June 2010).

²⁵¹ Queensland Law Society, Submission No 168 to Queensland Law Reform Commission as cited in Queensland Law Reform Commission, above n 10, vol 3, 180 [16.236].

²⁵² Victorian Law Reform Commission, above n 42, xiv [99].

²⁵³ Queensland Law Reform Commission, above n 10, vol 3, 180 [16.234].

- the availability of contact details for the person who is the subject of the instrument and their nominated or appointed substitute decision-maker/s, particularly in time-critical circumstances (e.g. in hospital settings);
- greater efficiency for third parties in determining the appropriate decision-maker;²⁵⁴
- improved authority and access to information for substitute decision-makers through greater recognition of their authority;²⁵⁵
- increased understanding and awareness about enduring instruments/Tribunal orders within the community;²⁵⁶
- the existence of an electronic repository of enduring documents/Tribunal orders to enable instruments to be located;²⁵⁷
- confirmation that a person had capacity to create the instrument at the time of its registration (assuming other evidence is provided) to aid the resolution of disputes;²⁵⁸ and
- capacity to collate and publish data about aspects of Queensland’s guardianship system.²⁵⁹

6.2.3.2 Issues and concerns

Conversely, there are a number of potential issues and concerns regarding the creation and operation of a register. Depending on the scope and parameters of the mechanism, these may include:

- limitations of a register to ensure the actual validity of an instrument;
- limited ability of a register to detect fraud and abuse;
- conduct of improper dealings by an attorney due to the perceived legitimacy of an instrument;
- likely restrictions on the extent to which a registration system can record the status of an instrument;
- the additional step of registering and/or uploading an instrument will further complicate and lengthen the process of creating an enduring document and may therefore act as a deterrent;
- resource requirements in relation to the establishment and ongoing operation of the register;
- concerns in relation to the availability of private and personal information to third parties;
- impact of delays in the processing the registration of an instrument; and
- managing community expectations about the capabilities and restrictions of the register and the obligations of government in relation to the register.²⁶⁰

²⁵⁴ Office of the Public Advocate interviews B9X, C2W, FRY (2014).

²⁵⁵ Queensland Law Reform Commission, above n 10, vol 3, 180 [16.234].

²⁵⁶ Victorian Law Reform Commission, above n 42, 59 [5.29].

²⁵⁷ Queensland Law Reform Commission, above n 10, vol 3, 173 [16.206]; Submission No C87B to Queensland Law Reform Commission as cited in Queensland Law Reform Commission, above n 10, vol 3, 180 [16.234].

²⁵⁸ The Adult Guardian, Submission No 164 to Queensland Law Reform Commission as cited in Queensland Law Reform Commission, above n 10, vol 3, 180-181 [16.236].

²⁵⁹ Victorian Law Reform Commission, above n 42, xxiv-xxv [19].

²⁶⁰ Office of the Public Advocate interview C2W (2014); Queensland Law Reform Commission, above n 10, vol 3, 186 [16.257-16.258], 181 [16.239], 186 [16.258]; The Public Trustee, Submission No 156A to Queensland Law Reform Commission as cited in

In 2010, the QLRC recommended against the establishment of mandatory registration of enduring powers of attorney. It determined that the benefits of a requirement to register an enduring power of attorney did not outweigh the implementation burden.²⁶¹ To date, no extensive cost/benefit assessment has been undertaken in Queensland.

The QLRC was also concerned that the formality, costs and complexity of the registration scheme might also discourage people from making enduring power of attorneys.²⁶²

More recently, the Communities, Disability Services and Domestic and Family Violence Prevention Committee noted that some jurisdictions have mandatory licencing of attorneys and recommended “that the Queensland Government consider and adopt strategies to regulate and record the appointment of attorneys in Queensland”.²⁶³ The Committee noted the range of benefits associated with the registration of powers of attorney and commented that these benefits may outweigh the costs of administering a register. The Committee recommended the compulsory registration of powers of attorney instruments.²⁶⁴

In response, the Queensland Government noted the existence of competing views in relation to the compulsory registration of powers of attorney and committed to examining ways to address the aims of the Committee’s recommendation.²⁶⁵

6.3 Recommendations

Recommendation 7: The Queensland Government should enhance the process of advance planning by delivering online forms containing easy-to-understand explanatory notes and a series of standard and optional clauses, providing a central public website relating to advance planning; and making any necessary legislative amendments to improve the legislative safeguards for individuals.

Recommendation 8: The Queensland Government and relevant statutory agencies develop a contemporary communication strategy to increase awareness of, and knowledge about, advance planning and the roles and obligations of principals and attorneys. The strategy should include initiatives to increase general community awareness as well as targeted communications to specific groups (e.g. older Queenslanders, medical and health professionals, solicitors etc.).

Recommendation 9: The Queensland Government should require that attorneys, guardians and administrators are aware of their roles and obligations upon appointment or re-appointment. An online training program may be a useful tool to address the lack of awareness among decision-makers about their role and responsibilities. A similar program would also be of benefit to private guardians and administrators.

Recommendation 10: The Queensland Government should examine the benefits, issues and costs associated with establishing a registration scheme for enduring instruments in Queensland.

Queensland Law Reform Commission, above n 10, vol 3, 182 [16.242]; The Perpetual Group of Companies, Submission No 155 to Queensland Law Reform Commission as cited in Queensland Law Reform Commission, above n 10, vol 3, 181 [16.240].

²⁶¹ Queensland Law Reform Commission, above n 10, vol 3, 186 [16.259].

²⁶² Ibid.

²⁶³ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 87, 147.

²⁶⁴ Ibid 151-152.

²⁶⁵ Queensland Government, above n 90, 13.

7 Capacity

“Legal capacity sets the threshold for individuals to take certain actions that have legal consequences”.²⁶⁶ As articulated by Carney, “Those who make the choice should be able to provide valid consent, and make decisions for which they can be held accountable. They should, in short, be legally competent.”²⁶⁷

Capacity and the way in which it is determined is an important aspect of Queensland’s guardianship system.

A finding of impaired capacity for a matter means that a person can no longer exercise their legal capacity for that matter; that is, the law will not recognise the decisions that the person makes in relation to that matter.²⁶⁸ If a person is found to lack capacity for a matter, a substitute decision-maker such as a guardian or administrator may be appointed to make decisions for them, or an enduring power of attorney may be activated. A finding such as this has an obvious and significant impact on a person’s autonomy.

The importance of the manner in which capacity is assessed and the impact of a finding of incapacity, is highlighted by this example provided by a community legal centre:

“Also of concern is the dilemma of people seeking a Declaration of Capacity when they have been deemed by a doctor in the past as not having capacity. We recently had a case where a woman was in an aged care facility but wanted to return home. Her GP had, in the past, diagnosed her with dementia, however we believed that her dementia was mild, and that she had the capacity to make the decision to return home. As our service is in a rural area where access to geriatricians is extremely limited, we encountered substantial barriers in having this woman assessed as having the capacity to make this particular decision. Our attempts to assist this woman were obstructed by both the woman’s daughters, one of whom was acting prematurely in her role as her mother’s attorney, and the nursing home manager who was enabling the attorney to make decisions prematurely. Eventually we arranged an assessment with a geriatrician which resulted in this woman’s right to make her own decision about returning to her home being upheld. However this was a lengthy, and abusive, procedure itself as the woman was 84 and had to undergo an assessment which she found stressful when it appeared obvious to our service (as well as workers from two services who had independently referred her to us) that she had decision-making capacity. Other people in the same situation of being placed in a nursing home and kept there against their will (and this is not uncommon in the experience of workers from this service) have no means of challenging the doctor’s assessment which has often been influenced by family members wanting to rid themselves of elderly parents by placing them in aged care facilities. Often children have their own agendas for keeping parents out of their own decision-making process.”²⁶⁹

²⁶⁶ Australian Law Reform Commission, above n 6, 44 [2.40].

²⁶⁷ T Carney and D Tait, above n 45, 3 as cited in Australian Law Reform Commission, above n 6, 45 [2.40].

²⁶⁸ *Bergmann v DAW* [2010] QCA 143 [35] (Justice Muir).

²⁶⁹ Seniors Legal and Support Service, above n 199, 2-3.

7.1 Determining capacity

Capacity has traditionally been viewed by the law as a deterministic and absolute concept. A person either has capacity or they don't, and if they do not have capacity then this disqualifies them from making any decisions or even engaging in a range of activities.²⁷⁰ Contemporary discussion about guardianship and administration, and the provision of support for decision-making, questions this approach to capacity.

Guardianship laws, such as those in Queensland, often operate on a threshold of capacity.²⁷¹ That is, the appointment of a substitute decision-maker requires a determination that the person has impaired decision-making capacity, even if it is only for that matter for which the appointment is made. Such a determination can have a radical effect on a person's autonomy. The person no longer holds the legal authority to make decisions that relate to the matters subject to the guardianship order.

This association between lack of competence and autonomy is emphasised by medical ethicists who comment that although "'autonomy' and 'competence' differ in meaning (autonomy meaning self-governance; competence meaning the ability to perform a task or range of tasks), the criteria of the autonomous person and of the competent person are strikingly similar".²⁷²

In the past, it was assumed that if a person had a disability, then they lacked capacity to make any decisions for themselves; a view that can still sometimes prevail. However, with changes in medical practice, psychology and the growth of the disability rights movement, such views have been challenged.²⁷³ The dominant approach to assessing capacity for guardianship purposes is now a functional one. This new approach has also intersected with reforms in guardianship laws including limited guardianship orders and legislative directions to consider the preferences of the person subject to guardianship.²⁷⁴

7.1.1 Capacity and the law

As highlighted by the ALRC report *Equality, Capacity and Disability in Commonwealth Laws*, mental capacity refers to a person's cognitive abilities, legal capacity refers to a person's ability to make legally binding decisions. While the two terms are often conflated, they are distinct.²⁷⁵

At common law a person's legal capacity is presumed.²⁷⁶ The *Guardianship and Administration Act* and the *Powers of Attorney Act* uphold the common law presumption of capacity.²⁷⁷

²⁷⁰ For example entering into a binding contract, disposing of property by will or gift, voting, becoming a member of parliament, holding various public offices, having sexual relations with another person, marrying, authorising many forms of medical treatment, engaging in various occupations as discussed in Victorian Law Reform Commission, above n 42, 100.

²⁷¹ Shih-Ning Then, above n 46, 144.

²⁷² Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (Oxford University Press, 6th ed, 2009) 111 in Victorian Law Reform Commission, *Guardianship: Final Report 24*, Report No 24 (2012) 99.

²⁷³ Kristin Booth Glen, 'Changing paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond' (2012) 44(1) *Columbia Human Rights Law Review* 93, 98.

²⁷⁴ *Ibid* 115.

²⁷⁵ Australian Law Reform Commission, above n 6, 46 [2.45].

²⁷⁶ See, e.g. *Re T (Adult: Refusal of Medical Treatment)* [1992] 3 WLR 782, 796; *Anderson v Anderson* [2013] QSC 8 (22 February 2013) [45], [52].

²⁷⁷ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 1; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 1.

Under these pieces of Queensland legislation, capacity is defined as:

- understanding the nature and effect of decisions about the matter; and
- freely and voluntarily making decisions about the matter; and
- communicating the decisions in some way.²⁷⁸

This represents a functional definition of capacity. Consistent with the contemporary understanding of disability, the functional approach to determining capacity does not conflate a person's impairment or disability with a necessary lack of capacity. The focus is on the person's ability to understand, retain and weigh the information to reach a decision.²⁷⁹

This definition of capacity is also time and matter-specific. That is, if a person has been deemed to have impaired capacity for a matter, this means they do not have the capacity to make decisions for that particular matter.²⁸⁰ It does not, however, limit their capacity to make decisions in respect of other matters. Further, it is possible that a person may have capacity to make decisions at certain times (for example, first thing in the morning) even though they may be considered to lack capacity at other times.

However, the legal definition is only one aspect of the process for determining capacity. Determining a person's capacity also involves applying the test in practice and importantly gathering and using evidence. While the definition of capacity in the guardianship legislation may be consistent with a functional approach and the presumption of capacity clearly stated, QCAT must still apply a clear, transparent and accountable process for determining whether a person has capacity for a matter.

7.1.2 The Tribunal and capacity

QCAT may determine the decision-making capacity of a person in a number of circumstances. First, when QCAT is considering the appointment or review of a guardian or administrator, it must be satisfied, amongst other things,²⁸¹ that the person has impaired capacity for the matter. QCAT may also make a declaration about the capacity of a person, guardian, attorney or administrator.²⁸² QCAT may make such a declaration on its own initiative or upon application of the individual or another interested person.²⁸³

In accordance with the common law presumption and general principle one, QCAT must begin with a presumption of capacity.²⁸⁴ To make a finding that a person has impaired capacity, QCAT must be satisfied that this presumption is rebutted.

²⁷⁸ *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'capacity'); *Powers of Attorney Act 1998* (Qld) sch 3 (definition of 'capacity').

²⁷⁹ Queensland Law Reform Commission, above n 10, vol 1, 266; *Re MB* [1997] 2 FLR 427, 437 (Butler-Sloss LJ); *R (Burke) v General Medical Council* [2005] QB 424, [42] (Munby J).

²⁸⁰ *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'impaired capacity'); *Powers of Attorney Act 1998* (Qld) sch 3 (definition of 'impaired capacity').

²⁸¹ QCAT must also be satisfied that there is a need for a decision in relation to the matter and without an appointment that the adult's needs will not be met or their interests will not be adequately protected. (*Guardianship and Administration Act 2000* (Qld) s 12(1)).

²⁸² *Guardianship and Administration Act 2000* (Qld) s 146.

²⁸³ *Ibid* s 146(2).

²⁸⁴ *Re T (Adult: Refusal of Medical Treatment)* [1992] 3 WLR 782, 796.

In 2014-15, QCAT received 234 matters relating to declarations of capacity, 3,363 matters for the appointment or review of administrators and 3,120 matters for the appointment or review of guardians. During this period, QCAT conducted 6,715 hearings (including 3,946 tribunal hearings and 1,023 ‘on the papers’ hearings) and conducted 1,098 ‘on the papers’ reviews.²⁸⁵ Irrespective of whether a matter relates to a new appointment or the review of an existing appointment, or whether a tribunal or ‘on the papers’ hearing is conducted, QCAT must apply the presumption of capacity every time it makes a determination about a person’s capacity.²⁸⁶

7.1.2.1 Conduct of hearings – information relied upon

QCAT must, as far as it considers practicable, make sure it has all the relevant information and material to decide a matter.²⁸⁷ Although if the Tribunal considers urgent or special circumstances justify it doing so, or with the agreement of the active parties, it may proceed to decide a matter on the information before it without seeking further information.²⁸⁸

In making an application for a declaration of capacity, or applying for a guardian or administrator, the applicant must not only provide their own views about the person’s capacity and the reasons why they believe the person to have impaired capacity in relation to a matter, but also attach a report from a medical, psychiatric or other professional.²⁸⁹ The medical report must detail the person’s current medical conditions, medication and treatment being provided and convey the opinion of the medical professional about the person’s capacity for making decisions.²⁹⁰ The professional may attach the results of cognitive assessments that may have been performed, for example a Mini Mental State Examination (MMSE).

In addition to reports by medical professionals, which might include reports from general practitioners, psychologists, allied health professionals or geriatricians²⁹¹, Tribunal members also rely on a range of other evidence. For example, talking to the person to whom the hearing relates, members of the person’s family, their friends, carers and supporters who can advise the Tribunal about how well they think the person is functioning.²⁹²

7.1.2.2 Reliance on medical experts and cognitive tests

Commentators on the process of assessing legal capacity highlight the heavy reliance on the advice of medical and allied health professionals when determining capacity.²⁹³

²⁸⁵ Queensland Civil and Administrative Tribunal, Customised data request for the Office of the Public Advocate, 20 January 2016.

²⁸⁶ *Bucknall v Guardianship and Administration Tribunal No 1* [2009] 2 Qd R 402, [27]-[31].

²⁸⁷ *Guardianship and Administration Act 2000* (Qld) s 130(1).

²⁸⁸ *Ibid* s 131.

²⁸⁹ Queensland Civil and Administrative Tribunal, *Application for a declaration of capacity – Guardianship and Administration Act 2000: Form 11 Version 1* (2 April 2015) Queensland Civil and Administrative Tribunal

<http://www.qcat.qld.gov.au/__data/assets/pdf_file/0005/100895/form-11-app-for-dec-about-capacity.pdf>; Queensland Civil and Administrative Tribunal, *Application for administration/guardianship appointment or review – Guardianship and Administration Act 2000: Form 10 Version 2* (2 April 2015) Queensland Civil and Administrative Tribunal, <http://www.qcat.qld.gov.au/__data/assets/pdf_file/0005/100868/Form-10-Application-for-Administration-Guardianship.pdf>.

²⁹⁰ Queensland Civil and Administrative Tribunal, *Report by medical and related health professionals – Guardianship and Administration Act 2000* (2 April 2015) Queensland Civil and Administrative Tribunal <http://www.qcat.qld.gov.au/__data/assets/pdf_file/0005/101111/report-by-medical-and-health-professionals.pdf>.

²⁹¹ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6NV, 6Y2, 7GT, 7TZ (2014).

²⁹² Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6NV, 6Y2, 6K6, 7GT (2014).

²⁹³ Mary Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 136; Peter Bartlett and Ralph Sandland, *Mental Health Law: Policy and practice* (Oxford University Press, 3rd edition, 2007) 514; M J Gunn et.al. ‘Decision-Making Capacity’ (1999) 7 *Medical Law Review* 269.

A further but related concern is the reliance placed on the potentially limited value of cognitive tests such as the MMSE.²⁹⁴ It is argued that tests such as the MMSE do not really assess whether a person can understand information but whether, at an abstract level, the person has the ability to understand.²⁹⁵

As a test for cognitive impairment, the MMSE, for example, is based on a series of questions that aim to assess orientation, memory, concentration, language and visual-spatial ability.²⁹⁶ As a test of cognitive function, it is often used in the diagnosis of conditions such as Alzheimer's and other dementias and the examination of the cognitive domains of orientation, registration, attention recall, language and constructional praxis.²⁹⁷ Darzins, Molloy and Strang also point out that cognitive function tests, like the MMSE, are primarily language based and influenced by a person's education, culture and language.²⁹⁸ Some people who may be capable, but who score poorly on these tests due to limited education or language difficulties, for example, may be wrongly found to lack capacity.

Many argue that the general cognitive testing often relied upon by QCAT is inconsistent with the functional approach to capacity.²⁹⁹

This is particularly relevant to the *Guardianship and Administration Act* where the first limb of the test of capacity is focused on whether the person understands “the nature and effect of decisions about the matter”.³⁰⁰ As a matter specific test, the relevant issue is whether the person understands information about the matter in question, not their level of cognitive ability generally.

These issues point to the importance of considering broader evidence about capacity rather than simply relying on cognitive tests; as well as the importance of ensuring necessary support and access to information to enable the adult to make decisions.³⁰¹ It also points to the importance of professionals with appropriate knowledge and expertise undertaking capacity assessments and the critical evaluation of medical and other expert evidence by QCAT.

7.1.2.3 Other approaches

There have been moves in other jurisdictions to adopt testing practices appropriate to the functional nature of capacity determinations and to either regulate the process for capacity assessments or promote the undertaking of capacity assessments by trained professionals. For example, Practice Notes that were issued by the Family Division of the High Court in United Kingdom³⁰² have discouraged the use of psychometric tests for the assessment of capacity in accordance with the recognised common law test.³⁰³

²⁹⁴ Mary Donnelly, above n 293, 136; Peter Bartlett and Ralph Sandland, above n 293, 514; M J Gunn et.al., above n 293, 269.

²⁹⁵ Mary Donnelly, above n 293, 136.

²⁹⁶ Ibid.

²⁹⁷ John Devereux and Malcolm Parker “Competency issues for young persons and older persons” as cited in Ian Freckleton and Kerry Petersen (eds) *Disputes and Dilemmas in Health Law* (The Federation Press, 2006) 72.

²⁹⁸ Peteris Darzins, William Molloy and David Strang, *Who Can Decide? The Six Step Capacity Assessment Process* (Memory Australia Press, 2000) 8.

²⁹⁹ Mary Donnelly, above n 293, 136; John Devereux and Malcolm Parker “Competency issues for young persons and older persons” as cited in Ian Freckleton and Kerry Petersen (eds) *Disputes and Dilemmas in Health Law* (The Federation Press, 2006) 72.

³⁰⁰ *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of ‘capacity’).

³⁰¹ Ibid sch 1, pt 1; principle 7(3)(a).

³⁰² Practice Note (Declaratory Proceedings: Medical and Welfare Decisions for Adults Who Lack Capacity) [2002] 1 WLR 325, 327.

³⁰³ *Re MB (Medical Treatment)* [1997] 2 FLR 426, 437.

UK Practice Note – Evidence for capacity

Practice notes that were issued by the Family Division of the High Court in the United Kingdom stipulated that given the common law test for capacity is matter specific, evidence from a psychiatrist or psychologist who has assessed the patient in relation to the particular decision in question is generally required, and that ‘global psychometric test results’ are unlikely to be relevant.³⁰⁴

There are some standardised tests that focus on actual understanding of specific information about the decision to be made as part of the test measures. For example, the MacArthur Competence Assessment Tool for Treatment (the MacCAT-T) requires that the assessor provide the person with information relating to the disorder, the treatment proposed and the risks and benefits, then tests the person’s understanding through questions designed to elicit a description of the information in the person’s own words.³⁰⁵ As Donnelly argues, a requirement for understanding also places an onus on health care professionals and others to provide information in a form that can be understood by the person.³⁰⁶

The VLRC reported that “one approach to capacity assessment that received significant support in consultation and submissions was the six-step capacity assessment process devised by Professor Peteris Darzins and colleagues”.³⁰⁷ This process strongly emphasises the obligation to work from the presumption of capacity and that evidence of incapacity should be sought. The presumption of capacity should prevail if such evidence cannot be found.³⁰⁸

DARZIN’S six step capacity assessment process

Step 1: Establishing the trigger – ensures that assessment of decision-making capacity is done only when a valid trigger is present. In acknowledgement of the invasive nature of capacity assessments, the guidelines enable a determination if triggers are serious enough to justify assessments and to minimise unwarranted assessments of capacity.

Step 2: Engage the person being assessed in the process – engages the person being assessed in the process. This involves informing the person to be assessed about the process and its possible outcomes.

Step 3: Information gathering – involves assessors gathering information in relation to the context, choices and consequences of the relevant decision/s to be made by the person to be assessed. In gathering this information the assessor should be guided by knowledge of the issues presented and the person’s values and goals in determining the choices which are available.

Step 4: Education – involves educating the person about the context, choices and their consequences of the relevant decision/s to be made. This step is designed to ensure that a person is not deemed to lack capacity just because they haven’t been provided with the right information in the right format.

Step 5: Capacity assessment – involves carrying out the assessment. The assessor communicates with the person to determine if they understand and appreciate the decisions they face. If they lack understanding of their situations, or their choices, or appreciation of the reasonably foreseeable consequences of their choices, they are incapable.

Step 6: Acting on results of capacity assessment – actions are taken depending on the results of the assessment. A plan is drawn up to deal with the issues that triggered the assessment.³⁰⁹

³⁰⁴ Practice Note (Official Solicitor: Declaratory Proceedings: Medical and Welfare Decisions for Adults who Lack Capacity) [2001] 2 FLR 158.

³⁰⁵ Mary Donnelly, above n 293, 136-137.

³⁰⁶ Ibid 136-137.

³⁰⁷ Victorian Law Reform Commission, above n 42, 113.

³⁰⁸ Ibid.

³⁰⁹ Peteris Darzins, William Molloy and David Strang, above n 298, as referred to in Victorian Law Reform Commission, above n 42, 113.

7.1.2.4 Conduct of hearings – views of the person

The conduct of a hearing was thought to be important to the determination of capacity by eight out of the ten Tribunal members who were interviewed.³¹⁰ Eight out of the ten Tribunal members who were interviewed also felt that sufficient information was generally provided about an adult to make a capacity determination.³¹¹

One Tribunal member spoke of the importance of making efforts to include the person who was the subject of the application in proceedings, with hearings sometimes taking place at the bedside of people who remain in hospital for example. They acknowledged, however, that people to whom the matter was related were less likely to attend when they had a severe disability or communication impairment or when it was thought likely that they would be traumatised by the process.³¹²

A review of nine cases before QCAT (including published decisions and the written transcripts of the hearing) found that in practice, assessments of a person's capacity generally took into account both oral and written evidence. When the person who was the subject of the hearing participated in the proceedings, the Tribunal examined them directly in the assessment of their capacity. For instance, probing questions would be asked to determine the person's level of understanding in relation to the decisions needed.³¹³

In some cases, this direct inquiry of the person during the hearing seemed to be the conclusive factor in determining capacity. Where the person was able to clearly show some depth of understanding in relation to the decisions required, it appeared to carry some weight in the determination of capacity.

There were three instances where the oral evidence provided directly by the person impacted upon the Tribunal's decision, although not always favourably.³¹⁴ In two of the hearings, the Tribunal appeared to find that the oral evidence of the person who was the subject of the proceeding contradicted some of the medical evidence. For instance in *HM* the Tribunal stated that it "places greater weight on evidence that includes observation and description of the manner in which HM attends to his day to day finances, income and investments"³¹⁵ and, on balance, it found that "while [the doctors] may have concluded that the adult has the ability to manage his financial decisions, the evidence of HM and the representative of the Public Trustee of Queensland does not, on any reasonable or objective basis, justify such a conclusion."³¹⁶ However, the opposite outcome was capable of occurring where the person presented well and in one instance this assisted a declaration of capacity.³¹⁷

Generally however, it appeared that Tribunal members preferred the written evidence of health and other professionals over the oral evidence of friends and family. This was particularly the case where the opinions of family members and friends were inconsistent.³¹⁸

³¹⁰ Office of the Public Advocate, above n 34.

³¹¹ *Ibid.*

³¹² Office of the Public Advocate interview 6NV (2014).

³¹³ *FM* [2013] QCAT 135, 59-60 (Restricted Transcript); *HM* [2013] QCAT 351, 49-50 (Restricted Transcript); *JS* [2013] QCAT 706, 9, 12-15 (Restricted Transcript).

³¹⁴ *TS* [2011] QCAT 112; *HM* [2013] QCAT 351; *MAD* [2014] QCAT 123.

³¹⁵ *HM* [2013] QCAT 351, [23].

³¹⁶ *HM* [2013] QCAT 351, [23].

³¹⁷ *MAD* [2014] QCAT 123.

³¹⁸ *JS* [2013] QCAT 706.

Occasionally it was difficult to determine which evidence held the most weight and this was predominantly where the professional evidence was consistent with the other evidence provided.³¹⁹ For example, in *BMD* the Tribunal found that “the presumption of capacity that is ordinarily accorded to an adult to manage their own personal and financial affairs has been rebutted based on the ... recent health professional reports and [the parties in attendance] concurrence with that.”³²⁰

QADA expressed concern about what they saw as routine reviews of guardianship and administration orders, which were heard on the papers without there being an opportunity to hear from the person. Concern was also raised indicating that while the people who are the subject of the hearing may have been present at hearings, there was no one there to speak on their behalf, or help them make their views heard.³²¹

QCAT aims to settle matters without the requirement of a traditional court hearing in ‘a way that is accessible, fair, just, economical, informal and quick’.³²² Parties are generally required to be self-represented.³²³ However, active parties (including the person who is the subject of the hearing, applicants, and administrators/guardians who come into contact with QCAT through a guardianship matter) can access legal representation by leave.³²⁴ People with impaired decision-making capacity can access such leave as a matter of right, in the interest of justice.³²⁵ Notably, however, people rarely have legal representation in QCAT.³²⁶

A number of agencies provide assistance and advocacy to people subject to guardianship matters. For example, the Queensland Public Interest Law Clearing House Self-Representation Service provides free legal advice and assistance to self-represented parties in guardianship matters with QCAT. QAI, QADA and the Seniors Legal and Support Service are also examples of other organisations who provide assistance.³²⁷ However, these organisations are limited in respect of the services they can provide due to their size and funding. A further problem relates to how best to enable the people who are subject to guardianship proceedings to become aware of and get assistance to contact the relevant agencies.

A further issue is how Tribunal application forms approach and promote the participation of the person to whom the matter relates. The application form for guardianship and administration matters only includes a brief statement in relation to the attendance of the person to whom the matter relates at a hearing. The form reads, “In some cases, the tribunal will expect the adult to attend the hearing”.³²⁸

³¹⁹ *FDN* [2011] QCAT 325; *FPC* [2012] QCAT 689; *BMD* [2013] QCAT 479.

³²⁰ *BMD* [2013] QCAT 479, 7 (Restricted Transcript).

³²¹ Queensland Aged and Disability Advocacy Inc., above n 24, 4, 6.

³²² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 3-4; Queensland Civil and Administrative Tribunal, *Practice Direction No 1 of 2012 – Hybrid hearings*, 3 September 2012, para 1; Bobette Wolski, ‘QCAT’s hybrid hearing: The best of both worlds or compromised mediation?’ (2013) 22(3) *Journal of Judicial Administration* 154.

³²³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(1).

³²⁴ *Guardianship and Administration Act 2000* (Qld) ss 119, 124.

³²⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(1); Queensland Civil and Administrative Tribunal, *Legal advice and representation* (24 August 2015) <<http://www.qcat.qld.gov.au/using-qcat/legal-advice-and-representation>>.

³²⁶ Hazel Genn, ‘Tribunals and informal justice’ (1993) 56(3) *The Modern Law Review* 393, 398; Queensland Law Reform Commission, above n 10, vol 4, 34.

³²⁷ Queensland Advocacy Incorporated, *Individual advocacy* (2009) Queensland Advocacy Incorporated <http://www.qai.org.au/index.php?option=com_content&view=article&id=78&Itemid=67>; Queensland Aged and Disability Advocacy Inc., *Guardianship Advocacy* (2014) Queensland Aged and Disability Advocacy Inc. <<http://www.qada.org.au/services/guardianship-advocacy>>; Caxton Legal Centre Inc., *Seniors Legal and Support Service* Caxton Legal Centre Inc. <https://caxton.org.au/sails_slass.html>.

³²⁸ Queensland Civil and Administrative Tribunal, *Application for administration/guardianship appointment or review – Guardianship and Administration Act 2000*, Form number 10 (version 2) (28 January 2016) Queensland Civil and Administrative

The principles promote the right of a person to participate in the making of decisions that affect their life to the greatest extent possible.³²⁹ As such, the participation of the person to whom the matter relates in hearings and reviews should be presumed and encouraged rather than communicated as being an exception. Tribunal forms should reflect an expectation that the person will attend and participate in the hearing.

Additionally, the participation of the person in a proceeding should be confirmed immediately prior to a proceeding, particularly when a notable period of time has passed between when the application was made and when the matter will be heard. A person's health, wellbeing and/or circumstances can change between the time at which an application is made and the matter is heard and therefore their ability to participate in a proceeding can change.

7.2 Developing an appropriate legislative and procedural framework for assessing capacity

Developing an appropriate procedural framework for capacity assessment is not a straightforward matter. The varying circumstances, requirements and reasons involved in capacity assessments require guidelines that focus on more than just processes.³³⁰ There is a need to develop a holistic strategy that provides for a principled but flexible approach to capacity assessments, while mandating certain procedural safeguards for those subject to a capacity assessment. Such a process must also be conducted in a way that seeks to maximise the capacity of the person involved.³³¹

7.2.1 Guidelines for capacity assessment

The QLRC considered that the current definition of capacity achieved an “appropriate balance between maximising an adult’s decision making autonomy and safeguarding the adult from neglect, abuse and exploitation.”³³² The QLRC also considered that, to ensure a consistent and best practice approach to such assessments, the *Guardianship and Administration Act* and the *Powers of Attorney Act* should be amended to require the Minister to prepare and issue guidelines for assessing capacity. Further, it was proposed that these should be contained in subordinate legislation, and be informed by wide and inclusive consultation with individuals and organisations with qualifications and experience in making capacity assessments.³³³

In the United Kingdom, the Code of Practice under the *Mental Capacity Act 2005* requires that before deciding that someone lacks capacity to make a particular decision, all practical and appropriate steps are taken to enable them to make the decision themselves.³³⁴ The Code of Practice provides guidance on the steps to be taken to ensure the person being assessed has been given the relevant information about a decision in a way that is most appropriate in helping that particular person to understand, and that all possible and appropriate means of

Tribunal <http://www.qcat.qld.gov.au/__data/assets/pdf_file/0005/100868/Form-10-Application-for-Administration-Guardianship.pdf>.

³²⁹ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1.

³³⁰ Mary Donnelly, above n 293, 150.

³³¹ *Ibid* 152.

³³² Queensland Law Reform Commission, above n 10, vol 1, 272 [7.132].

³³³ *Ibid* vol 1, lxvi-lxvii [recs 7-11 to 7-17].

³³⁴ Department for Constitutional Affairs (United Kingdom), above n 146, 29.

communication are tried.³³⁵ Emphasis is placed on undertaking these steps in a way that reflects the person's individual circumstances and meets their particular needs.

A number of Canadian provinces have also adopted more regulated approaches to capacity assessment. For example, Alberta requires that guardianship, trusteeship and co-decision-making applications are accompanied by a 'capacity assessment report'.³³⁶ A capacity assessor is required to conduct an assessment in accordance with the regulations (which also includes the provision for the Minister to make guidelines for the assessment of capacity) and complete a capacity assessment report in the prescribed form.³³⁷ In Alberta, the regulations outline the process for undertaking capacity assessment with a focus on the rights of the person subject to the assessment including that:

- a capacity assessment may be conducted only if the need for the assessment has been established;
- a person has the right to refuse to undergo a capacity assessment;
- a person must be given the opportunity to undergo an assessment at a time and under circumstances in which the adult will be likely to demonstrate the person's full capacity.³³⁸

Similarly in Ontario, there is a system of capacity assessors. The Capacity Assessment Office trains health professionals to be capacity assessors and maintains a current roster of qualified capacity assessors.³³⁹ Capacity assessment guidelines are produced with sample questions depending on the type of matter for which capacity is being assessed.³⁴⁰

The cost associated with capacity assessments may be a financial barrier to some people accessing capacity assessments. However, the need for capacity assessments may diminish with enhanced understanding and guidance about capacity. The establishment of practical guidance and requirements, such as the Code of Practice in the United Kingdom, may facilitate an improved understanding of capacity within the community and relevant professions.

7.2.2 Principles to support capacity assessments

Principles to guide capacity assessment arguably also provide for greater guidance about the approach that should be taken in implementing the legal test for capacity. Although the legal test is appropriate, the assessment process may not be carried out according to the underlying philosophy of either the test or the overarching legislation.

Consideration should be given to the inclusion of a set of principles to guide assessments of decision-making capacity.

Queensland's guardianship legislation seeks to balance the right of a person with impaired decision-making capacity to the greatest possible degree of autonomy in decision-making and the right to adequate and appropriate support in decision-making.³⁴¹

³³⁵ Ibid 29-39.

³³⁶ *Adult Guardianship and Trusteeship Act SA 2008*, c A-4.2, ss 13(2)(a), 26(3)(a), 46(2)(a).

³³⁷ Ibid s 102.

³³⁸ *Adult Guardianship and Trusteeship Regulation*, Alta Reg 219/2009, s 3(1).

³³⁹ Ontario Ministry of the Attorney General, *Capacity Assessment* (12 April 2011), Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity.asp>>.

³⁴⁰ Ontario Ministry of the Attorney General, *Guidelines for Conducting Assessments of Capacity* (2005).

³⁴¹ *Guardianship and Administration Act 2000* (Qld) s 6.

Taking this into account, alongside the recommendation for capacity assessment guidelines, the QLRC also recommended that a set of principles be developed for assessing capacity including:

- the presumption that a person has capacity for a matter;
- the principle that, in performing a capacity assessment, the assessment must be done in a way that promotes and safeguards the person’s rights, interests and opportunities in the way least restrictive of the person’s rights, interests and opportunities;
- the importance of preserving, to the greatest extent practicable, the person’s right to make decisions; and
- the person’s right to be given any necessary support and access to information to enable them to make or participate in decisions affecting their life.³⁴²

The VLRC also recommended that any new guardianship legislation should contain the following capacity assessment principles:

- a person’s capacity is specific to the decision to be made;
- impaired decision-making capacity may be temporary or permanent and can fluctuate over time;
- a person’s incapacity to make a decision should not be assumed based on their age, appearance, condition, or an aspect of their behaviour;
- a person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support; and
- when assessing a person’s capacity, every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed.³⁴³

7.2.2.1 The role of support in assessing capacity

Article 12 of the Convention imposes an obligation on State parties to recognise that people with disability enjoy legal capacity on an equal basis with others.³⁴⁴ Read with article 5, an overarching principle of equality and non-discrimination,³⁴⁵ there is an obligation on State parties to ensure support is provided to people with disability to enable them to exercise their legal capacity, so as to avoid discrimination.

There is a growing emphasis on strength-based assessments for capacity, where capacity should be related less to the level of a person’s cognitive capacity or functional ability, and more to the level of support available to a person or that could be built around the person to make the decision.

Values in Action, a United Kingdom organisation, states that “the starting point is not a test of capacity, but the presumption that every human being is communicating all the time and that this communication will include preferences. Preferences can be built into the expressions of

³⁴² Queensland Law Reform Commission, above n 10, vol 1, 304 [7.277].

³⁴³ Victorian Law Reform Commission, above n 42, 122.

³⁴⁴ *Convention on the Rights of Persons with Disabilities* art 12.

³⁴⁵ *Ibid* art 5.

choice and these into formal decisions. From this perspective, where someone lands on a continuum of capacity is not half as important as the amount and type of support they get to build preferences into choice”.³⁴⁶

The principle that a person must be supported to exercise legal capacity is now reflected in the recommendations of relevant law reform commission reports and legislation.

The VLRC recommended a set of capacity assessment principles, one of which was that a person “should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support”.³⁴⁷ Similarly the ALRC in its review of *Equality, Capacity and Disability in Commonwealth Laws* included an obligation to provide support in decision-making as a key national decision-making principle, and the introduction of support guidelines with an emphasis on assessing a person’s capacity within the context of available supports.

This approach is also reflected in similar legislation in other jurisdictions. For example, a key statutory principle of the *Mental Capacity Act 2005* (UK) is that “a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success”.³⁴⁸

7.2.2.1.1 In Queensland

The *Guardianship and Administration Act* contains an acknowledgement that the capacity of an adult with impaired capacity to make decisions may differ according to:

- the nature and extent of the impairment; and
- the type of decision to be made, including for example, the complexity of the decision to be made; and
- the support available from members of the adult’s existing support network.³⁴⁹

The complicating factor is that this acknowledgement applies to a person with impaired decision-making capacity. A number of the Tribunal members who were interviewed acknowledged that this principle was restricted to people who were already found to lack capacity, and felt that it applied less to assessments of capacity than to the need for the appointment of a guardian or administrator.³⁵⁰

³⁴⁶ S Beamer and M Brookes, *Making Decisions: Best Practice and New Ideas for Supporting People with High Support Needs to Make Decisions* (Values into Action, London, 2001) in Jo Watson, Submission No 19 to the Victorian Law Reform Commission, *Review of the Guardianship and Administration Act 1986*, May 2010, 10.

³⁴⁷ Victorian Law Reform Commission, above n 42, 72.

³⁴⁸ *Mental Capacity Act 2005* (UK) s 1(3)

³⁴⁹ *Guardianship and Administration Act 2000* (Qld) s 5(c).

³⁵⁰ Office of the Public Advocate interviews 4DL, 5PJ, 5XW, 7GT (2014).

7.3 Ability, not capacity

The Convention considers the denial of legal capacity on the basis of a person's disability or decision-making skills to be discriminatory.³⁵¹

The ALRC report *Equality, Capacity and Disability in Commonwealth Laws* highlighted the distinction between legal capacity and mental capacity. The Commission commented that “what is clearly not appropriate in the context of the CRPD is a disqualification or limitation on the exercise of legal capacity because of a particular status, such as disability.”³⁵²

The ALRC suggested that an appropriate approach would centre on the support needed to exercise legal capacity, rather than an assumption that legal capacity is impaired because of an impairment. Due to the connotations associated with the word ‘capacity’, e.g. confusion and conflation with legal and mental capacity, the word ‘ability’ is preferred over ‘capacity’. The Commission suggested that ‘ability’ “emphasises that the focus should be on assessing how the individual can be supported to exercise their ability”.³⁵³

7.4 Recommendations

Recommendation 11: In view of the direction fostered by the Convention and the ALRC, the way in which ‘capacity’ is viewed in law and policy should be reconsidered to better reflect the spectrum of ‘ability’ and a focus on the supports that must be provided for a person to exercise their ‘ability’.

Recommendation 12: The Queensland Government should develop and introduce into legislation principles to underpin the process of assessing capacity. The principles should include (but not necessarily be limited to):

- a person’s capacity to make decisions should be presumed;
- a person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with support;
- a person should not be found to lack capacity unless information relevant to making the decision has been provided in a format appropriate to the individual person’s needs and circumstances; and
- when assessing a person’s capacity every attempt should be made to carry out the assessment at a time and in an environment that means the person’s capacity can be accurately assessed.

Recommendation 13: Alongside principles to guide capacity assessment, the Queensland Government should engage individuals and entities with relevant expertise to develop capacity assessment guidelines. The process of developing these guidelines should include a review of the evidence currently requested/recommended for capacity determinations, including whether cognitive tests such as the MMSE are appropriate, and should consider other

³⁵¹ Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014) Article 12: Equal recognition before the law*, CRPD/C/GC/1, Eleventh Session, 31 March–11 April 2014, 3.

³⁵² Australian Law Reform Commission, above n 6, 46 [2.45], 47 [2.49].

³⁵³ *Ibid* 47 [2.49–2.50].

evidence-based approaches to assessing capacity. Consideration should be given to including these in a Code of Practice, practice guidelines or equivalent instrument.

Recommendation 14: QCAT should comprehensively review the information and evidence that it requires to make well-informed capacity assessments and ensure that application forms and registry processes facilitate the gathering of appropriate information.

Recommendation 15: The Queensland Government should strengthen guardianship legislation to require that the person who is the subject of the capacity assessment participates in Tribunal processes associated with making a determination of the person's capacity, except in circumstances that would result in harm or have a detrimental impact on a person's wellbeing. All people who are the subject of a proceeding should be offered support and/or representation for the process.

8 Appointment of guardians and administrators

The appointment of a guardian and/or administrator may be considered when other less-restrictive decision-making supports and interventions have failed to meet the needs of a person. Guardians and administrators are typically appointed by QCAT, either upon application or on QCAT's own initiative.³⁵⁴ Given that the *Guardianship and Administration Act* asserts that a person's right to make their own decisions should be interfered with to the least possible extent,³⁵⁵ the appointment of a guardian and/or administrator should be an intervention of absolute last resort. Plenary (or full) appointments should be avoided, with guardians and administrators appointed only for matters for which the adult lacks capacity and orders made for the shortest time necessary.

This is consistent with article 12(4) of the Convention, which stipulates that any decision-making intervention must uphold the rights, will and preferences of the person; be free of conflict of interest and undue influence; be proportional and tailored to the person's needs and circumstances; apply for the shortest time possible; and be subject to regular review.³⁵⁶

Despite this, the number of Tribunal applications and orders in Queensland have been steadily increasing.³⁵⁷

Half of the Tribunal members who were interviewed for the research indicated that there were often less restrictive ways to support a person's decision-making other than by a guardianship or administration order (based on the matters over which they preside).³⁵⁸ This raises the question about why appointments might be made in circumstances where less restrictive alternatives might be available.

8.1 Circumstances leading to an application for a guardian or administrator

A diverse range of life circumstances may trigger an application for guardianship and/or administration. According to the Tribunal members who participated in the research, the most common circumstances in a person's life that lead to applications for guardianship and/or administration applications related to the person's diagnosed condition or impairment, the person's stage of life, a change in the person's circumstances, or conflict among people in the person's life. It was also very common for guardianship and/or administration applications to be sought due to the person's informal support network having inadequate authority to act on behalf of the person or due to the demands of third party organisations. Other reasons for applications being lodged included the desire to protect the person who may have impaired capacity, the desire for informal supporters to maintain a loving and supportive role rather than a decision-making role, and the absence of a support network.³⁵⁹

³⁵⁴ *Guardianship and Administration Act 2000* (Qld) s 12(3).

³⁵⁵ *Ibid* s 5(d), sch 1, pt 1, principle 7.

³⁵⁶ *Convention on the Rights of Persons with Disabilities* art 12.

³⁵⁷ Queensland Civil and Administrative Tribunal, above n 154.

³⁵⁸ Office of the Public Advocate, above n 34.

³⁵⁹ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6NV, 6Y2, 6K6, 7GT, 7TZ (2014).

8.1.1 Change in circumstances

Interviewees commonly spoke of situations where there was a “change in the adult’s personal circumstances where it may be considered that he or she is vulnerable or at risk”.³⁶⁰ Significant and often unexpected health events such as a health crisis (e.g. stroke or a sudden illness) or an accident requiring hospitalisation (e.g. resulting in serious injury or acquired brain injury) were the most common examples raised by interviewees.³⁶¹ Even if the reason for hospitalisation was not connected to the person’s cognitive functioning, it could trigger a fulsome evaluation of their physical and cognitive health.³⁶²

Interviewees also frequently highlighted that changes in the existence or composition of a person’s informal support network, or the absence of an informal support network were a common trigger for applications to the Tribunal. Examples included where family lived a significant distance away from the person, death in the family, conflict between family members, other changes in family circumstances or dynamics, family members no longer being able to provide support (e.g. support needs increasing, ageing parents), and the breakdown of informal support networks.³⁶³

The need for a person to transition to supported accommodation or residential aged care was also a commonly identified change in a person’s life that often triggers an application to the Tribunal.³⁶⁴ The need to transition into alternative accommodation is sometimes, but not always, linked to a person’s stage of life.

8.1.2 Diagnosed condition and/or impairment

Interviewees highlighted that applications to the Tribunal were often made as a result of a person experiencing a decline in their cognitive function. The existence of a brain tumour or dementia were noted as being the most common reasons underpinning a person’s cognitive decline. Intellectual disability was also frequently identified as a cause of impaired decision-making capacity.³⁶⁵ A number of interviewees explained that mental illness and other mental health issues were also commonplace.³⁶⁶ Due to underlying mental health issues, a person’s capacity may become impaired for a significant period of time, or it may fluctuate throughout their life. One interviewee noted that substance abuse was also a common factor underpinning applications to the Tribunal.³⁶⁷

8.1.3 Life stage

Many interviewees explained that the ageing population was impacting the demand for guardianship and administration through a greater prevalence of age-related conditions such as dementia and the ageing carers of people with impaired decision-making capacity.³⁶⁸

³⁶⁰ Office of the Public Advocate interview FRY (2014).

³⁶¹ Office of the Public Advocate interviews FRY, GHP, JMF, KC8, MXS (2014).

³⁶² Office of the Public Advocate interview KC8 (2014).

³⁶³ Office of the Public Advocate interviews FRY, GHP, HB5, HPK, JMF, L5K, MDZ (2014).

³⁶⁴ Office of the Public Advocate interviews HB5, HPK, JMF, L5K (2014).

³⁶⁵ Office of the Public Advocate interviews FRY, GHP, HPK, JMF, KC8, K4R (2014).

³⁶⁶ Office of the Public Advocate interviews FRY, GHP, HPK, KC8 (2014).

³⁶⁷ Office of the Public Advocate interview K4R (2014).

³⁶⁸ Office of the Public Advocate interviews FRY, GHP, HB5, HPK, JMF, L5K (2014).

The other key life stage described by interviewees as a trigger for applications was young people with intellectual disability turning 18 years of age. This cohort included young people with intellectual disability who were transitioning from the care of the State.³⁶⁹

8.1.4 Third party organisations

It is common for applications for the appointment of an administrator, and to a lesser extent a guardian, to be made in circumstances where informal decision-making arrangements are not recognised or accepted by third party organisations.³⁷⁰ This may arise where an organisation has established arrangements that address obligations in respect of privacy legislation, legal and fiduciary responsibilities, and organisational policies and practices.

The most commonly identified scenarios by Tribunal members in which third party organisations sought evidence of legal authority from an informal decision-maker included:

- aged care providers requiring a formal order prior to a person entering their care;
- financial institutions requiring formal authority for a person to act on behalf of another;
- government agencies requiring a nominated liaison with whom they can interact with authority;
- service providers (e.g. telephone companies, electricity companies, disability support providers, real estate agents) requiring formal authority for a person to act on behalf of another person; and
- hospitals requiring authorisation to act.³⁷¹

The demands by third party organisations for legal decision-making authority were viewed by some stakeholders to primarily be a risk management strategy.³⁷² As one stakeholder explained, the guardianship system “is being used as an instrument of service provision in order to sanction a service provision related decision and manage legal risk – an extension of service provision.”³⁷³

“Hospitals and nursing homes are using legal processes in order to facilitate their operational efficiency.”³⁷⁴

Concerns centred on health care, aged care and other service providers, some of whom were seen to be skilled in securing guardianship and/or administration appointments.³⁷⁵ Example situations included hospitals making QCAT applications to assist with the discharge of patients from hospital, and aged care facilities pursuing the continued appointment of the Public Guardian to sign off on the annual support plans for residents.³⁷⁶

³⁶⁹ Office of the Public Advocate interviews GHP, HPK, KC8 (2014).

³⁷⁰ Office of the Public Advocate interviews FRY, GHP, HB5, HPK (2014).

³⁷¹ Office of the Public Advocate interviews 5CD, 6Y2, 6K6, 4DL, 7TZ, 44Y, 5XW, 5PJ, 6NV, 7GT (2014).

³⁷² Office of the Public Advocate interviews B9X, C2W (2014); Carers Queensland Inc., above n 24; Queensland Aged and Disability Advocacy Inc., above n 24.

³⁷³ Office of the Public Advocate interview C2W (2014).

³⁷⁴ Carers Queensland Inc., above n 24, 9.

³⁷⁵ Office of the Public Advocate interviews B9X, C2W (2014); Carers Queensland Inc., above n 24, 8; Queensland Aged and Disability Advocacy Inc., above n 24,.

³⁷⁶ Office of the Public Advocate interviews B9X, C2W, FRY (2014); Carers Queensland Inc., above n 24, 8-9.

Carers Queensland expressed concern about organisations giving precedence to administration requirements over the needs of individuals, commenting that this “diminishes the value of the informal care relationship and the contribution of informal carers in the life of an individual.”³⁷⁷ This can be a source of frustration for many carers who find that health and allied health practitioners seek the appointment of a substitute decision-maker “often without: consideration of the individual’s recovery or rehabilitation potential; [and/or] meaningful communication with the individual and their carers/family to ascertain the competency of informal support structures.”³⁷⁸

8.1.5 Conflict

Nine out of the ten QCAT members interviewed felt that it was common for guardianship and/or administration applications to be made in circumstances of family conflict.³⁷⁹ While conflict between family members appeared to be the most common form, conflict also involved attorneys and service providers. Separate to the issue of family conflict was family members not being able to agree about a particular decision. Conflict also occurred between family members and service providers, or between different service providers.³⁸⁰

One Tribunal member described the point at which the Tribunal becomes interested in situations involving conflict, “the Tribunal is well aware of the fact that families do not always get on and frankly we don’t care about that except when it impacts upon an adult, so if you come here and you don’t get on with each other and you haven’t liked each other for many, many years, that’s of no interest until it impacts on the ability for appropriate decisions to be made for the adult and that is when we do take a very keen interest in it.”³⁸¹

Conflict involving attorneys can occur in different contexts such as conflict between attorneys, or conflict between family and an attorney. Conflict can result from the questionable actions or inactions of an attorney. This was noted to primarily be in relation to financial abuse.³⁸² Enduring power of attorney matters are “often very contentious when somebody is very unhappy with the actions of the attorney or maybe the inactions of the attorney”.³⁸³

8.1.6 Protection

The desire to protect a person who may have impaired decision-making capacity can be an impetus for guardianship and/or administration applications to the Tribunal.³⁸⁴ For example, ageing parents who provide informal care for their adult child with disability may engage in transition planning for a future time when they are no longer able to provide care.

³⁷⁷ Carers Queensland Inc., above n 24, 9.

³⁷⁸ Ibid 8.

³⁷⁹ Office of the Public Advocate, above n 34.

³⁸⁰ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 6K6, 7GT (2014); JS [2013] QCAT 706; FDN [2011] QCAT 325; FPC [2012] QCAT 689.

³⁸¹ Office of the Public Advocate interview 6K6 (2014).

³⁸² Office of the Public Advocate interviews FRY, GHP, KC8, MDZ (2014); BMD [2013] QCAT 479.

³⁸³ Office of the Public Advocate interview GHP (2014).

³⁸⁴ Office of the Public Advocate interview 5CD (2014).

8.2 Unnecessary applications and appointments

Concerns that the last resort intervention of guardianship is overused and misapplied in response to circumstances discussed above are longstanding.³⁸⁵ 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.³⁸⁶

8.2.1 Requirements for an appointment

QCAT must follow a three-step process prior to appointing a guardian or administrator. First QCAT must be satisfied that the presumption of capacity has been rebutted for the person in respect of the matter at hand. Second, there must be a need for a decision or a likelihood that the person will subject their health, welfare or property to unreasonable risk. Importantly, it must be established that without the appointment of a substitute decision-maker, the person's needs will not be adequately met or their interests will not be adequately met.³⁸⁷ There must also be regard for the purpose and principles of guardianship legislation. QCAT must act in a way that is the least restrictive of the person.

8.2.2 Unnecessary applications

The majority of the Tribunal members who were interviewed felt that some of the guardianship and administration applications that come before them were unnecessary. Many members suggested that unnecessary applications generally related to guardianship matters rather than administration matters.³⁸⁸

Varied reasons underpinned these views and included the existence of informal and less restrictive decision-making options, a lack of work done with or by families to resolve the issue/s at hand, and a lack of urgency for a decision to be made.³⁸⁹ Such issues would often be identified after an initial examination of the situation and the provision of information.³⁹⁰

A further indication that unnecessary applications may be made is that several Tribunal members commented that the need for the appointment of a substitute decision-maker can dissipate in between the time at which application is lodged and when the matter is heard. The majority of examples were about accommodation decisions (e.g. transitioning to residential aged care) and crisis situations involving mental health issues.³⁹¹

QADA highlighted that "service providers often jump too quickly to make a QCAT application. This often leads to informal supports that the adult has in place for their own decision making being replaced by the appointment of the Public Trustee or the [Public Guardian]."³⁹²

³⁸⁵ Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 70, 1117.

³⁸⁶ D Tait and T Carney, above n 66, 445.

³⁸⁷ *Guardianship and Administration Act 2000* (Qld) s 12(1).

³⁸⁸ Office of the Public Advocate interviews 5CD, 5PJ, 5XW, 6NV, 6Y2, 6K6, 7GT, 4DL, 44Y, 7TZ (2014).

³⁸⁹ Office of the Public Advocate interviews 4DL, 44Y, 5PJ, 5CD, 5XW, 6Y2, 6K6, 7GT, 7TZ (2014).

³⁹⁰ Office of the Public Advocate interviews 4DL, 5PJ, 6K6 (2014).

³⁹¹ Office of the Public Advocate interviews 4DL, 44Y, 5XW, 6Y2, 7TZ (2014).

³⁹² Queensland Aged and Disability Advocacy Inc., above n 24, 2.

Some stakeholders raised issues about the rigorousness of QCAT processes and the extent to which there was procedural fairness. One interviewee stated that “there is no one to run a counter argument to any of the applications”³⁹³ and that “you really don’t get a mechanism whereby the motives of the person who is making the application are subject to rigorous consideration”.³⁹⁴

8.2.3 Unnecessary appointments

8.2.3.1 Need for a service or accommodation decision

Many stakeholders suggested unnecessary appointments most commonly related to guardianship matters e.g. support and accommodation services.³⁹⁵ These applications are commonly instigated by service providers who are often said to be “motivated by a need for certainty about ‘who is responsible’ for a particular decision or concern about those in the support network not being seen as reliable.”³⁹⁶ In other words, the Public Guardian “is appointed really for the purpose of sanctioning a service provision decision or accommodation decision” to assist service providers to manage their legal risk.³⁹⁷

8.2.3.2 Dealing with third party organisations

One of the most common reasons cited for potentially unnecessary appointments was the need to progress matters with third party organisations, for example government agencies, financial institutions, mental health providers and residential aged care providers. For some people, it can be impossible to progress matters (including matters that do not directly relate to an agreement or contract) without an appointment, and some people still incur difficulties after an order is made.³⁹⁸ This can become the ‘need’ for which an appointment is considered to be required.³⁹⁹

Tribunal members highlighted that guardianship applications are often lodged to appease residential aged care providers, however they are often dismissed by the Tribunal after finding that there is no real need for an appointment.⁴⁰⁰

8.2.3.3 Family conflict

Situations of family conflict where there was a view that the Tribunal had not sufficiently scrutinised or was unable to adequately work through the issue/s of contention were also identified as a source of sometimes unnecessary appointments. While it was recognised that such situations “are not black and white at all”,⁴⁰¹ it was suggested that on occasions “rather than the Tribunal working through the conflict and trying to unpack it, it just gets to the point where it is kind of too hard; off to the statutory guardian”.⁴⁰²

³⁹³ Office of the Public Advocate interview B9X (2014).

³⁹⁴ Ibid.

³⁹⁵ Office of the Public Advocate interviews B9X, C2W, DXC, 5CD, 5PJ, 5XW, 6NV, 6Y2, 6K6, 7GT (2014).

³⁹⁶ Queensland Aged and Disability Advocacy Inc., above n 24, 2.

³⁹⁷ Office of the Public Advocate interview QNC, C2W (2014).

³⁹⁸ Office of the Public Advocate interviews 5CD, 5XW, 44Y, 5PJ, 6NV, 6K6, 7GT, 7TZ (2014).

³⁹⁹ Office of the Public Advocate interview 5CD (2014).

⁴⁰⁰ Office of the Public Advocate interviews 5CD, 6K6 (2014).

⁴⁰¹ Office of the Public Advocate interview C2W (2014).

⁴⁰² Ibid.

QADA commented that “conflict with an existing support network is often approached by QCAT as requiring the formal appointment of the Public Trustee or the Office of the Adult Guardian [now Public Guardian]”.⁴⁰³ This view was supported by a stakeholder from within the guardianship system who commented that on occasions it seemed like,

“the Tribunal is appointing [the Public Guardian] for the purpose of family mediation or appointing [the Public Guardian] to sort the mess out so that another person can be appointed. In some cases where the Tribunal is appointing [the Public Guardian] to arbitrate between warring factions about what day and time of the week Party A visits Mum in the nursing home and what day and time... I mean it’s as simple as that. It really is. The Tribunal have views about the extent to which they can successfully resolve that before the appointment and we will have our views about the extent to which that could’ve, should’ve, would’ve been dealt with in a pre-appointment hearing.”⁴⁰⁴

8.3 Potential strategies for avoiding unnecessary applications and/or appointments

The following section offers discussion of some potential strategies to ensure that only necessary applications proceed to a hearing and that only necessary appointments are made. Some of these processes and initiatives could be viewed as a redistribution of existing resources, rather than activities requiring significant additional resourcing. Others may require supplementary resourcing, for example for strategies that propose additional activities for some statutory agencies.

8.3.1 Information and education

Some Tribunal members described how the provision of information to hearing participants about aspects of the guardianship system can avoid the need for an appointment. This can often result in applications being withdrawn or dismissed.⁴⁰⁵

Tribunal members explained that they often educate hearing participants about the statutory health attorney regime; purpose and implications of guardianship and/or administration; the protective jurisdiction of the Tribunal; the least restrictive alternative; the inability of the Tribunal to make appointments ‘just in case’ the need for a decision arises; and the provision of informal decision-making support and/or informal substitute decision-making.⁴⁰⁶

This educative approach to hearings appeared to assist with determining the need for an appointment and preventing unnecessary appointments. Although arguably the provision of such information should ideally occur prior to the application and/or the hearing process.

⁴⁰³ Queensland Aged and Disability Advocacy Inc., above n 24, 2.

⁴⁰⁴ Office of the Public Advocate interview QNC (2014).

⁴⁰⁵ Office of the Public Advocate interviews 4DL, 44Y, 5CD (2014).

⁴⁰⁶ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5XW, 6NV, 6Y2, 7GT (2014).

8.3.2 Tribunal registry processes

Some interviewees suggested that unnecessary appointments may be predicated by insufficient scrutiny in the course of assessing an application (both before and during the conduct of a hearing).⁴⁰⁷ This notion was supported by QADA who submitted that the “undue haste [of service providers] to proceed to an application is seemingly rarely met with much scrutiny from QCAT.”⁴⁰⁸

Guardianship and administration applications are first examined by the Registry of the Human Rights Division, which is responsible for the case management of applications. The Registry gathers and initially examines the relevant information associated with lodged applications to ensure that Tribunal members have adequate information at hearings.⁴⁰⁹

Enhanced scrutiny of case information by QCAT’s Registry may mitigate some unnecessary applications, however the Registry is not currently equipped to undertake such work.

The Human Rights Division Registry undertakes its work assiduously; it handled a record number of guardianship and administration applications in 2014-15.⁴¹⁰ However the imperative to process applications promptly may inhibit the Registry’s ability to interrogate applications in a more fulsome manner.

“QCAT can ask for material when it gets an application, but they are under enormous pressure down there. They have so many things to do and they are not funded or equipped to, in fact launch an investigation in relation to the application and conduct an active investigation and try and find the full range of the circumstances. They go on what is put before them. If there is something that is obvious or something in dispute, they will ask a question to get further material, but the whole process is not what you would call ideal in any way, shape or form for addressing the fundamental issue, ‘Is this a case where a guardian should be appointed? Is there any alternative arrangement that can be put in place?’”⁴¹¹

In supporting Queensland’s obligations under the Convention, and in upholding the underlying premises of Queensland’s guardianship system, the screening and case management of guardianship and administration applications in QCAT should be strengthened with a view to identifying unnecessary applications and diverting applications that may be resolved in a less restrictive manner. Such processes should also involve early engagement with the person subject to the application and connecting them to advocacy services where appropriate.

Some interviewees suggested that scrutiny of case information by QCAT’s Registry may mitigate some unnecessary appointments by either enhancing the information upon which decisions are made or identifying situations where the need for a hearing could be avoided or

⁴⁰⁷ Office of the Public Advocate interviews B9X, C2W, DXC (2014).

⁴⁰⁸ Queensland Aged and Disability Advocacy Inc., above n 24, 2.

⁴⁰⁹ Office of the Public Advocate interviews B9X, C2W, KC8 (2014); Queensland Civil and Administrative Tribunal, *Organisational structure* (24 March 2015) Queensland Civil and Administrative Tribunal <<http://www.qcat.qld.gov.au/about-qcat/organisational-structure>>; Queensland Civil and Administrative Tribunal, ‘Annual Report 2009-10’ (2010) 14.

⁴¹⁰ Queensland Civil and Administrative Tribunal, above n 154.

⁴¹¹ Office of the Public Advocate interview B9X (2014).

addressed via other means (e.g. alternative dispute resolution).⁴¹² One interviewee suggested that “there seems to be a bit of a gap between that kind of administrative checking off and then what happens in the Tribunal. There is a gap there. Something [is needed] whereby the information that has come in gets tested a little bit; you have got to do it very carefully. It’s not replacing what the Tribunal does, but it’s kind of put through a filter. And I think this happens to some extent, but we see lots of examples where it hasn’t happened.”⁴¹³

Enhancing current screening processes could lead to the identification of alternatives to guardianship and administration such as:

- providing information to equip applicants to undertake a supported or informal decision-making role (as done in hearings by some Tribunal members);
- advocating the pursuit of less restrictive interventions (e.g. enduring documents, informal support or decision-making, the statutory health attorney regime etc.); and/or
- redirecting applications from the hearing process to other processes like mediation or conciliation.

Such an approach was supported by Carers Queensland Inc. who endorsed “the introduction of enhanced initial screening processes, with the option of family conferencing, as a means of either diverting inappropriate applications or improving the guardianship and administration process for all parties.”⁴¹⁴ QADA also supported the concept, advocating that “QCAT could take a more active role in vetting applications relating to guardianship and administration in line with the principles of supported decision making and the General Principles more broadly”.⁴¹⁵

8.3.2.1 Obtaining the views of the person prior to the hearing

QADA suggested that guardianship and administration applications should not proceed to a hearing until the person who is the subject of the application has been given information about the matter in a way that they can understand it. The person must also have access to relevant and appropriate decision-making supports prior to the application being made.⁴¹⁶

QADA also considered that applicants must demonstrate that the person who is the subject of the application knows that it has been made, and must also explain why other less restrictive supports are not appropriate and/or able to continue.⁴¹⁷ QADA stated “just as an application will not proceed to hearing if a medical report has not been approved, an application should not proceed to hearing unless the above are addressed”.⁴¹⁸

Currently, the role of QCAT’s Registry is limited to notifying the person of the hearing and providing a copy of the application.⁴¹⁹

⁴¹² Office of the Public Advocate interviews B9X, C2W (2014).

⁴¹³ Office of the Public Advocate interview C2W (2014).

⁴¹⁴ Carers Queensland Inc., above n 24, 9.

⁴¹⁵ Queensland Aged and Disability Advocacy Inc., above n 24, 4.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid 3.

⁴¹⁹ *Guardianship and Administration Act 2000* s 118; *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 21; Queensland Civil and Administrative Tribunal, *Application for administration/guardianship appointment or review – Guardianship and Administration Act 2000: Form 10 Version 2* (2 April 2015) Queensland Civil and Administrative Tribunal, 3 <http://www.qcat.qld.gov.au/__data/assets/pdf_file/0005/100868/Form-10-Application-for-Administration-Guardianship.pdf>.

By contrast, the Tribunal Registry in New South Wales obtains the views of the person the application is about and assists in identifying how the person can best participate in the proceedings wherever possible.⁴²⁰ The benefits of the New South Wales approach are that:

- the Tribunal can have a higher degree of confidence that the person who is the subject of the application has truly been made aware of the application, its implications and the process that it lends itself to;
- the views of the person are made known to the Registry and can inform decision-making about what less restrictive alternatives to guardianship and/or administration might be appropriate and subsequently how an application should proceed; and
- the pre-hearing process better reflects the general principles in guardianship legislation and the principles of the Convention.

8.3.2.2 Forms

One mechanism to enable and enhance the screening process undertaken at a registry level may be to review or examine the current forms to ensure appropriate information is provided to facilitate screening. QCAT's application forms could be "updated to reflect a focus on the principles of supported decision making and the principles underpinning the *Guardianship and Administration Act*. This re-designed form would then enable QCAT to "checklist" compliance with these principles in relation to the application and hearing process."⁴²¹

This would help ensure that applicants are acting in a manner that reflects the philosophy of the *Guardianship and Administration Act*, particularly the rights-protection provisions in the Acknowledgments of the Act and the principles. It would also ensure that guardianship and administration is only pursued as a true last resort and that applicants demonstrate that the person who is the subject of the application has been "given all practicable help before anyone treats them as not being able to make their own decisions".⁴²²

8.3.2.3 Presence of the Public Guardian and Public Trustee at QCAT

One strategy to minimise unnecessary appointments made to public agencies may be to have officers from the OPG and Public Trustee work alongside the Tribunal Registry. The role of these officers would be to examine applications, ensure all other less restrictive alternatives are considered and, where appropriate, advocate for less restrictive alternatives to the appointment of a public decision-maker.

This practice occurred some years ago when representatives from the then Adult Guardian were based at the Tribunal to examine applications and, where appropriate, advocate for less restrictive alternatives to the appointment of the Adult Guardian.⁴²³ The process provided a safeguard for people who were the subject of applications and helped ensure that applications were rigorously considered. It also reduced the likelihood of unnecessary appointments to the Adult Guardian through ensuring that all other less restrictive alternatives were considered.

⁴²⁰ *Guardianship Act 1987* (NSW) s 14(2)(a); New South Wales Civil and Administrative Tribunal, *Application Process: Guardianship Division* (20 January 2015) New South Wales Civil and Administrative Tribunal <http://www.ncat.nsw.gov.au/Pages/guardianship/application_process/application_process.aspx>.

⁴²¹ Queensland Aged and Disability Advocacy Inc., above n 24, 5.

⁴²² *Mental Capacity Act 2005* (UK) pt 1, s 1(3) as cited in Queensland Aged and Disability Advocacy Inc., above n 24, 5.

⁴²³ Office of the Public Advocate interview PNJ (2014).

The Office of the Public Advocate in Victoria places a Liaison Officer at the Tribunal to provide advice and support to people at the centre of applications, those who make applications, family members etc. The Liaison Officer provides information to the Tribunal on the powers and functions of the Public Advocate and its ability to respond to requests of the Tribunal.⁴²⁴

8.3.3 Alternative dispute resolution

The term ‘alternative dispute resolution’ (ADR) is an umbrella term used to describe processes that can be used to resolve a matter via processes other than a traditional hearing. Types of ADR that may be used for guardianship and administration include:

- **Compulsory conference** – a hybrid of mediation and case management. It involves the conduct of a meeting aimed at reaching an agreement between parties to resolve issues and avoid the conduct of a hearing. The meeting may be chaired by a Tribunal member, adjudicator or the Principal Registrar.⁴²⁵
- **Mediation** – a structured process led by a mediator who assists parties to discuss their differences with a view to them reaching an agreement. The role of the mediator does not include finding fault with any of the parties or making a decision about the matter.⁴²⁶
- **Hybrid hearing** – a process where hearing and mediation processes are held on the same day with the same Tribunal member. At the hearing, all parties hear the evidence and submissions of the other parties and the member makes a decision. The member’s decision with reasons are noted but not revealed to the parties.⁴²⁷

If the parties resolve the matter during the subsequent mediation, the member will record the terms of the settlement, make the necessary orders and never reveal their decision. If an outcome is not reached through mediation, the member will inform the parties of their decision with reasons and make the necessary orders to give effect to the decision.⁴²⁸

8.3.3.1 Use of alternative dispute resolution

While the availability of ADR processes is pivotal to QCAT achieving its functions, the use of ADR as an alternative to the conduct of guardianship and administration hearings is minimal.

QCAT promotes the use of ADR processes as a key strategy to deliver accessible, quick and inexpensive dispute resolution services to Queenslanders and fulfil its statutory obligations under the *Queensland Civil and Administrative Tribunal Act 2009*.⁴²⁹ The use of ADR processes to resolve guardianship and administration matters however does not appear to be part of the

⁴²⁴ Office of the Public Advocate (Victoria) ‘Annual Report 2012-13’ (2013) 19.

⁴²⁵ Queensland Civil and Administrative Tribunal, ‘Annual Report 2009-10’ (2010) 9; Queensland Civil and Administrative Tribunal, *Compulsory conferences* (10 July 2012) Queensland Civil and Administrative Tribunal <<http://www.qcat.qld.gov.au/going-to-the-tribunal/types-of-proceedings/compulsory-conferences>>; Queensland Civil and Administrative Tribunal, *Compulsory conferences – an overview* (10 July 2012) Queensland Civil and Administrative Tribunal <<http://www.qcat.qld.gov.au/going-to-the-tribunal/types-of-proceedings/compulsory-conferences>>.

⁴²⁶ Queensland Civil and Administrative Tribunal, *Mediation* (17 July 2012) Queensland Civil and Administrative Tribunal <<http://www.qcat.qld.gov.au/going-to-the-tribunal/types-of-proceedings/mediation>>; Queensland Government, *Mediation* (29 July 2014) <<http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/mediation/>>.

⁴²⁷ Queensland Civil and Administrative Tribunal, *QCAT Practice Direction No 1 of 2012 – Hybrid hearings*, 3 September 2012.

⁴²⁸ *Ibid.*

⁴²⁹ *Queensland Civil and Administrative Tribunal Act 2009* s 4(b); Queensland Civil and Administrative Tribunal, ‘Annual Report 2011-12’ (2012) 5.

contemporary practice of the Tribunal. This is evidenced by the low number of ADR proceedings (Table 3) and a Practice Direction that implies that guardianship matters are only heard via a hearing or on the papers.⁴³⁰

Table 3: Number of compulsory conference and mediation proceedings

	2010-11	2011-12	2012-13	2013-14	2014-15
Compulsory conference	24	20	6	10	9
Mediation	0	0	0	0	0
Total	24	20	6	10	9

Source: Queensland Civil and Administrative Tribunal, Customised data request for the Office of the Public Advocate, 20 January 2016.

Note: Figures represent proceedings conducted anywhere in Queensland.

8.3.3.2 Benefits of alternative dispute resolution

Some of the potential benefits of ADR that may be of assistance to guardianship and administration matters include:

- the opportunity to resolve matters via processes that are confidential, off-the-record and less formal than a public hearing;
- the opportunity to open up communication between parties and enable them to gain a deeper understanding of each other's positions;
- the provision of information to educate parties about guardianship and administration and less restrictive options;
- a chance to preserve or restore a relationship or ensure that a terminated relationship is more amicable and that the focus is on the person's needs;
- greater scope for creative solutions and less restrictive options compared to a hearing;
- the potential avoidance of the time, effort and costs associated with a hearing;
- reduced wait times for hearings due to fewer hearings being scheduled; and
- fewer guardianship and administration appointments being made.⁴³¹

The views of the Tribunal members were mixed in relation to the impact that greater use of ADR processes would have on the number of appointments made by the Tribunal.⁴³² However, a number of the Tribunal members indicated that the use of ADR processes would be a flexible and useful response to applications involving conflicting parties (i.e. conflict between family members, conflict involving attorneys, or conflict with service providers) or families that are not able to reach agreement about a particular decision themselves.

⁴³⁰ Queensland Civil and Administrative Tribunal, *QCAT Practice Direction No 8 of 2010 – Directions relating to guardianship matters*, 23 June 2010, para 3; Queensland Civil and Administrative Tribunal, above n 154.

⁴³¹ Queensland Civil and Administrative Tribunal, *Compulsory conferences – an overview* (10 July 2012) Queensland Civil and Administrative Tribunal <http://www.qcat.qld.gov.au/__data/assets/pdf_file/0011/101171/compulsory-conference-overview.pdf>; Queensland Civil and Administrative Tribunal, *Compulsory conferences* (10 July 2012) Queensland Civil and Administrative Tribunal <<http://www.qcat.qld.gov.au/going-to-the-tribunal/types-of-proceedings/compulsory-conferences>>; Queensland Civil and Administrative Tribunal, *QCAT Practice Direction No 1 of 2012 – Hybrid hearings*, 3 September 2012; Queensland Government, *Mediation* (29 July 2014) <<http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/mediation/>>; Queensland Civil and Administrative Tribunal, 'Annual Report 2009-10' (2010) 10; Office of the Public Advocate, above n 34.

⁴³² Office of the Public Advocate, above n 34.

It was also suggested that ADR processes may be useful in circumstances where there is poor or no communication between those supporting a person who may have impaired decision-making capacity.⁴³³

While the extent to which Tribunal members collectively apply ADR processes and/or techniques is unknown, a number of the Tribunal members who were interviewed indicated that they attempt to incorporate ADR techniques into the hearings over which they preside. For example, conducting the hearing in an educative manner, having a discussion about known issues prior to commencing the formal aspects of the hearing, using ADR techniques to explore the need for an appointment, and identifying creative solutions to resolve matters.⁴³⁴

Carers Queensland Inc. runs the Family Support and Advocacy Service, which has facilitated sessions aimed at “ameliorating family conflict and determining arrangements with regard to the care and support of a vulnerable family member. Overall, the Advocacy Service has found that investing in good communication processes with all parties at the outset of the process pays dividends in the longer term”.⁴³⁵

In its report on the Review of Queensland’s Guardianship Laws, the QLRC conveyed support for greater use of ADR processes to resolve guardianship and administration matters.

The QLRC considered that “there are many benefits to be gained from a greater use of dispute resolution processes in suitable cases”⁴³⁶ and proceeded to outline numerous potential benefits to the individuals who are the subject of guardianship and administration proceedings and their support networks. The QLRC also highlighted that it is important for guardianship applications involving family conflict to be “identified at an early stage in the proceedings and assessed for their suitability for referral to dispute resolution”.⁴³⁷

The Queensland Parliamentary Committee examining the financial protections for older Queenslanders recommended the development of programs that delivered more participatory forms of justice, such as supported elder mediation.

More recently, in 2015, the Communities, Disability Services and Domestic and Family Violence Prevention Committee reported that alternative justice approaches are cost effective and can preserve family relationships.⁴³⁸ The Committee acknowledged the particular benefits of Supported Elder Mediation and recommended that “the Queensland Government develop programs to enhance the delivery, availability and accessibility of Supported Elder Mediation”.⁴³⁹ In response, the Queensland Government confirmed that it “will explore options for the development and implementation of Supported Elder Mediation”.⁴⁴⁰

⁴³³ Office of the Public Advocate interviews 5PJ, 5XW, 5CD, 6NV, 6K6 (2014).

⁴³⁴ Office of the Public Advocate interviews 4DL, 5XW, 6NV, 6Y2, 6K6, 7TZ (2014).

⁴³⁵ Carers Queensland Inc., above n 24, 9.

⁴³⁶ Queensland Law Reform Commission, above n 10, vol 3, 59 [14.198].

⁴³⁷ Ibid vol 3, 60 [14.200].

⁴³⁸ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 87, 136.

⁴³⁹ Ibid 137.

⁴⁴⁰ Queensland Government, above n 90, 4.

8.3.3.3 Potential barriers and limitations

The Tribunal can determine the manner in which it resolves matters. As such, ADR processes can be utilised to resolve guardianship and administration matters, and a person may request that a matter be resolved through procedures other than a hearing, for example via a conference.⁴⁴¹ However, anecdotal evidence suggests that there is low awareness among applicants, the people who are the subject of the matter, and other parties in respect of the different resolution mechanisms available. The various ways in which a matter may be resolved should be better promoted so that the most appropriate and least restrictive procedure can be identified and utilised.

The degree to which the person who is the subject of the Tribunal application is able to understand and participate in an ADR process may impact the appropriateness of the process and their ability to sign an agreement. For example, people with particular conditions or severe impairments may experience difficulties.

In some circumstances, there may also be a power imbalance whereby the person who is the subject of the application is vulnerable as a result of a condition, impairment or their circumstances. For example, a person may be experiencing an advanced stage of dementia, have a severe or profound intellectual disability, or be at risk of being unduly influenced by other parties.

According to the Tribunal members who were interviewed, the barriers to greater use of ADR processes include:

- a perception that ADR processes are not appropriate for the majority of guardianship and administration applications;
- the legislated obligation for the Tribunal to make a decision;
- the Tribunal's focus on a traditional hearing process rather than on contemporary ADR processes (in relation to guardianship and administration matters);
- the ease of achieving an outcome via a hearing compared to an ADR processes;
- a lack of training and education of members in ADR processes and techniques;
- the additional scheduling complexities associated with ADR processes;
- the constrained funding and resources of the Tribunal; and
- an unwillingness among some Tribunal members to utilise ADR techniques and/or processes.⁴⁴²

There were contrasting opinions among Tribunal members in relation to the value of the use of ADR for guardianship and administration matters. Some members indicated that constrained resources would inhibit additional use of ADR processes while others indicated that such processes were cost effective. Some members were unwilling to utilise ADR techniques while others incorporate such techniques into their hearing processes.⁴⁴³

⁴⁴¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 4(b), 28(1).

⁴⁴² Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6Y2, 6K6, 7GT (2014).

⁴⁴³ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5XW, 6NV, 6Y2, 6K6, 7TZ (2014).

8.3.4 Considering the impact of decision-making support

While there were mixed views among Tribunal members as to whether the provision of informal support directly assists a person’s decision-making capacity, the need for an appointment or both, the majority of Tribunal members highlighted that many appointments may be negated by the provision of adequate informal decision-making support.⁴⁴⁴

The need for an appointment can be negated by the provision of adequate informal decision-making support.

QADA has “been involved in a number of QCAT decisions where no formal appointment was made because there was no need for any decisions at that time or there was no need for a formal appointment because an informal support network, sometimes including service providers, could provide informal decision making support”.⁴⁴⁵ However, examples such as this “are not representative of the bulk of what QADA has observed in practice. Instead, we often find that an adult’s right to make all the decisions that they could be supported to make for themselves is neither upheld nor prioritised”.⁴⁴⁶

This highlights the importance of thorough exploration of the informal support that is or could be available to a person with impaired capacity and any other less restrictive options that may be appropriate. Initial exploration of informal supports, along with the provision of educative information, should occur as part of QCAT’s Registry case management processes. Further exploration should also occur during the assessment of an application by a Tribunal member.

8.3.5 Integrated services and case management

Gaps in social service systems and the lack of a coordinated social service system contribute significantly to the demand for guardianship.⁴⁴⁷

As with most Australian States and Territories, Queensland’s human service system is complex, fragmented and difficult to navigate, particularly for people with cognitive impairment and/or impaired decision-making capacity. The coordination of supports is crucial for many people, particularly those who experience difficulties in accessing support services. Case management and service coordination can mean the difference between a person accessing the supports they need or ‘falling through the cracks’ of the system.

An increase in the provision of case management to vulnerable Queenslanders, particularly those with complex support needs, may lead to better personal outcomes and change the potential trajectory of some people into the guardianship system. This view was supported by various stakeholders who explained that the demand for guardianship was influenced by:

- a paucity of social supports and services (i.e. the rationing of services);
- the existence of service gaps and the challenges in accessing support to bridge these gaps (e.g. through case management, which involves working with individuals, their families and support network to identify and access information and/or supports);

⁴⁴⁴ Office of the Public Advocate interviews 4DL, 5CD, 5XW, 6NV, 6K6, 7GT, 44Y, 7TZ (2014).

⁴⁴⁵ Queensland Aged and Disability Advocacy Inc., above n 24, 2.

⁴⁴⁶ Ibid.

⁴⁴⁷ Queensland Advocacy Incorporated, above n 24, 12-13.

- bureaucracy that can exclude informal supporters from involvement in decision-making processes; and
- the fragmented nature of local communities and the depletion of community spirit.⁴⁴⁸

“A large percentage of [Public Guardian] appointments are because of systemic failure.”⁴⁴⁹

In contrast, only six out of the ten QCAT members that were interviewed thought that the need for guardianship and/or administration could be reduced by providing people with greater access to the social supports and services they need. More particularly, only four QCAT members felt that a greater investment in case management support could reduce the number of guardianship and/or administration applications.⁴⁵⁰ It was suggested that, despite greater case management, there would still be decisions to be made about services and support for people with impaired capacity.⁴⁵¹ In the words of one Tribunal member, “I don’t see how social supports and services will help with decision-making. Someone still has to make a decision. The fact that there might be choices magnifies the idea that they have to make decisions. I hope there is going to be more support for people with disabilities, but that doesn’t mean that there is going to be a less need for guardianship appointments.”⁴⁵²

The application of guardianship in lieu of appropriate case management is likely to be disproportionate to the needs of many people and contributes to the pressures on the guardianship system.

This issue not only drives guardianship applications, but is of concern to the OPG in relation to the people for whom it acts as guardian. The OPG recently noted three key issues and challenges facing the agency in relation to guardianship. The first of these was the lack of service and accommodation options for the people for whom the OPG acts as guardian. This requires the OPG to expend resources “on advocacy, negotiation and escalation with government funding bodies and non-government service providers, in order to achieve suitable outcomes which protect a person’s rights and interests”.⁴⁵³

Other key issues were the social exclusion and marginalisation of Queensland adults subject to public guardianship, and their unmet disability support needs. Some people who are subject to a public guardianship order have significant and complex support needs. Further to their needs not being prioritised by government, these people experience “routine exclusion from appropriate, mainstream services”.⁴⁵⁴ The OPG suggested that their clients who suffer such exclusion and disadvantage would benefit from “intensive case management and service coordination activities”.⁴⁵⁵

⁴⁴⁸ Office of the Public Advocate interviews B9X, C2W (2014); Queensland Advocacy Incorporated, above n 24, 12-13.

⁴⁴⁹ Office of the Public Advocate interview 8LN (2014).

⁴⁵⁰ Office of the Public Advocate, above n 34.

⁴⁵¹ Office of the Public Advocate interviews 44Y, 5PJ, 7TZ (2014).

⁴⁵² Office of the Public Advocate interview 5PJ (2014).

⁴⁵³ Office of the Public Guardian, above n 104, 40.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

8.4 The least restrictive order

Queensland legislation requires that “the right of an adult with impaired capacity to make decisions should be restricted and interfered with to the least possible extent”.⁴⁵⁶ Further, the principles require that a person’s right to participate in decisions, and the need to preserve the person’s right to make their own decisions, must be taken into account and that “a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult’s rights”.⁴⁵⁷ There are various ways in which least restrictive orders can be made to promote decision-making autonomy. The use of screening and ADR strategies may be one mechanism by which creative opportunities for making the least restrictive order could be identified.

There are a number of other ways that QCAT can ensure that guardianship and administration orders observe the least restrictive principle such as:

- not making a formal appointment i.e. dismissing or inviting the withdrawal of applications where the matter can be resolved by means that are less restrictive than a guardianship and/or administration order (e.g. through the statutory health attorney regime, enduring power of attorney documents, informal arrangements, etc.);
- restricting appointments to the matter/s for which the person has impaired capacity;
- appointing member/s of the person’s support network in preference (where possible) than the Public Guardian or Public Trustee; and
- ensuring that appointments are made for the shortest time necessary and are subject to regular review.

8.4.1 Not making a formal appointment

Tribunal members may not make a guardianship and/or administration order for a number of reasons including: determining that a person has decision-making capacity; finding that a person is able to make decisions with support from others; uncovering that there is no real need for a decision to be made; and identifying that the matter can be resolved by means less restrictive than a Tribunal order. For example, during the hearing of *JS*, the presiding member explained that “sometimes this tribunal, even although we receive applications, does not make the formal appointment of a guardian, because the tribunal finds there’s no need. The informal arrangements can work well, and the tribunal under the legislation must be as least intrusive”.⁴⁵⁸

8.4.2 Making matter specific orders

While past practices often involved making plenary (or full) guardianship orders, where guardians exercised decision-making responsibility for all personal decisions on behalf of the person, there is now an emphasis on guardianship (and to a lesser extent administration) orders being limited to those matters for which the person lacks capacity and in which a decision is needed.

⁴⁵⁶ *Guardianship and Administration Act 2000* (Qld) s 5(d).

⁴⁵⁷ *Ibid* sch 1, pt 1, principle 7(1)-(3); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(1)-(3).

⁴⁵⁸ *JS* [2013] QCAT 706.

8.4.2.1 Plenary vs matter specific orders

There is a large contrast between the extent to which QCAT makes plenary guardianship and administration orders to the public agencies. As seen in Table 4, almost all (96%) administration appointments made to the Public Trustee are plenary. For the people who are subject to these orders, it means that the Public Trustee is their substitute decision-maker for all financial and property matters and that they have no legal authority in relation to such matters.

In contrast, plenary appointments account for only 8% of guardianship appointments made to the Public Guardian. Very few of the people who are subject to a guardianship order made to the Public Guardian are denied legal authority in all areas of personal and health care decision-making. The majority of people subject to a public guardianship order retain their legal authority for some personal and health care matters.

Table 4: Plenary and matter specific orders made to public agencies

	Public Guardian	Public Trustee
Plenary orders	8%	96%
Matter specific/limited orders	92%	4%
Total	100%	100%

Sources: The Public Trustee, Customised data request for the Office of the Public Advocate, 7 October 2014; Office of the Adult Guardian 'Annual Report 2014-15' (2015) 22.

Notes: Data for the Public Guardian was current as at 30 June 2015. Data for the Public Trustee was current as at 7 October 2014.

A plenary administration order involves the person losing legal capacity to make all financial decisions, and arguably is not consistent with article 12 of the Convention.

Many of the Tribunal members who were interviewed indicated that they felt more assured that the person's needs would be met if a plenary order for administration was made. There appeared to be two main reasons that underpinned their position: the overall protective jurisdiction of the Tribunal; and difficulties implementing the compartmentalisation of financial matters.⁴⁵⁹ A number of Tribunal members took comfort that people subject to administration orders, despite having lost their legal authority for all financial matters, would continue to have an opportunity to participate in decision-making. These members trusted that appointed administrators, particularly the Public Trustee, would always apply the least restrictive principle when undertaking their role.⁴⁶⁰ The law requires that administrators undertake their role in a manner that is least restrictive and maximises the involvement of the person subject to the order.

8.4.2.2 Simple versus complex decisions

The *Guardianship and Administration Act* acknowledges that the capacity of a person to make a decision may differ according to the complexity of the decision to be made.⁴⁶¹ Theoretically, orders may be limited to decisions of particular complexity. In practice however, it seems compartmentalising simple and complex decisions can be a challenge.

⁴⁵⁹ Office of the Public Advocate interviews 44Y, 5PJ, 6NV, 6K6, 6Y2, 7GT, TTZ (2014).

⁴⁶⁰ Office of the Public Advocate interviews 5PJ, 6NV, 6Y2, 6K6, 7GT (2014).

⁴⁶¹ *Guardianship and Administration Act 2000* (Qld) s 5(c)(ii).

8.4.2.2.1 Guardianship

Interestingly, there were varied perspectives among the interviewed Tribunal members as to whether the *Guardianship and Administration Act* enabled guardianship appointments to be restricted to complex decisions in relation to a type of matter. Most members were of the view that the Act allowed for orders to be limited to complex matters, although some did not think the Act provided for delineation within types of matters. Others were unsure.⁴⁶²

Some Tribunal members indicated that it was rare for guardianship appointments to be restricted to complex decisions regarding a type of matter and others expressed a reluctance to make such appointments. The underpinning reasons included the:

- very individualised nature of ‘simple’ and ‘complex’ decisions;
- difficulty associated with delineating the decisions that could be considered as ‘simple’ versus ‘complex’;
- need to ensure an order was workable (i.e. that it can be implemented without confusion or difficulty);
- need for an appointment often being centred on complex types of decisions (as opposed to simple decisions); and
- importance of ensuring the person subject to the order is not vulnerable to risk.⁴⁶³

Tribunal members indicated that the challenges associated with dissecting simple and complex decisions in relation to particular matters can result in orders that are not workable or practical.⁴⁶⁴ In some circumstances, this may prevent the needs of the person who is subject of the order from fully being met or their interests protected. Another consequence raised by a Tribunal member was that a higher likelihood of unworkable orders may result in subsequent applications brought before the Tribunal.⁴⁶⁵

8.4.2.2.2 Administration

Nine out of the ten Tribunal members who were interviewed were of the view that the *Guardianship and Administration Act* enabled administration appointments to be restricted to complex financial decisions. One member did not think that the Act enabled such appointments.⁴⁶⁶

Akin to guardianship decisions, Tribunal members cited a number of challenges in delineating simple and complex financial decisions. These included:

- having sufficient information and evidence to reliably determine if a person can make simple versus complex decisions;
- the complexities around determining and compartmentalising ‘simple’ versus ‘complex’ financial decisions for a person;

⁴⁶² Office of the Public Advocate, above n 34; Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6NV, 6Y2, 6K6, 7GT, 7TZ (2014).

⁴⁶³ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6NV, 6Y2, 6K6, 7GT, 7TZ (2014).

⁴⁶⁴ Office of the Public Advocate interviews 4DL, 44Y, 5PJ, 5XW, 6Y2, 7GT, 7TZ (2014).

⁴⁶⁵ Office of the Public Advocate interview 6Y2 (2014).

⁴⁶⁶ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6NV, 6Y2, 6K6, 7GT, 7TZ (2014).

- the need to ensure administration orders are workable i.e. that they can be implemented without confusion or difficulty;
- the need for appointments to align with the protective jurisdiction of the Tribunal i.e. ensure that the needs and interests of the person who will be subject to an order will be met and that they will not be exposed to unacceptable risk;
- ensuring that subsequent applications to the Tribunal will not be required, particularly in relation to determining whether a particular financial decision would be considered 'simple' or 'complex' for a person; and
- the focus of making an appointment being centred on 'need' rather than on what decisions are simple or complex from the perspective of the person.⁴⁶⁷

While some members indicated that they regularly make orders appointing an administrator for complex financial decisions (e.g. managing large lump sums of money), overall there was a preference to appoint administrators for all financial matters.⁴⁶⁸ QADA submitted however that they have been able to successfully advocate for administration orders to be limited to complex financial matters, however such appointments were not the norm.⁴⁶⁹ QADA further advised that in their experience the general principles "often seem to be dismissed in favour of arguments relating to the protection of the adult and 'duty of care'".⁴⁷⁰

A Tribunal member described an administration review hearing which highlights the particular complexities involved in segregating simple from complex decisions and the risks that may eventuate for the people that Tribunal members see on a day-to-day basis. It also illustrates the impact on a person's overall financial position of being given authority to make numerous simple financial decisions.

The Tribunal member presided over a review hearing for an administration appointment that centred on a highly articulate and well supported young woman with a diagnosed mental illness. The young woman lived in a residential service and had a network of informal supporters. At a previous hearing, she was deemed to have capacity for simple but not complex financial decisions. She retained control of her pension, however an administrator was appointed to manage a sum of money that she had inherited.

The woman made decisions to purchase furniture, gym equipment and ongoing storage for these purchases. The purchases were made as the woman believed she would soon leave the residential service, which was not a decision that the OPG would endorse. The young woman also purchased meals to be consumed at the residential service when meals were already provided as part of her accommodation costs. The woman submitted each invoice to her administrator for payment.

Three to five years later, the review hearing established that there were little funds remaining in the woman's inheritance. In response to the member's questions about the depletion of the woman's inheritance, the administrator indicated that the woman was deemed to have capacity to make simple financial decisions. As such, the invoices provided by the woman were paid.

In retrospect, the young woman and her administrator may have not fully understood the cumulative nature and impact of her decisions. She made many 'simple' purchases and financial decisions that resulted in a significant reduction in her financial assets.⁴⁷¹

⁴⁶⁷ Office of the Public Advocate interviews 4DL, 44Y, 5PJ, 5XW, 6Y2, 6K6 (2014).

⁴⁶⁸ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6NV, 6Y2, 7GT, 7TZ (2014).

⁴⁶⁹ Queensland Aged and Disability Advocacy Inc., above n 24, 2.

⁴⁷⁰ Ibid 3.

⁴⁷¹ Office of the Public Advocate interview 44Y (2014).

8.4.3 Appointing the most appropriate guardian/administrator

If QCAT decides to appoint a guardian or administrator, they must then identify the most appropriate appointee. The *Guardianship and Administration Act* sets out the considerations that Tribunal members must take into account when determining the most appropriate appointee, which include for example the general principles and whether the potential appointee is likely to apply them; and whether the person subject to the order and the potential appointee are compatible.⁴⁷²

Given these considerations and that the general principles emphasise the importance of maintaining a person's supportive relationships, arguably there should be a greater emphasis on choosing an appointee who is already part of the person's support network, rather than the Public Guardian or Public Trustee who does not have a personal relationship with the person. In the case of the appointment of a guardian, the *Guardianship and Administration Act* stipulates that the Public Guardian should only be appointed as a last resort, that is only if there is no other appropriate person available.⁴⁷³

8.4.3.1 Public vs private appointments

As shown in Table 5, there is typically a greater number of public guardianship appointments than private appointments. This trend was reversed in 2014-15, when for the first time in many years, public guardianship appointments (41%) accounted for a lower proportion of guardianship appointments when compared to private/other appointments (59%).

Table 5: Private and public guardianship appointments

	2010-11	2011-12	2012-13	2013-14	2014-15
Private/other appointments	992	1,134	1,259	1,098	1,436
Public appointments	1,382	1,431	1,400	1,282	998

Source: Queensland Civil and Administrative Tribunal, Customised data request for the Office of the Public Advocate, 20 January 2016.

Over the past five years, there has been a progressive decline in the proportion of administration appointments made to the Public Trustee in comparison to private/other appointments (Table 6). In 2010-11, public appointments accounted for 50% of all administration appointments whereas they accounted for 43% in 2014-15.

Table 6: Private and public administration appointments

	2010-11	2011-12	2012-13	2013-14	2014-15
Private/other appointments	1,230	1,497	1,766	2,174	2,086
Public appointments	1,360	1,475	1,536	1,580	1,542

Source: Queensland Civil and Administrative Tribunal, Customised data request for the Office of the Public Advocate, 20 January 2016.

In 2014, a new option for decision-making support emerged in Queensland – a fee-for-service guardian. The private organisation offering this type of service proposes to charge a fee for the supply of 'case management' type services that provide decision-making support to a person.

⁴⁷² *Guardianship and Administration Act 2000* (Qld) s 15(1).

⁴⁷³ *Ibid* s 14(2).

The Office of the Public Advocate is not aware of any guardianship appointments made by the Tribunal to a fee-for-service guardian.

While the *Guardianship and Administration Act* does not preclude guardianship appointments to fee-for-service guardians, it requires that the Tribunal consider the appropriateness of all potential appointees. This includes consideration of the extent to which a person's interests are likely to conflict with a proposed appointee.⁴⁷⁴ Arguably, the remuneration of a fee-for-service guardian may be considered to be a conflict of interest in some circumstances. The research identified that some stakeholders opposed appointments being made to fee-for-service guardians.⁴⁷⁵

To protect the rights and interests of people with impaired decision-making capacity, comprehensive consideration must be given to whether, as a matter of policy, Queensland's guardianship system should allow for fee-for-service guardians and, if so, what safeguards should be implemented to mitigate against the risks associated with such appointments.

8.4.3.2 Why public appointments may be preferred

Interviews with Tribunal members highlighted a number of reasons why a public appointment might be preferred over a private one.⁴⁷⁶ One common reason was that a family member or other supportive person was unwilling to take on the role of a formal substitute decision-maker. This might occur for numerous reasons, including that the potential appointee:

- believes that their relationship with the person will be negatively impacted by them being a substitute decision-maker;
- is comfortable having a loving and supportive role, but is uncomfortable making decisions on behalf of the person;
- is unable to make a decision about the particular matter (e.g. deciding whether their ageing parent should move into residential aged care);
- believes that the role of substitute decision-maker will involve conflict situations with other people (e.g. family members) who are not supportive of the person subject to the order; and
- does not feel they can adequately fulfil the role of substitute decision-maker due to other responsibilities (e.g. raising their own children).⁴⁷⁷

The research highlighted a number of other circumstances where the Public Guardian and/or Public Trustee might be considered to be the most appropriate appointee. These included:

- the absence of an informal support network;
- a significant degree of family conflict, breakdown, dysfunction and/or neglect;
- concern that members of the person's support network will not undertake the role adequately, apply the general principles and/or act in a manner consistent with the proper care and protection of the person;

⁴⁷⁴ Ibid ch 3 pt 1 s 15.

⁴⁷⁵ Office of the Public Advocate interview B9X (2014); Queensland Advocacy Incorporated, above n 24, 15; Carers Queensland Inc., above n 24, 11.

⁴⁷⁶ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6NV, 6Y2, 6K6, 7GT, 7TZ (2014).

⁴⁷⁷ Office of the Public Advocate interviews 4DL, 44Y, 6NV, 6Y2, 6K6 (2014).

- the supporters of the person subject to the order are ageing themselves and may experience difficulty in making decisions;
- the person subject to the order had suffered financial abuse at the hands of a family member and another family member would be required to pursue strategies to recover funds from the family member responsible for the abuse;
- the poor or limited understanding of the substitute decision-making role and the related responsibilities;
- vulnerability of the potential appointee to sabotage, abuse or exploitation themselves;
- the onerous requirements of a guardian for restrictive practice matters; and
- the nature, size and complexity of the person's assets that need to be managed.⁴⁷⁸

8.4.3.3 Benefits of a public appointment

A public guardianship or administration appointment can offer specific safeguards for some vulnerable people.

These safeguards can be particularly important for people who are socially isolated and/or without family support, or whose family is in significant conflict; whose family and/or supporters are in conflict with service providers; or those with a history of having experienced abuse, neglect and/or exploitation. Some of the following benefits of a public appointment were cited by stakeholders:

- decision-making independence and objectivity (particularly in crisis situations);
- detailed understanding of relevant legislation and regulatory frameworks;
- the identification and obtainment of financial benefits and entitlements (e.g. Centrelink benefits, Total and Permanent Disablement payments);
- access to professional legal and specialist services and advice at commercially agreed rates, which can result in professional advice that may not otherwise be obtainable;
- the skills of decision-makers who are experienced in navigating complex circumstances and/or service systems to benefit the people for whom they represent (e.g. financial, legal, disability services, restrictive practices, health, housing, taxation), which may lead to greater options and/or better outcomes for a person;
- the weight and power of the State Government underpinning requests and/or decisions (this may assist with advocating for a person and can mean that there may be consequences for not complying with requests and/or decisions);
- greater transparency and accountability (e.g. Ombudsman, judicial review) around the decisions made and the processes by which they were made; and
- greater support for a person's autonomy and self-determination in situations where a person's family or support network are restrictive of the person's right to make their own decisions and/or participate in decision-making.⁴⁷⁹

⁴⁷⁸ Office of the Public Advocate interviews C2W, FRY, B9X, JMF, GHP, HPK, L5K, MDZ, MXS, KC8, HB5, DXC (2014); Office of the Public Advocate, above n 51; Office of the Public Advocate, above n 34; Queensland Aged and Disability Advocacy Inc., above n 24, 2.

⁴⁷⁹ Office of the Public Advocate interviews B9X, C2W, PF3, DXC (2014); Carers Queensland Inc., above n 24, 11.

8.4.3.4 Issues with public appointments

Despite these perceived benefits, guardianship and/or administration orders made to public agencies are, arguably, one of the most restrictive decision-making interventions that can be imposed upon a person who experiences difficulty with making and/or communicating a decision. Under these arrangements, the right of a person to make and action their own decisions about a type of matter is transferred to a public officer, who often has comparatively limited knowledge about the person, their history and circumstances.

The appointment of a public guardian or administrator should only be a true intervention of last resort.

The following stakeholder perspectives about the substitute decision-making undertaken by public agencies emerged from the research:

- the high work load of public guardians negatively impacting the time afforded to understand a person and their circumstances, and including the person in decision-making;
- decisions being driven by expediency and cost-efficiency rather than appropriately engaging and involving the person with impaired capacity;
- poor application of the principles;
- the devaluing and/or exclusion of informal supports;
- a tendency to favour the proper care and protection of a person over maximising the person's autonomy; and
- poor opportunity for people with impaired capacity to participate in decision-making.⁴⁸⁰

Three quarters (75%) of the OPG staff who participated in the online survey felt that their high case load inhibited the time that they have to engage in the decision-making process for each person.⁴⁸¹ In practice, some guardians have a case load of between 40 and 60 people.⁴⁸² This can present daily operational challenges for the agency⁴⁸³ and arguably impact the ability of public decision-makers to apply the principles, including principle seven, which outlines an approach to substitute decision-making that involves the person as much as possible.

The research highlighted the various perceptions about the role of public decision-makers. For example, many people in the community, and in sectors such as health and in government, perceived the role of public decision-makers to include individual advocacy and the enforcement of decisions.⁴⁸⁴ Almost all (94%) of the OPG staff who participated in an online survey indicated that the people for whom they make decisions did not understand the role that they have as a public decision-maker.⁴⁸⁵ Further, it was suggested that many people did not understand the fiduciary role and responsibilities of the Public Trustee.⁴⁸⁶

⁴⁸⁰ Queensland Advocacy Incorporated, above n 24, 4, 16; Queensland Aged and Disability Advocacy Inc., above n 24, 3.

⁴⁸¹ Office of the Public Advocate, above n 51.

⁴⁸² Office of the Public Advocate interviews B9X, C2W (2014); Office of the Public Advocate, above n 51.

⁴⁸³ Office of the Public Advocate interview NH9 (2014).

⁴⁸⁴ Office of the Public Advocate interviews C2W, NH9 (2014).

⁴⁸⁵ Office of the Public Advocate, above n 51.

⁴⁸⁶ Office of the Public Advocate interview DXC (2014).

A stakeholder from within the guardianship system believed that the expectations of people subject to public guardianship and/or administration orders (and those of their families and carers) can be inadvertently and unrealistically set by other agencies with whom the person interacts.⁴⁸⁷

It is likely, however, that the actions of public decision-makers themselves also contribute to confusion and misperceptions about their role. To ensure the proper care and protection of the people they represent, public decision-makers do, on occasion, act as an advocate and/or case manager in seeking to generate appropriate service and support options for the person for whom they are appointed. The need for a public decision-maker to advocate or case manage in this way may also be more prevalent in regional areas where there is a paucity of services.⁴⁸⁸

8.4.4 Order for the shortest time necessary

QCAT has significant flexibility (and, given the general principles, an onus of responsibility) to make guardianship and administration orders for the shortest time necessary. One way to minimise the limitations placed upon a person who is subject to a guardianship and/or administration order is to create a self-limiting order. This means that the order concludes once a specific decision has been made rather than after a specific period of time.

Nine out of the ten Tribunal members who were interviewed were aware that the *Guardianship and Administration Act* provided for the creation of self-limiting orders.⁴⁸⁹ Many members attributed this to section 12 of the Act, which allows for orders to be made subject to any appropriate terms; the requirement of 'need' for an appointment; and other provisions in the Act that ensure any decision-making intervention is undertaken in a way that is the least restrictive of a person's rights.⁴⁹⁰

The majority of members indicated, however, that they either rarely or never made self-limiting orders. Some indicated this was because the option wasn't at the front of their mind or included on hearing forms.⁴⁹¹

Despite self-limiting orders not being common practice, members advised that these orders had been used in relation to legal matters, accommodation decisions, the sale of property (e.g. the family home), changing service providers, insurance claims (e.g. personal injury claims), superannuation matters, obtaining a passport, and health matters (e.g. decision to have an operation).⁴⁹²

Some members implied that it can be difficult to determine when an appointment should end in relation to an event or specific decision and that they need to be mindful that an order does not end prior to the matter being fully settled.⁴⁹³ In relation to the sale of a house, for example, the Tribunal member would need to consider whether a person had the capacity to manage the proceeds from the sale of a house, not just whether they had capacity to oversee

⁴⁸⁷ Office of the Public Advocate interview NH9 (2014).

⁴⁸⁸ Office of the Public Advocate interviews, B9X, NH9 (2014).

⁴⁸⁹ Office of the Public Advocate, above n 34.

⁴⁹⁰ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6K6, TGT (2014).

⁴⁹¹ Office of the Public Advocate interviews 4DL, 44Y, 5CD, 5PJ, 5XW, 6Y2, 6K6, TGT, 7TZ (2014).

⁴⁹² Office of the Public Advocate interviews 44Y, 5CD, 5PJ, 5XW, 6Y2, TGT, 7TZ (2014).

⁴⁹³ Office of the Public Advocate interviews 5PJ, 7TZ (2014).

the process of selling the house. Another example provided by a member was in relation to the settlement of a person in residential aged care. They expressed concern about making an order that concludes when the person is settled in a residential aged care accommodation placement when there is a chance that soon after the placement the person may indicate that they are unhappy with their new place of residence and express a desire to be re-located.⁴⁹⁴

Tribunal members suggested a couple of alternative approaches to self-limiting orders such as estimating how long the appointment might be required so that, at that time, the matter will be reviewed by the Tribunal with a view to determining whether or not a further appointment is required. Alternatively, the Tribunal could make an appointment for a short period of time, after which the order concludes.⁴⁹⁵

8.5 Towards least restrictive guardianship and administration orders

The *Guardianship and Administration Act* provides for QCAT to make guardianship and administration orders subject to any terms that are considered to be appropriate.⁴⁹⁶ This gives the Tribunal significant scope and flexibility in relation to the breadth, length and structure of orders. The provision enables 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.

Queensland's guardianship legislation offers significant scope and flexibility in relation to making orders that are the least restrictive of a person's rights, however this capability may not always be utilised.

Yet the research has identified that these creative mechanisms for making the least restrictive order are not often used.⁴⁹⁷

There are however examples of how such flexibility may work, particularly when guided by the general principles, to minimise the restrictiveness of guardianship and administration orders on adults and promote their decision-making autonomy. QADA highlighted an example of this strategy, in relation to an administration order, explaining that,

"QADA was able to successfully advocate for a QCAT Tribunal member to make an order appointing the Public Trustee which was only 12 months in duration and included a direction that the Public Trustee consider trialling increasing financial autonomy for the adult over the course of the order. The hope was that over that period of time the adult could be supported to take up increasing responsibility for their own financial decision making and that, after twelve months, the Public Trustee would no longer be needed".⁴⁹⁸

⁴⁹⁴ Office of the Public Advocate interviews 4DL, 44Y, 5PJ (2014).

⁴⁹⁵ Office of the Public Advocate interviews 5CD, 6Y2, 6K6 (2014).

⁴⁹⁶ *Guardianship and Administration Act 2000* (Qld) s 12(2).

⁴⁹⁷ Office of the Public Advocate interviews B9X, C2W, FRY, HB5, HPK, JMF, K4R, L5K, MDZ, NH9 (2014); Queensland Aged and Disability Advocacy Inc., Advisory Group case examples for the Office of the Public Advocate, 4 February 2015.

⁴⁹⁸ Queensland Aged and Disability Advocacy Inc., above n 24, 1.

Such conditions can also form part of guardianship orders. Although from another jurisdiction (in the United States), the following case provides an excellent example of the types of orders that could also be made in Australian jurisdictions, including Queensland.

The case concerned a 29-year-old woman with Down Syndrome who also had a diagnosed intellectual disability.

She had a persistent history of irresponsibility with personal finances, stemming from an “inability to comprehend fundamental money management principles”.⁴⁹⁹ It was also found that she had failed to take adequate steps to protect her own safety, and had in the past “placed herself in jeopardy both by under-dosing and over-dosing on medication”.⁵⁰⁰

While expert evidence found that her adaptive living skills were in the low functioning range, the conclusion was that “with appropriate support” she would not meet the statutory definition of ‘incapacitated’ and could manage her property and financial affairs. Although the evidence did not support that she could function fully independently.⁵⁰¹

While the Court found that the woman lacked capacity to “meet the essential requirements for health, safety, or therapeutic needs without the assistance of a guardian at this time,”⁵⁰² the Court accepted her counsel’s argument that, with support, the woman may one day be able to conduct her own affairs.

While the Court made an order for guardianship, the order included the following terms:

1. The guardianship shall expire one (1) year from the date of the entry of this Order;
2. The Guardians shall have the power to make medical and safety decisions on behalf of the Respondent, giving due deference to the wishes of the Respondent;
3. The Guardians shall have an assessment of the Respondent’s basic needs and services conducted by a professional knowledgeable in the Intellectual Disability Medicaid Waiver services, such as the Community Services Board, and arrange for their practical implementation within a reasonable time from the entry of this Order.
4. For the duration of the guardianship, the Guardians shall continue to assist Medicaid Waiver service providers and guide Respondent in obtaining the maximum benefit appropriate for her needs under the Waiver.
5. The Guardians shall transition the Respondent, in accordance with her wishes, from her group home setting to a private residential environment.
6. The Guardians shall assist the Respondent with understanding financial issues and to the extent possible develop money management skills with monitoring and guidance.
7. The Guardians shall support and foster the Respondent in rebuilding and strengthening her relationships with her biological family, including Petitioners, her natural father, her grandmother, half and step siblings, and others.
8. The Court strongly recommends that the Guardians continue to provide supportive decision making assistance in anticipation of the termination of the guardianship order at the end of one year.⁵⁰³

The court added, “At the end, it is the Court’s opinion that the Respondent will be able to work with staff provided by the Medicaid Waiver, who will be providing the supportive decision making skills and increased self-reliance that will allow her to adapt and succeed independently.”⁵⁰⁴

⁴⁹⁹ *Ross v. Hatch*, No. CWF120000426P-03 (Va. Cir. Ct. Aug. 2, 2013) [5].

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid* [4].

⁵⁰² *Ibid* [6].

⁵⁰³ *Ibid* [1-10].

⁵⁰⁴ *Ibid* [10].

Importantly, applying flexible approaches is highly individualised and must be considered on a case-by-case basis taking into account the unique situation and circumstances of the person. There are multiple ways by which to promote creative and less restrictive orders for guardianship and administration. First, they could be pursued for by a person's representative or advocate. Second public decision-makers (i.e. the Public Guardian and the Public Trustee) can advocate for the review of orders, where a new appointment is made on less restrictive conditions. Finally, Tribunal members themselves can make such orders. The ability to make such orders could arguably be enhanced by the increased use of screening processes in the registry, the involvement of the person in the proceedings and/or through the use of ADR.

8.6 Recommendations

Recommendation 16: The Queensland Government enhance QCAT's registry processes to ensure that, as far as possible, only those applications genuinely requiring a Tribunal hearing proceed accordingly. To enable this, consideration might be given to:

- improved screening of applications;
- contact with the person who is the subject of the application ahead of proceedings (where possible);
- contact with other parties/applicants ahead of proceedings to obtain further information and/or provide information to ensure the appropriateness of the application;
- involvement of an officer of the Public Guardian or Public Trustee in providing information and/or options to applicants;
- redirecting relevant matters to ADR;
- reviewing QCAT application forms for guardianship and administration matters to ensure that all relevant information is obtained, including information that confirms that the application is being made as a last resort (following all other practical attempts to assist the person by other less restrictive and more supportive means), and that assists to identify whether the matter might be resolved using ADR processes;
- undertaking an analysis of the benefits and costs of enhanced screening processes; and/or
- reviewing legislation to ensure that any barriers are appropriately mitigated.

Recommendation 17: QCAT should review its systems and processes to ensure that they appropriately recognise and attend to the specialist nature of capacity determination, its relationship to deciding guardianship and administration matters, and the potentially significant consequences that these processes have upon the rights of a person. Members presiding over such matters must have appropriate knowledge and expertise in hearing such matters, and means by which to promote and share their learnings about hearing processes and about the systems with which people who may have impaired decision-making interact. This will promote greater consistency in decision-making.

Recommendation 18: In applying a least restrictive approach to guardianship and administration, and seeking to ensure the sustainability of the guardianship system, QCAT should develop orders that include terms and conditions requiring the provision of decision-making support to the person subject to the order, with an expectation that the person will be assisted by their guardian or administrator to develop their decision-making skills and autonomy during the period of the order.

9 Decision-making by public guardians and administrators

When QCAT appoints a guardian or administrator, one option is to appoint the Public Guardian or Public Trustee. In the case of the Public Guardian, QCAT can only make this appointment if there is no one else appropriate (from the person's own support network for example) to undertake this role.⁵⁰⁵

Within the terms of a QCAT order, the Public Guardian can undertake substitute decision-making with respect to personal decisions and the Public Trustee with respect to financial decisions.⁵⁰⁶ In practice, the day-to-day decision-making for an adult are primarily delegated to officers within the offices of the Public Guardian and Public Trustee.

The Public Guardian and Public Trustee operate in a legislative framework that acknowledges that "an adult with impaired capacity has a right to adequate and appropriate support for decision-making".⁵⁰⁷ Further, the general principles require that a substitute decision-maker recognise and take into account a person's right to participate in decisions that affect them, and take into account the importance of preserving a person's right to make decisions.⁵⁰⁸ As such, a person must be given any necessary support and access to information that is required to enable their participation, and the person's views and wishes must be sought and taken into account.⁵⁰⁹

Yet, the extent to which public guardians and administrators may be able to provide the kind of support necessary to ensure their clients can participate in decision-making can be impacted by a number of factors including, but not limited to, the level of contact they have with their client, the size of their case load, and the geographic location of their client.

In this section of the report, the term 'client' is used to describe a person for whom the Public Guardian and/or Public Trustee has been appointed as decision-maker. The term 'survey respondents' is used to describe the people who responded to an online survey.

Limited information from the survey of Public Trustee staff is presented in this section due to the low survey response rate. The survey data concerning the OPG is considered to be generally representative of the Adult Guardianship Team at the OPG.

⁵⁰⁵ *Guardianship and Administration Act 2000* (Qld) s 14(2).

⁵⁰⁶ *Ibid* s 33.

⁵⁰⁷ *Ibid* s 5(e).

⁵⁰⁸ *Ibid* sch 1, pt 1, principle 7(1)-(2); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(1)-(2).

⁵⁰⁹ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7(1)-(3); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(1)-(3).

9.1 Public decision-makers – roles and responsibilities

9.1.1 The Public Guardian and Public Trustee

While the Public Guardian has a number of important roles and functions with respect to people with impaired decision-making capacity, one of those functions includes acting as a guardian for personal matters if appointed by QCAT.⁵¹⁰ As at 30 June 2015, the Public Guardian had over 2,300 guardianship clients, which represents an 11% increase on 2013-14.⁵¹¹

The Public Trustee delivers a number of financial and legal services, including administration of deceased estates, management of trusts, creation of wills as well as financial administration for people with impaired decision-making capacity where appointed by QCAT.⁵¹² As at 30 June 2015, the Public Trustee was acting as administrator for 8,403 Queensland adults.⁵¹³

9.1.2 Participation of persons in decision-making

9.1.2.1 Legal obligation to provide support

In Queensland, as in all other states and territories, guardianship legislation imposes an obligation on guardians and administrators to perform their functions or exercise their powers in a way that promotes the care and protection of people under guardianship.⁵¹⁴

Yet, unlike many jurisdictions, public decision-makers also have an obligation to take into account the right of people to participate to the greatest extent practicable in decisions affecting their lives and the importance of preserving, to the greatest extent practicable, the right of a person to make their own decisions. This includes providing the people with any necessary support and access to information to enable their participation and seeking and taking into account, to the greatest extent practicable, the views and wishes of the person.⁵¹⁵ Guardians and administrators must also act in a way least restrictive of a person's rights.

As such, clients of public substitute decision-makers must be given any necessary support and access to information that is required to enable their participation, and the person's views and wishes must be sought and taken into account.⁵¹⁶

⁵¹⁰ *Public Guardian Act 2014* (Qld) s 12.

⁵¹¹ The Public Guardian, above n 104, 37.

⁵¹² *Public Trustee Act 1978* (Qld); The Public Trustee of Queensland, 'Annual Report 2014-2015' (2015) 38.

⁵¹³ The Public Trustee of Queensland, above n 512, 8.

⁵¹⁴ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7(5); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(5).

⁵¹⁵ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1 principle 7; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7.

⁵¹⁶ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7(1)-(3); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(1)-(3).

9.1.2.2 National standards for public guardianship and administration

The national standards for public guardianship and administration articulate the minimum level of service that people should receive from public decision-makers and serve as a benchmark for state agencies.⁵¹⁷ The national standards for guardianship that relate to the participation of a person in personal decision-making are:

- providing information in an appropriate format about the role of the guardian and the framework that guides decision-making;
- seeking and considering the views of the person (and other relevant parties), giving effect to the wishes of the person where possible;
- considering and advocating for the least restrictive alternative that meets the needs of the person;
- assessing the available options and advocating for the best option for the person in terms of quality of life and opportunity;
- making decisions that fulfil legislative and agency requirements and communicating those decisions to the person and key parties in a meaningful manner; and
- instigating appointment reviews or revocations in the best interests of the person, ascertain the views of the person during a review, and advocate for the least restrictive alternative for the person.⁵¹⁸

The national standards for the participation of a person in financial decision-making include:

- keeping the person (and other key people as appropriate) informed about their financial affairs in appropriate formats;
- seeking and considering the views of the person in relation to major financial decisions;
- assisting the person to understand decisions and make decisions themselves;
- providing every appropriate opportunity for the person to take control of the management of some or all of their financial affairs;
- making decisions in the best interests of the person, however in doing so such decisions should be similar to those the person would have made prior to being subject to an administration order;
- acting professionally e.g. treat the person with respect and dignity, communicate appropriately, never impose personal views, respect privacy etc.;
- limiting the decision-maker's involvement in the person's financial affairs to what is required by the administration order; and
- instigating appointment reviews, variations or revocations in the best interests of the person and advocate for the least restrictive alternative for the person.⁵¹⁹

⁵¹⁷ Australian Guardianship and Administration Council, *National Standards of Public Guardianship* (10 June 2015), Australian Guardianship and Administration Council, 1 <http://www.agac.org.au/images/stories/national_stands_public_guardianship.pdf>; Australian Guardianship and Administration Council, *National Standards For Financial Managers* (10 June 2015), Australian Guardianship and Administration Council, 1 <http://www.agac.org.au/images/stories/nat_stds_fin_mgrs.pdf>.

⁵¹⁸ Australian Guardianship and Administration Council, *National Standards of Public Guardianship* (10 June 2015), Australian Guardianship and Administration Council <http://www.agac.org.au/images/stories/national_stands_public_guardianship.pdf>.

⁵¹⁹ Australian Guardianship and Administration Council, *National Standards For Financial Managers* (10 June 2015), Australian Guardianship and Administration Council <http://www.agac.org.au/images/stories/nat_stds_fin_mgrs.pdf>.

9.2 Participation and support in practice

The ability and inclination of a person subject to public guardianship to participate in decision-making is highly individual. Similarly, the experience that people have had as a participant in decision-making about their own lives will differ from person to person. Some people might be engaged throughout the decision-making process, that is their initial views and wishes may be sought and expressed, or they may be involved in the process of gathering and weighing information and then involved in making the final decision. Others may be involved at particular stages and some not at all.

The OPG and the Public Trustee have client management systems that enable them to efficiently service clients and offer continuity of service. While these systems are client-centric, they are only one part of appropriately and adequately ensuring client participation in decision-making. Authentic engagement of clients in decision-making processes currently rests with individual guardians and administrators.

In practice, however, the extent to which guardians and administrators are able to engage clients to participate in decision-making is impacted by: the effectiveness of training and development initiatives, available resources, high caseloads, tight deadlines for decisions, organisational culture, and for some, a mechanistic and task-orientated approach to decision-making. All these can prevent the proper application of guardianship legislation and constrain the rights of people with impaired decision-making capacity.

9.2.1 Seeking the views and wishes of clients

9.2.1.1 Public guardians

Unsurprisingly, all survey respondents (100%) felt that they sought the views of their clients about each decision they make to the greatest extent possible. Almost all respondents (94%) also felt that they, to the greatest extent possible, consult with the relevant interested parties about each decision that they make.⁵²⁰

The most common approaches used to seek to understand the views of the clients were directly communicating with clients and other people involved in their client's life. To a lesser extent, respondents also sought to understand the views of their clients through examining available documents and trying to determine what the client would have done when/if they had capacity.⁵²¹

Over three-quarters (77%) of survey respondents indicated that they liaised with their clients when gathering the information required to make a decision, while almost all (93%) reported that they are in contact with their clients during the process of making a decision or reaching a conclusion. The main reasons for engaging with clients during these processes were to seek the views and wishes of their client, seek general information from the client to inform the decision, discuss the available options with their client and to discuss the decision or choice that the guardian proposed to make.⁵²²

⁵²⁰ Office of the Public Advocate, above n 51.

⁵²¹ Ibid.

⁵²² Ibid.

Respondents sometimes experienced difficulties with some of the activities relating to gathering information to inform a decision. These included identifying the options available to their client and the factors that constrained the decision or the available options, gathering information that was relevant to the decision, and obtaining the views of their client and other interested parties. The majority of survey respondents indicated that they either ‘sometimes’ or ‘seldom’ experienced difficulty identifying the factors or information that was relevant to a decision (i.e. distinguishing between relevant and irrelevant information), applying the relevant legislation or assessing the merits of each option available to their client.⁵²³

The research identified a number of barriers to public guardians adequately consulting with their clients. These included:

- clients not being able to participate in decision-making due to their inability to understand the decision and/or its consequences;
- the geographic location of clients;
- the limited amount of time available to make a decision;
- difficulty locating or contacting clients;
- the number of clients for whom they are actively making decisions;
- clients not being willing to engage with their appointed decision-maker;
- difficulties communicating with clients e.g. communication impairment;
- the amount of time required to engage with clients; and
- determining the appropriate way in which to communicate with clients.⁵²⁴

In upholding the principle requiring the proper care and protection of a client, a public guardian might override the views and wishes of a client when making a decision.⁵²⁵ This tension was experienced by the majority of public guardians when making decisions.⁵²⁶ This situation may occur for any number of reasons though most commonly occurs in situations where there are concerns for a client’s personal safety.⁵²⁷

The issues predicating any other difficulties experienced by public guardians were varied and included:

- the limited timeframe in which the decision was required;
- the complex nature of the decision/s to be made;
- poor quality information provided by interested parties (e.g. family, friends, health professionals);
- the range of options available to their client (either limited or extensive options);
- a lack of information provided by interested parties;
- issues relating to communicating with family members, carers, friends or other people involved in their client’s life;

⁵²³ Ibid.

⁵²⁴ Ibid.

⁵²⁵ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7(5).

⁵²⁶ Office of the Public Advocate, above n 51.

⁵²⁷ Office of the Public Advocate interview NH9 (2014).

- issues related to communicating with their client;
- issues related to communicating with service providers or other professionals who provide support to their client;
- the complex nature of each option available to their client;
- difficulty identifying the factors that are directly relevant to the decision; and
- difficulty understanding the contextual information relevant to the decision.⁵²⁸

9.2.1.2 Trust officers

In addition to making financial decisions, Trust Officers have a fiduciary role and associated obligations. Their primary role is to preserve and/or improve a person's income and assets, however this must be done considering the views and needs of the person and their support network.⁵²⁹ They must consider the current and future financial needs of a person when making financial decisions, for example, ensuring a person has adequate money to ensure their long-term financial security and quality of life.⁵³⁰

Upon the commencement of an appointment, the Public Trustee will develop an individualised plan for the future management of the client's property and finances. The processes of the Public Trustee require that the client and other relevant persons in their support network participate in the planning process. This typically occurs via a face-to-face meeting.⁵³¹

The client's current and future needs are discussed at the meeting as well as the client's goals, aspirations and general interests. One aim of the meeting is to ensure that the client's basic and essential needs can be met within their budget. The meetings generally involve a conversation with clients and their supporters. Trust Officers use a guide developed by the Public Trustee to ensure that critical aspects of the client's lifestyle and finances are discussed.⁵³²

This can be a delicate process as some clients and/or their supporters may not initially be pleased with having had an administrator appointed. In such situations Trust Officers will attempt to build rapport with the client and their supporters and find the best way for the Public Trustee to work with the client and their stakeholders to ensure the financial interests of the client are protected.⁵³³

It can take a number of months to finalise an initial financial plan for a client due to the time required to access and properly account for a client's income, assets, financial commitments and liabilities. A financial plan may have several iterations, depending on the extent and quality of information provided to the Public Trustee.⁵³⁴

⁵²⁸ Office of the Public Advocate, above n 51.

⁵²⁹ *Guardianship and Administration Act 2000* (Qld) s 7(d); Office of the Public Advocate interview ZS9 (2014); The Public Trustee, *The Public Trustee of Queensland – Our Role as Administrator* (20 March 2015), The Public Trustee <<http://www.pt.qld.gov.au/files/role-administrator.pdf>>.

⁵³⁰ *Guardianship and Administration Act 2000* (Qld) s 35; The Public Trustee, *The Public Trustee of Queensland – Our Role as Administrator* (20 March 2015), The Public Trustee <<http://www.pt.qld.gov.au/files/role-administrator.pdf>>; Australian Guardianship and Administration Council, above n 519.

⁵³¹ The Public Trustee, 'Financial Management Manual' (2014) Section 15.

⁵³² Office of the Public Advocate interview PF3 (2014).

⁵³³ *Ibid.*

⁵³⁴ Office of the Public Advocate interview 3NC (2014).

In addition to financial figures, a client's financial plan and related documents are informed by personal information about the client, such as their lifestyle, values, health and support needs, future care needs and support network.⁵³⁵ Financial plans and related documents are dynamic and based on the available information at any given point in time.

The role of Trust Officers then focuses on the day-to-day management of their client's finances and making financial decisions as required. Once finalised, a client's financial plan and budget forms the basis for responding to client enquiries or changes in the client's situation; attending to regulatory, legal and/or financial aspects of the client's financial matters; undertaking a review; or making ad hoc financial decisions.⁵³⁶

The degree of autonomy a client may exercise within their administration appointment is partially impacted by the amount of discretionary funds they have available. The Public Trustee must ensure that their fiduciary obligations are met, however if there are any available discretionary funds once the client's financial needs are attended to, the client may be given the freedom to make minor purchases on items such as clothing and entertainment.⁵³⁷

The research provided little insight into the way in which public administrators engage with clients, the difficulties they encounter and the reasons that might underpin any difficulties that are experienced. Unfortunately, the very low response rate of the online survey of public administrators meant that the findings could not be published.

The Public Trustee's client management system prompts officers to undertake tasks to communicate with clients and seek their views and wishes, however it is only one enabler of client participation in decision-making. Similar to public guardians, the degree to which the views and wishes of clients are sought rests heavily with individual officers and the manner and extent to which they engage with clients. Appropriately seeking the views and wishes of clients is not solely achieved via the client management system.

9.2.2 Developing the decision-making ability of clients

The Public Guardian and Public Trustee are required to apply the principles and, as such, the agencies have responsibility to provide or facilitate the necessary support to enable their clients to participate in decision-making. However, it is questionable whether these agencies have a responsibility to develop the decision-making ability of their clients.

Guardianship legislation does not require the Public Guardian or Public Trustee to develop the decision-making skills and ability of clients. The roles of the Public Guardian and Public Trustee are to make substitute decisions, and the Public Trustee has a further role to preserve and/or improve the finances and assets of clients. These public decision-makers are not charged with the training or development of clients' decision-making skills and are therefore not funded or resourced to undertake such activities.

Despite this, 55% of respondents to the survey of public guardians felt that they had a responsibility to help their clients develop their decision-making ability. Further to this, 40% of respondents indicated that they spent some time with their clients to help them improve their

⁵³⁵ The Public Trustee, 'Financial Management Manual' (2014) Section 15.

⁵³⁶ Office of the Public Advocate interview PF3 (2014).

⁵³⁷ Ibid.

decision-making. This however, seemed to be an ad hoc practice that was partially dependent on the time that a guardian had available.⁵³⁸

Supporting clients to make their own decisions is a role in which the Transitions Team at the Office of the Public Guardian specifically engages. The aim of the Transitions Team is to assist clients, where appropriate, to gain greater decision-making autonomy and/or transition to less restrictive decision-making supports. As such, this team has a focus on increasing the participation of clients in decision-making and providing decision-making support.⁵³⁹

9.3 Issues affecting guardians and administrators in supporting client decision-making

9.3.1 Public guardians

A number of pressures impact on public guardians that arguably affect their ability to provide decision-making support for their clients. These include the individual case load of each officer and the limited face-to-face contact that guardians have with their clients. In addition, to engage in such practices there needs to be both training and guidance to undertake this role, along with a policy and/or practice mandate.

While almost half (47%) of survey respondents had a case load of 40-49 clients, the majority were actively undertaking decision-making processes for fewer than 20 clients (Table 7). Arguably, making personal and health decisions for this number of people could be considered to be a sizeable case load. Determining an appropriate or ideal case load for public guardians is difficult and is complicated by many factors including the complexity of client circumstances, the type and number of decisions to be made for clients, client demographics etc.

Table 7: Organisational support from the Office of the Public Guardian

	Current case load	Current decision-making processes
Less than 10 clients	3%	30%
10-19 clients	0%	53%
20-29 clients	17%	3%
30-39 clients	7%	0%
40-49 clients	47%	0%
50 or more clients	13%	3%
Unsure	13%	10%
Total	100%	100%

Base: All respondents (N=30). Source: Office of the Public Advocate, Survey of Public Guardians (2014).

Note: Percentages may not total 100% due to the rounding of figures to whole numbers.

The type and complexity of a decision, coupled with a high case load and tight timeframes for making a decision, can also impact a guardian’s capacity to provide decision-making support to a client.

⁵³⁸ Office of the Public Advocate, above n 51; Office of the Public Advocate interview ZS9 (2014).

⁵³⁹ Office of the Public Advocate interview NH9 (2014).

Almost half (43%) of survey respondents were reportedly in contact with the majority of their clients at least once a month, with a further 40% in contact with the majority of their clients at least once every 2-3 months. Seven percent (7%) of survey respondents indicated that they were in contact with most of their clients less than every 6 months. The most common methods of contact between public guardians and their clients were telephone (97%), in person (43%), and email (30%).⁵⁴⁰ One interviewee advised that telephone communication was considered to be adequate and appropriate for some clients, however not for the majority of clients and therefore represents a challenge for the office.⁵⁴¹

Almost 63% of survey respondents indicated that they visit the majority of their clients at least once every 10-12 months. A further 23% visited most of their clients at least every 6 months. A small percentage (3%) of survey respondents visited the majority of their clients less than every 12 months, which is under the 12-month benchmark adopted by the OPG (based on the National Standards of Public Guardianship).⁵⁴² The ability of public guardians to visit their clients is primarily influenced by their case load, geographic location of their clients, and the availability of organisational resources.⁵⁴³

Only 37% of survey respondents felt that the induction and training they receive was adequate preparation for their daily role. Almost half (47%) did not feel adequately prepared for their role after induction and training. An increase in the effectiveness of staff training would be beneficial to both staff and clients, acknowledging that anticipating all possible scenarios for substitute decision-making is a complex task. Fifty-seven percent (57%) of survey respondents felt well supported in their role, while 32% did not feel well supported. The majority (79%) of survey respondents knew where to access information and/or assistance when they need it.⁵⁴⁴

9.3.2 The Public Trustee

Public Trust Officers also experience a range of pressures that may impact on their ability to provide decision-making support. Regrettably, the survey data regarding caseloads and contact with clients is not publishable.

However, one significant difference between the Public Guardian and Public Trustee processes is the heavily automated nature of the processes relating to public administration. The Public Trustee has invested heavily in the development of a client management system, which is considered to be the most advanced in Australia in terms of public administration. The system enables the Public Trustee to manage daily operations and minimise the likelihood of systemic failures. For example, the system provides a structure and process for financial decision-making and ensures officer activities fall within the appropriate financial delegation.⁵⁴⁵

The system enables Trust Officers to manage higher caseloads than would otherwise be possible in the absence of such a system.⁵⁴⁶ The work of Trust Officers is generally task-orientated and prompted by the client management system. For example, the system prompts

⁵⁴⁰ Office of the Public Advocate, above n 51.

⁵⁴¹ Office of the Public Advocate interview ZS9 (2014).

⁵⁴² Office of the Public Advocate, above n 51; Office of the Public Advocate interview ZS9 (2014); Australian Guardianship and Administration Council, above n 518, 1.

⁵⁴³ Office of the Public Advocate interview ZS9 (2014).

⁵⁴⁴ Office of the Public Advocate, above n 51.

⁵⁴⁵ Office of the Public Advocate interviews 2SS, Q4B (2014).

⁵⁴⁶ Office of the Public Advocate interview 2SS (2014); The Public Trustee, 'Financial Management Manual' (2014).

Trust Officers for activities that need to be undertaken for clients (e.g. preparing a financial plan, sending a letter, etc.) and the specific tasks that comprise that activity (e.g. prompts for specific items to be included in a financial plan, identifies which letter template is appropriate to use).⁵⁴⁷ As a result, there is little need for Trust Officers to seek guidance on issues as they are skilled to handle any tasks relating to their delegation level.⁵⁴⁸

Akin to the Office of the Public Guardian, the Public Trustee has developed a training system for their staff. Due to a low response rate, the survey results regarding staff's perception of the adequacy of this training is not available.

9.4 Enhancing decision-making support from public agencies

Survey respondents from the Office of the Public Guardian indicated that even within existing constraints they try and engage clients as much as possible in the decision-making process. However their ability to actually build the decision-making capacity of their clients was limited.⁵⁴⁹ As such, particularly within the OPG, the Transitions Team play an important role, actively supporting certain people subject to guardianship to transition to less restrictive orders, or pursuing a revocation of their order where appropriate.

With more resources, and a stronger mandate, further progress could potentially be made in:

- identifying people who may benefit from the provision of greater support for decision-making;
- providing support for decision-making, including linking people with appropriate people to provide such support; and
- actively pursuing the review of public guardianship and administration orders to seek less restrictive or revocation of orders.

A key strategy being trialled in other jurisdictions is to provide support to people, including those who are subject to public guardianship and/or administration, to develop their decision-making capacity. Government trials of supported decision-making have been conducted in many Australian jurisdictions. Refer to section 12.2 for further discussion about these trials.

The trials have shown that Australia can deliver on the intent of article 12 of the Convention by enhancing the legal capacity of some of the people subject to guardianship and administration. They also demonstrated that the provision of decision-making support can be:

- a viable alternative to substitute decision-making undertaken by public agencies; and
- a valuable addition to the decision-making that occurs under public guardianship and administration orders.⁵⁵⁰

⁵⁴⁷ Office of the Public Advocate interview 3NC (2014).

⁵⁴⁸ Office of the Public Advocate interview 2SS (2014).

⁵⁴⁹ Office of the Public Advocate, above n 51; Office of the Public Advocate interview 3NC (2014).

⁵⁵⁰ Westwood Spice (for the Department of Family and Community Services (New South Wales)), 'My life, my decision: An independent evaluation of the Supported Decision Making Pilot' (2015); Margaret Wallace, *Evaluation of the Supported Decision-Making Project* (November 2012) Office of the Public Advocate (South Australia), 5 <http://www.opa.sa.gov.au/files/batch1376447055_final_supported_decision_making_evaluation.pdf>; Office of the Public Advocate (South Australia), *Supported Decision making* (2015) Office of the Public Advocate (South Australia)

Given the results of the Australian trials, there is arguably a need to provide both a greater imperative and mandate, as well as designated resources, if the principles underpinning Queensland's guardianship legislation are to be fully realised. There is also a need for available supporters in the case of some people who are subject to public guardianship and/or administration. Sadly, a submission from an advocacy organisation highlighted that many of their clients have been subject to public administration orders for long periods of time and have never been offered or provided with support.⁵⁵¹

9.5 Recommendations

Recommendation 19: The Queensland Government must 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.

Recommendation 20: Wherever possible and appropriate, all agencies within Queensland's guardianship system must seek to develop, maintain and/or strengthen an adult's support network to minimise the extent to which the person and those who support the person are reliant on these agencies for purposes other than that for which they have been appointed.

<http://www.opa.sa.gov.au/resources/supported_decision_making>; ADACAS Advocacy, *Spectrums of Support: A Report on a project Exploring Supported Decision Making for People with Disability in the ACT* (September 2013), ACT Disability, Aged Care and Carer Advocacy Service <http://www.adacas.org.au/decision-support/copy_of_SupportedDecisionMakingProjectFinalReport.pdf>.

⁵⁵¹ Queensland Aged and Disability Advocacy Inc., above n 24.

10 Monitoring and safeguards

10.1 Support networks

Arguably, some of the best safeguards are those that exist in response to the specific needs of a person who may have impaired decision-making capacity, for example having a close network of people involved in the person's everyday life. These people may be family members, friends, neighbours, paid and unpaid support providers, members of social groups/clubs or other trusted persons.

Support networks are a critical safeguard for people with impaired decision-making capacity.

The people with whom the vulnerable person regularly interacts observe various aspects of the person's life and some may be well positioned to identify any changes to the person's health, wellbeing or circumstances. These people may also detect if decisions are being made by the person, their informal support network or appointed decision-maker that do not appear consistent with the person's personality, views or typical behaviour. Decisions that appear to be outside the person's ordinary behaviour could indicate that those decisions may have been made under duress, without the person's involvement or against their wishes.

People should be encouraged to first raise such matters with the person concerned or someone else who may be in a position to help validate or dispel the concerns. The community should also be made better aware of where and how they can more formally raise concerns about the potential abuse, neglect, exploitation or mistreatment of people with impaired decision-making capacity.

As discussed in section 3.3.2.3, social isolation is a key risk factor for abuse, neglect and exploitation and may be experienced by people with impaired decision-making capacity. It can also be a trigger for guardianship and administration, particularly for people who do not have access to people who can provide informal support for decision-making.

10.2 Information

10.2.1 People with impaired decision-making capacity

There is no obligation to ensure that people who may have impaired capacity are provided with information about their rights (with the exception of people who are subject to restrictive practices), including their rights to: representation at the Tribunal; be included in decision-making processes; and request a declaration of capacity or an appointment review. Pursuing different courses of action, such as attending a Tribunal hearing or requesting a review of an appointment, is partially dependent on the person knowing about and exercising that right with or without support.

People who are the subject of proceedings or decisions must be provided with information about their rights.

Information about various aspects of the guardianship system should be produced in accessible formats and provided to people who may have impaired capacity and those who are subject to decision-making by an attorney, guardian or administrator. With significant decisions being made by others (e.g. Tribunal or a substitute decision-maker) about their life, people who are the subject of proceedings or decisions must be made aware of their rights.

There should be a requirement for applicants to the Tribunal to make the person who is the subject of the application aware of the processes that the application will trigger and the person's rights during these processes. Similarly, those who exercise power or perform a function under guardianship legislation (including attorneys) must be given responsibility to inform the person who is the subject of a matter about upcoming processes and/or decisions and how the person can exercise their rights. Publications or materials to support this process should be developed and provided to Tribunal applicants.

10.2.2 Substitute decision-makers

While some people may deliberately set out to exploit or abuse a person for whom they are acting as a guardian, administrator or attorney, the majority of substitute decision-makers want to do the right thing but may be unaware of their responsibilities and obligations. For example, administrators and attorneys may be unaware of the requirement to keep their assets separate to those of the person for whom they make decisions in order to avoid conflict transactions.

The provision of information to substitute decision-makers about decision-making principles, their role and responsibilities is a proactive safeguard. As identified by the research, there is low awareness of the general principles and the roles and responsibilities of attorneys, guardians and administrators. Increased knowledge may partially mitigate the likelihood of a person's rights being inadvertently or deliberately obstructed or denied, their disempowerment and/or risk of abuse, neglect, harm or exploitation.

10.3 Individual advocacy and support

Some people with impaired capacity may need support, advocacy and assistance to make decisions, voice their opinions, access services, navigate processes and make complaints. Support to undertake these activities becomes increasingly important when a person's life stage, wellbeing or circumstances trigger the need to interact with new systems and/or access support services e.g. the disability, health, guardianship, aged care and mental health systems.

There must be an ongoing commitment within various systems and programs to ensure that individual advocacy, whether informal or formal, is recognised and remains available and easily accessible to individuals. In addition, the level to which advocacy is funded must be adequate to meet future need and demand for advocacy services.⁵⁵²

It is essential that funded advocacy and support services remain independent and that the value of upholding this independence is not diminished.

⁵⁵² Office of the Public Advocate (Qld), Submission to the Department of Social Services, *Review of the National Disability Advocacy Framework*, August 2015, 4.

Individual advocacy can help ensure that systems and programs are transparent and accountable. Further, facilitating access to advocacy can reduce risk for vulnerable people and strengthen ‘their voice’.⁵⁵³ Such advocacy and other supports are important and practical safeguards for people with impaired decision-making capacity, and can prevent the need for guardianship in some circumstances.

10.3.1 Support agencies and organisations

There are numerous agencies and organisations across Queensland that seek to promote and protect the rights and interests of people with impaired decision-making capacity. Many of these agencies provide support, advice, advocacy and legal services and are faced with ever-growing demand. Further, many support agencies and organisations are limited by funding and geographical reach. In addition, the awareness and accessibility of support services are critical factors in ensuring they are readily accessed in a timely manner by the people who require support and/or assistance.

All people with impaired decision-making capacity, their families and carers should be afforded the same levels of support and assistance.

The legislation underpinning Queensland’s guardianship system comprises a provision that enables a person with impaired decision-making capacity to be represented by someone else in a Tribunal proceeding.⁵⁵⁴ While there are representation and advice services available, most people who are the subject of a Tribunal application do not have their own representation nor ‘have a voice’ in a Tribunal or on the papers hearing.

As discussed in section 7.1.2.4., this may be partially attributable to people not being aware that they have the right to representation and that there are people and/or organisations that could provide assistance. On the other hand, QAI submitted that “the advocacy, support and information available to people who are subject to guardianship proceedings is not sufficient”.⁵⁵⁵

10.4 Public appointments

As discussed earlier, a public guardianship or administration appointment can offer specific safeguards for some people with impaired decision-making capacity. These safeguards can be particularly important for people who are socially isolated, whose family is in significant conflict, or for those with a history of experiencing abuse, neglect and/or exploitation.

Section 8.4.3.3 of this report discusses the benefits that a public appointment may offer these people and the reasons why Tribunal members may sometimes consider a public appointment to be necessary to ensure the proper care and protection of a person with impaired decision-making capacity.

⁵⁵³ Ibid 4-5.

⁵⁵⁴ *Queensland Civil and Administrative Tribunal Act 2009* s 43(b)(i).

⁵⁵⁵ Queensland Advocacy Incorporated, above n 24, 17.

The ALRC reported that “some system of appointment of others to act is a necessary human rights backstop”.⁵⁵⁶ In their submission to the ALRC, the Offices of the Public Advocate in Victoria and South Australia highlighted that guardianship can be “a positive use of state power that enhances the inclusion and legal personhood of the represented person”.⁵⁵⁷

This view is not shared by some stakeholders. For example, QAI submitted that “the substitute decision-making model is fundamentally problematic and, by its very definition, increases the likelihood of abuse, neglect and exploitation by those vested with decision-making power”.⁵⁵⁸

10.5 Guardianship legislation

10.5.1 Duties and responsibilities of decision-makers

Guardians, administrators and attorneys are subject to a number of obligations under the *Guardianship and Administration Act* and the *Powers of Attorney Act*. For example, an administrator must apply the general principles; act honestly; keep detailed records about transactions and dealings; submit accounts according to QCAT decisions; avoid conflict transactions; keep their own property separate to that of the person for whom they represent; and invest prudently and obtain financial advice. If there is more than one administrator or if there is also a guardian or attorney appointed, they must consult with the other appointees and make decisions together.⁵⁵⁹

Similarly, an attorney must apply the general principles; keep detailed records about transactions and dealings made on behalf of the adult; avoid conflict transactions; keep their own property separate to the adult’s; and if there is more than one attorney or if there is also a guardian and/or administrator, they must consult with the other appointees and make decisions together.⁵⁶⁰

A guardian is also required to apply the general principles; act honestly and with reasonable diligence; avoid conflict transactions; and consult with any other guardian, administrator or attorney.⁵⁶¹

Consideration must be given to strategies that may increase awareness of, and compliance with, the duties and responsibilities of decision-makers.

To ensure that decision-makers better uphold their duties and obligations, the VLRC recommended that the Tribunal be given the power to make the appointment of a guardian or administrator subject to them undertaking a designated training program.⁵⁶² The Commission

⁵⁵⁶ Australian Law Reform Commission, above n 6, 60 [2.107].

⁵⁵⁷ Office of the Public Advocate (Vic) Submission to the Parliament of Victoria, *Family and Community Development Committee Inquiry into the social inclusion of Victorians with a disability* (2014) 11–12 as cited in Office of the Public Advocate (South Australia) and Office of the Public Advocate (Victoria), Submission No 95 to Australian Law Reform Commission, above n 6, 4.

⁵⁵⁸ Queensland Advocacy Incorporated, above n 24, 16.

⁵⁵⁹ *Guardianship and Administration Act 2000* chapter 4, part 1 sets out further functions, duties and powers of an administrator.

⁵⁶⁰ *Powers of Attorney Act 1998* chapter 5 sets out further functions, duties and powers of an attorney.

⁵⁶¹ *Guardianship and Administration Act 2000* chapter 4, part 2 sets out further functions, duties and powers of a guardian.

⁵⁶² Victorian Law Reform Commission, above n 42, 413.

also recommended that guardianship legislation require all substitute decision-makers to undertake in writing that they will act in accordance with their responsibilities and duties.⁵⁶³

Queensland’s Communities, Disability Services and Domestic and Family Violence Prevention Committee recently recommended that the *Powers of Attorney Act* be amended to clearly provide that “attorneys demonstrate explicit and actual knowledge of an attorney’s duties and responsibilities before they are appointed as attorney”.⁵⁶⁴ In its response to the Inquiry, the Queensland Government indicated that it supported the Committee’s recommendation in principle and committed to examining ways to address the aim of the recommendation.⁵⁶⁵

10.6 Queensland Civil and Administrative Tribunal

QCAT provides a unique and critical role in protecting the rights and interests of people who may have impaired decision-making capacity and acts as a gatekeeper to the guardianship system. As such, a number of QCAT’s functions in relation to the guardianship system operate as safeguards for people who may have impaired decision-making capacity. These include, but are not limited to:

- decisions about the capacity of adults, attorneys, guardians and administrators;
- considering applications for the appointment of guardians and administrators;
- giving directions or advice in relation to enduring documents, attorneys, guardians and administrators; and
- ratifying a decision or proposed decision by an informal decision-maker.⁵⁶⁶

QCAT (as well as the Supreme Court) can also make orders regarding enduring documents in relation to their validity, the capacity of the principal and revocation of such documents.⁵⁶⁷

10.7 Reviewing the need for public guardianship and administration

QCAT must review the appointment of a guardian or administrator within specified time periods in the *Guardianship and Administration Act* or in accordance with the order. At each review, the presumption of capacity must again be rebutted and QCAT must again consider whether the person has impaired capacity in respect of the matter at hand.

The conduct of a review provides an opportunity for a person to transition to a less restrictive decision-making intervention. For example, a person may transition to an order for fewer types of matters, from a public to a private appointment, or from guardianship or administration to informal decision-making support.

⁵⁶³ Ibid 414.

⁵⁶⁴ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 87, 147.

⁵⁶⁵ Queensland Government, above n 90, 13.

⁵⁶⁶ *Guardianship and Administration Act 2000* (Qld) s 81.

⁵⁶⁷ *Powers of Attorney Act 1998* (Qld) s 109A.

10.7.1 *Convention on the Rights of Persons with Disabilities*

Article 12 of the Convention stipulates that signatory governments must provide appropriate and effective safeguards to prevent abuse in relation to the exercise of legal capacity. One of the specified safeguards was the regular review of substitute decision-making appointments by a competent, independent and impartial authority or judicial body.⁵⁶⁸

10.7.2 Legislative requirements

Given the least restrictive principle (in both Queensland's guardianship legislation and in the Convention), guardianship and administration orders should apply for the shortest time necessary. Further, if guardians and administrators are conducting their role in accordance with general principle seven, which emphasises maximum participation of the person in the decision-making process, then some people could develop the capacity to begin to make some decisions for themselves. In some circumstances, this might prompt a review of the order.

While the timing of periodic reviews will depend on the terms of the order made by QCAT, the *Guardianship and Administration Act* requires the Tribunal to review the appointment of a guardian or administrator (other than the Public Trustee) at least every five years (known as a periodic review).⁵⁶⁹

The Tribunal may also review an appointment on its own initiative or upon application by a person subject to an order, someone else involved in the person's life, the Public Trustee, or another trustee company.⁵⁷⁰ Therefore if the Public Guardian or Public Trustee believes that an appointment in the current terms may no longer be necessary, or that there may be a more appropriate person (for example, someone from the person's support network) who could carry out the role, they can and should apply to the Tribunal for a review. In some circumstances the Office of the Public Guardian and the Public Trustee may encourage the person subject to an order, or a member of their support network to apply for a review.

Upon review, the Tribunal is required to revoke an order unless it is satisfied that it would make a new appointment if a new application was brought to the Tribunal.⁵⁷¹ Therefore during a review, the Tribunal must give full consideration to the same issues considered as part of a new appointment (e.g. presumption of capacity, need for an appointment, appropriateness considerations relating to potential appointees, etc.). Upon a decision to continue an appointment, the Tribunal may choose to continue the current order, change the terms of the order (e.g. to cover fewer or additional types of matters), and/or change the appointed decision-maker.⁵⁷²

⁵⁶⁸ *Convention on the Rights of Persons with Disabilities* art 12.

⁵⁶⁹ *Guardianship and Administration Act 2000* (Qld) s 28(1).

⁵⁷⁰ *Ibid* s 29(1).

⁵⁷¹ *Ibid* s 31(2).

⁵⁷² *Ibid* s 31(3).

10.7.3 National standards for public guardianship and administration

The National Standards for Public Guardianship require that public guardians:

- request a review of a guardianship order if there is an identified need to extend, review or revoke the order or where the order is not working in the best interests of the person who is subject to the order;
- recommend that any continuation of an order be based on the continued existence of impaired capacity and the need for a decision to be made;
- recommend that any continuation of an order be for the shortest time possible;
- consult with the person who has impaired decision-making capacity and other key parties to ascertain their views and inform the review of an order; and
- provide a report regarding the continuing need for a guardianship order to the Tribunal.⁵⁷³

The national standards relating to the review of an administration order do not include an obligation for administrators to proactively seek the review of an order where they identify a reason to do so, but do require that administrators:

- provide a report to the Tribunal to inform a review, which should include an update on the financial situation of their clients, an outline of any actions that have enabled clients to regain some control over their financial affairs and the views of their clients and other key parties; and
- recommend that any continuation of an order to be continued do so in the least restrictive manner and for the shortest time possible.⁵⁷⁴

10.7.4 Reviews in policy and practice

10.7.4.1 Queensland Civil and Administrative Tribunal

The Tribunal will only review an appointment prior to the date for a periodic review if new and relevant information has become available, the circumstances of the person subject to an order have changed, and/or where information that was not initially presented to the Tribunal can be provided to the Tribunal. A review may also be triggered by the identification of another appropriate appointee or a change in the competency of the current appointee.⁵⁷⁵

The *Guardianship and Administration Act* gives the Tribunal the power to determine the manner in which reviews are conducted. The review of the appointment of a guardian or administrator will be heard on the papers unless the allocated member recommends that an oral hearing is required.⁵⁷⁶ The introduction of this Practice Direction in 2010 coincided with a sizeable increase in the number of reviews undertaken on the papers (from 305 in 2009-10 to 862 in 2010-11), growing to 1,098 reviews conducted on the papers in 2014-15.⁵⁷⁷

⁵⁷³ Australian Guardianship and Administration Council, above n 518, 5.

⁵⁷⁴ Australian Guardianship and Administration Council, above n 519, 8-9.

⁵⁷⁵ Queensland Civil and Administrative Tribunal, above n 430, para 4.

⁵⁷⁶ *Guardianship and Administration Act 2000* (Qld) s 31(1); Queensland Civil and Administrative Tribunal, above n 430, para 3.

⁵⁷⁷ Queensland Civil and Administrative Tribunal, above n 154.

The growing number of reviews undertaken on the papers, and concerns about the lack of participation of the person subject to the order in that process, undermine the extent to which the comparatively advanced principles underpinning Queensland's guardianship legislation can be operationalised.

Arguably, one of the reasons underpinning the introduction of the Practice Direction about reviews on the papers is likely to have been the potential operational efficiencies that can be achieved. It is possible that such a decision was made in response to the growing demand for guardianship and administration and the subsequent operational pressures on the Tribunal.

QAI expressed concern that many periodic reviews are undertaken on the papers rather than via a hearing process. The organisation was therefore concerned that reviews are undertaken with limited participation, if any, from the person who is subject to the order.⁵⁷⁸

The evidence base from which a Tribunal member makes a decision on the papers is different to that obtained via a hearing. Presumably, many on the papers reviews would include only limited, if any, evidence from the person subject to the order. This is a concern, particularly considering the Tribunal must give full consideration to the same issues considered as part of a new appointment, especially for periodic reviews at intervals of 5 years.

Despite being a Tribunal with a different purpose and different evidential processes, evidence from the Mental Health Review Tribunal suggests that a person who attends a review hearing is ten times more likely to have their Involuntary Treatment Order revoked compared to those who do not attend a hearing.⁵⁷⁹ Arguably, the participation of the person in the review provides an opportunity for the Tribunal to conduct a more fulsome exploration of the circumstances and information relevant to their decision-making. It is feasible to suggest, however, that this may also be the case in relation to the review of guardianship and/or administration appointments.

The general principles establish a person's right to participate in decisions affecting their life to the greatest extent possible.⁵⁸⁰ Arguably, such decisions include the potential continuation of a guardianship or administration order. An operational decision to increase the number of reviews undertaken on the papers could arguably be seen to be obstructing the application of the general principles.

10.7.4.2 The Public Guardian

The OPG has a policy of ensuring that the need for the involvement of the Public Guardian in a person's life is regularly reviewed (at least every six months). When a client's circumstances are such that they do not appear to be at risk, there are no decisions to be made and/or their situation is stable, a guardian might pursue a revocation of the guardianship order or the oversight of that client might be transferred to the Transitions Team.⁵⁸¹

⁵⁷⁸ Queensland Advocacy Incorporated, above n 24, 17.

⁵⁷⁹ Queensland Mental Health Review Tribunal, 'Annual Report 2014-2015' (2015) 10.

⁵⁸⁰ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7.

⁵⁸¹ Office of the Adult Guardian, 'Reviewing the ongoing need for the Adult Guardian's Appointment' Internal Policy, Version 1 (July 2013); Office of the Public Advocate interview ZS9 (2014).

The Transitions Team actively supports some people subject to public guardianship orders (e.g. people whose circumstances indicate that there may no longer be a need for the Public Guardian to act as guardian) to gain greater decision-making autonomy and/or transition to less restrictive decision-making supports. Many of the equivalent agencies in other jurisdictions operate teams similar to the Transitions Team at the OPG.⁵⁸²

The Transitions Team will sometimes request the review of an appointment by the Tribunal. Stakeholders from within the guardianship system have indicated that it can sometimes be difficult to secure the revocation of a public appointment through the Tribunal review process. However, reportedly, this has been known to occur for people where the OPG felt there was no identified need for an appointment. For example, where there were no ongoing health issues for a person and the Public Guardian could act at the statutory health attorney of last resort if needed.⁵⁸³

It was suggested that some public appointments remained in place following a review ‘just in case’ future decisions were needed, despite the person’s circumstances being stable, low risk and not likely to trigger any decisions to be made.⁵⁸⁴ Such a practice does not align with the philosophy and the least restrictive approach articulated in guardianship legislation⁵⁸⁵ and may deny a person their legal capacity when there is no immediate need to do so.

Identifying whether there is a real opportunity to pursue the revocation of an appointment is a complex undertaking. Public substitute decision-makers must identify something that signals that a public appointment might not be necessary. Such signals can be subtle and difficult to identify. Public substitute decision-makers must also produce evidence of these signs for the Tribunal to consider as part of a review.⁵⁸⁶

10.7.4.3 The Public Trustee

The financial plans and budgets prepared by the Public Trustee are characterised as fluid documents that alter in response to changing client circumstances and needs. In addition to updating these financial documents as needed, the Public Trustee conducts an annual review of each client’s financial affairs. The annual review is undertaken in the form of a file review and includes a re-examination of clients’ income, assets and liabilities, and the updating of their financial plan and budget. Clients receive an Annual Statement of Account following the annual review process.⁵⁸⁷

While not part of a review process, the Public Trustee will, in certain circumstances, trial processes whereby their clients are able to exercise greater control over their finances e.g. be responsible for paying some household accounts. This process is undertaken with a view to upholding the legislative obligation to provide the greatest possible degree of autonomy in decision-making.

While such activities are consistent with the principles and philosophy of guardianship legislation, more clients might be identified and actively supported to achieve greater decision-

⁵⁸² Office of the Public Advocate interviews NH9, YR8 (2014).

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

⁵⁸⁵ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7(3)(c).

⁵⁸⁶ Office of the Public Advocate interview NH9 (2014).

⁵⁸⁷ The Public Trustee, ‘Financial Management Manual’ (2014) Section 15.

making autonomy if the Public Trustee dedicated resources to the undertaking of such activities, as done by the OPG. While this might initially require an investment of resources, in the long-term it may result in a greater number of people transitioning from public administration.

Under section 28(1) of the *Guardianship and Administration Act*, the Public Trustee is exempt from being reviewed as administrator every 5 years. This was an amendment that was made in 2003 by the *Guardianship and Administration and Other Acts Amendment Bill 2003*.

The Explanatory Notes explain that this amendment was made because there was a large number of Public Trustee appointments and the Tribunal would not have the resources to continue reviewing these appointments as well as continue with its other functions. It was justified that the Public Trustee and trustee companies already had to comply with their own legislation and therefore this provided protections already to the people with such trustees appointed as administrators.⁵⁸⁸

Despite reviews of the appointment of the Public Trustee not being required by legislation, in those circumstances where an administration appointment review is undertaken by QCAT, almost three quarters (73%) result in the re-appointment of the Public Trustee.⁵⁸⁹

10.8 Investigations of allegations of abuse, neglect and exploitation

10.8.1 Office of the Public Guardian investigations

The OPG has significant investigative powers in relation to complaints and allegations made about the actions of an attorney, guardian, administrator or other people appointed by enduring documents or a Tribunal order.⁵⁹⁰ The OPG may investigate any complaint or accusation about a person who may have impaired decision-making capacity being neglected, exploited or abused, or having inappropriate or inadequate decision-making arrangements.⁵⁹¹

The focus of a typical investigation is to determine the degree of risk for the person who may have impaired decision-making capacity and the necessary actions to best protect them and/or obtain better arrangements to support their care.⁵⁹² OPG investigations “gather evidence to find out whether the allegations can be substantiated on the balance of probabilities”.⁵⁹³

The OPG can require people to produce records and accounts, gain access to any information that is relevant to an investigation (including medical and financial files) and issue summons to require people to produce information.⁵⁹⁴

⁵⁸⁸ Explanatory Notes, *Guardianship and Administration and Other Acts Amendment Bill 2003*, 3.

⁵⁸⁹ The Public Trustee, Customised data request for the Office of the Public Advocate, 23 February 2016.

⁵⁹⁰ *Public Guardian Act 2014* (Qld) s (12)(c).

⁵⁹¹ *Ibid* s 19.

⁵⁹² Office of the Public Guardian, Submission No 5 to Communities, Disability Services and Family Violence Prevention Committee, *Inquiry into the adequacy of existing financial protections for Queensland’s seniors*, 29 May 2015, 3-4.

⁵⁹³ *Ibid* 3.

⁵⁹⁴ *Public Guardian Act 2014* (Qld) ss 22, 26(2).

The OPG has limited powers in relation to determining neglect, abuse and exploitation and it does not have the power to pursue prosecutions. The OPG aims to resolve investigation matters informally where ever possible, however will refer matters to the Queensland Police or QCAT as needed. The OPG typically has 100 to 120 investigation cases underway at any point in time.⁵⁹⁵

The investigative function of the OPG is reactive. An allegation or complaint must be reported before the Office can initiate an investigation. The commencement of an investigation therefore relies on the person subject to abuse, neglect or exploitation making a complaint and/or another person in their life identifying that the person is at risk of abuse, neglect or exploitation.⁵⁹⁶

Not all people who are subject to abuse, neglect or exploitation may feel that they are able to lodge a complaint. The OPG encourages family members, carers and support providers to immediately report suspicions of abuse to the agencies involved with the person's care, and where a criminal offence is suspected, also report the matter to the OPG or police directly.⁵⁹⁷

There is a need to increase community awareness about the ability to report suspicions of abuse, neglect or exploitation of people with impaired decision-making capacity to the OPG.

The level of awareness about the ability to lodge an allegation or complaint with the OPG is likely to impact the utilisation of this service. The research identified that there is low awareness and understanding of Queensland's guardianship system in general. This low level of awareness is likely to extend to the investigative function of the OPG, with the possible exception of some support and service providers.

10.8.2 Community Visitor Program

The OPG operates the Community Visitor Program, which involves independent community visitors attending 'visitable sites' to protect the rights and interests of the people who reside at the site. This includes residents who have impaired decision-making capacity. Importantly, Community Visitors act as the "independent 'eyes and ears' on the ground who are able to identify issues that others (including family) may not be able to see".⁵⁹⁸

Visitable sites include:

- disability accommodation provided or funded by the Department of Communities, Child Safety and Disability Services;
- authorised mental health services; and
- a place, other than a private dwelling house, that is prescribed under a regulation.⁵⁹⁹

⁵⁹⁵ Office of the Public Guardian, above n 592, 4; Evidence to Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, Brisbane, 3 June 2015, 12, Mr Kevin martin, Public Guardian.

⁵⁹⁶ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 87, 128.

⁵⁹⁷ Office of the Public Guardian, above n 592 3.

⁵⁹⁸ *Public Guardian Act 2014* (Qld) ss 39, 40(1); Office of the Public Guardian, above n 592, 6.

⁵⁹⁹ *Public Guardian Act 2014* (Qld) s 39; Office of the Public Guardian, *Community Visitors* (2015)

<<http://www.publicguardian.qld.gov.au/adult-guardian/adult-community-visitors>>.

During unannounced visits, Community Visitors may make inquiries and raise complaints for, or on behalf of, residents. Issues that may be investigated by a Community Visitor include the:

- provision of adequate assessment, treatment and support services;
- appropriateness of the standards of accommodation, health and wellbeing;
- provision of services in a manner that is the least restrictive of the residents' rights;
- provision of adequate information to residents about their rights; and
- existence of an accessible and effective complaints process.⁶⁰⁰

Community Visitors have the authority to access all areas of a visitable site; require that staff answer their questions; request and make copies of documents; and talk in private with residents or staff.⁶⁰¹ Community Visitors must take into account the views and wishes of residents, however must ultimately act in a way that is consistent with each resident's proper care and protection.⁶⁰²

A report is produced after each visit and provided to the OPG, the visitable site and other relevant parties, such as the Director, Mental Health or Director, Forensic Disability.⁶⁰³ In 2014-15, Community Visitors conducted 5,657 visits to over 1,250 visitable sites across Queensland. They protected the rights and interests of 6,741 vulnerable people.⁶⁰⁴

10.8.3 Enhancing investigations and complaints

In 2014, the then Office of the Adult Guardian reported that despite the Office's best efforts to resolve investigations in a timely manner, the level of complaints to the investigations team "will increase beyond the capacity of the current establishment to handle effectively".⁶⁰⁵ More recently, the Communities, Disability Services and Domestic and Family Violence Prevention Committee reported that stakeholders raised concerns about the OPG's ability to sufficiently fulfil its investigatory role.⁶⁰⁶

The OPG's investigations and community visitor functions are important safeguards. They must be legislated and resourced appropriately to ensure their ability to adequately protect the rights and interests of people who may have impaired decision-making capacity.

Any OPG investigation into allegations and complaints ceases upon the death of the person who is the subject of the allegation or complaint.⁶⁰⁷ The Communities, Disability Services and Domestic and Family Violence Prevention Committee supported the continuation of investigations to their logical conclusion and "that the *Public Guardian Act 2014* be amended to allow the OPG to continue to investigate a matter, notwithstanding the death of the individual whose affairs are being investigated".⁶⁰⁸

⁶⁰⁰ Ibid.

⁶⁰¹ *Public Guardian Act 2014* (Qld) ch 3 pt 6; Office of the Public Guardian, above n 599.

⁶⁰² *Public Guardian Act 2014* (Qld) s 46.

⁶⁰³ Ibid s 47.

⁶⁰⁴ Office of the Public Guardian, 'Annual Report 2014-2015' (2015) 26-27.

⁶⁰⁵ Office of the Adult Guardian, 'Annual Report 2013-2014' (2014) 7.

⁶⁰⁶ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 87, 131.

⁶⁰⁷ Office of the Public Guardian, above n 592, 4.

⁶⁰⁸ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 87, 132.

The safeguards provided by the Community Visitor Program should be extended to all people with impaired decision-making capacity who live in cared or supported accommodation.

Communities, Disability Services and Domestic and Family Violence Prevention Committee recognised the value of the Community Visitor Program and recommended that the program be expanded into all forms of care for Queenslanders.⁶⁰⁹ The Public Guardian advised that the Community Visitor Program “is a vital mechanism in protecting vulnerable people and it is something that needs to be expanded as the NDIS develops. It needs to be expanded into many areas of mental health and other forms of care for people”.⁶¹⁰

To complement the proposed expansion of the Community Visitor Program, the Communities, Disability Services and Domestic and Family Violence Prevention Committee recommended the development of agreed standards of care for clinical staff in relation to the recognition and identification of risk factors relating to abuse and exploitation”.⁶¹¹ The Committee also recommended that clinical staff “be required to be mandatory reporters where abuse or exploitation of a person with impaired capacity is suspected”.⁶¹²

The scope of this recommendation was limited to clinical staff providing care to older Queenslanders,⁶¹³ however consideration should be given to extending it to all providers of support to people with impaired decision-making capacity. Such consideration should include the administrative resourcing aspects of a mandatory reporting scheme and possible unintended consequences for individuals, service providers and government.

10.9 Other independent statutory mechanisms

10.9.1 Supreme Court

10.9.1.1 Appeals

Certain decisions made by QCAT, including those made in guardianship and administration proceedings, may be appealed to the Supreme Court’s Court of Appeal Division. These decisions include:

- decision made by a judicial member of the Tribunal;
- decisions made by a non-judicial member of the Tribunal referred by the President to the Court of Appeal; and
- a rejection to appeal to the Internal Review Tribunal regarding decisions made by non-judicial members.⁶¹⁴

⁶⁰⁹ Ibid 132-133.

⁶¹⁰ Evidence to Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, Brisbane, 3 June 2015, 13, Mr Kevin Martin, Public Guardian.

⁶¹¹ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 87, 133.

⁶¹² Ibid.

⁶¹³ Ibid.

⁶¹⁴ *Guardianship and Administration Act 2000* (Qld) s 163; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 144, 149, 150.

When appealing to the Court of Appeal regarding a decision made by a judicial member of QCAT, the appeal must be based upon a question of law (the application of legal principles or an interpretation of the law), fact (i.e. facts of the case and inferences arising from those facts), or both law and fact.⁶¹⁵ If the appeal is based upon a question of law, the Court of Appeal can confirm or amend the decision, or it can set aside the decision and substitute its own decision or return the matter to QCAT. If the appeal is based on a question of fact or a question of law and fact, the Court of Appeal can either confirm or amend the decision or set aside the decision and substitute its own.⁶¹⁶

10.9.1.2 Attorneys

The Supreme Court can order an attorney to compensate for a loss caused by the attorney's failure to comply with the *Powers of Attorney Act*. A failure to comply with the *Powers of Attorney Act* can include not exercising the attorney's power with honesty and reasonable diligence to protect the principal's interests, as well as entering into conflict transactions (where there is a conflict of interest in the transaction conducted).⁶¹⁷

The Supreme Court also has the power to revoke a power of attorney.⁶¹⁸

Seeking compensation for a loss suffered at the hands of an attorney must be pursued in the Supreme Court, which generally entails a lengthy and costly process. Yet, pursuing a loss at the hands of an administrator is undertaken through QCAT. Arguably, pursuing compensation for a loss through QCAT is a more accessible process and begs the question as to whether pursuing a loss at the hands of an attorney should be equally accessible.

10.9.1.3 Limitations

There may be limitations in accessing the Supreme Court for some people. Accessing the Supreme Court is likely to involve standard court and legal processes, such as preparing and filing an application, making submissions and appearing in court. All these processes carry a level of complexity and may require legal representation, which may attract financial costs. Delays in initiating and hearing a matter before the court may also be experienced.

10.9.2 Queensland Ombudsman – complaint investigation

The Queensland Ombudsman investigates complaints about the administrative actions and decisions of Queensland public sector agencies (including government departments, public authorities and local government) that may be unlawful, unreasonable, unfair or otherwise wrong.⁶¹⁹ This includes the public agencies that comprise the guardianship system, namely QCAT, the OPG and the Public Trustee. It also includes other Queensland Government departments that provide services to people with impaired decision-making capacity, such as Health, Housing and Public Works, Justice and Attorney-General, Education and Training, and Communities, Child Safety and Disability Services.

⁶¹⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 149.

⁶¹⁶ *Ibid* ss 146-147.

⁶¹⁷ *Powers of Attorney Act 1998* (Qld) ss 66(1), 73, 106(1).

⁶¹⁸ *Ibid* s 116.

⁶¹⁹ *Ombudsman Act 2001* (Qld) ss 8-9, 14(1); Queensland Ombudsman, *Role*, (2013) Queensland Ombudsman <<http://www.ombudsman.qld.gov.au/Aboutus/TheOffice/Role/tabid/60/Default.aspx>>.

Before making a complaint to the Queensland Ombudsman, a person must have first exhausted all complaint and review avenues with the agency about which they would like to make a complaint. The Queensland Ombudsman can provide people with advice and assistance in relation to raising a complaint with an agency.⁶²⁰

The Queensland Ombudsman will attempt to resolve a complaint informally with an agency and secure a mutually satisfactory outcome. The Ombudsman may make recommendations to an agency to rectify the situation if the agency was found to have acted unlawfully, unfairly or unreasonably. Recommendations can also be made to improve the agency's policies and practices. The Queensland Ombudsman is not able, however, to require that an agency action its recommendations, although agencies commonly accept the recommendations made by the Ombudsman.⁶²¹

10.9.3 Public Advocate – systems advocacy

The Public Advocate has an independent systemic advocacy role that focusses on positively influencing and changing systems, including the legislative, policy and practice aspects of systems. This is done in the interests of protecting and promoting the rights, autonomy and participation of people with impaired decision-making capacity in all aspects of community life, and improving their opportunities and outcomes.⁶²²

The statutory systems advocacy delivered by the Public Advocate provides an important layer of protection for the rights of Queensland adults with impaired decision-making capacity, and is uniquely positioned to influence government and non-government agencies.⁶²³

The Public Advocate has the right to all information that is necessary to monitor and review the delivery of services and facilities for adults with impaired decision-making capacity. This includes information about the services they receive and the policies and procedures of the organisations that provide services. Importantly, the Act provides protection from liability for individuals and organisations who provide information to the Public Advocate in accordance with these powers.⁶²⁴

The Public Advocate can prepare reports to the Minister about matters relating to the functions of the Public Advocate, which the Minister is required to table in Parliament.⁶²⁵

⁶²⁰ *Ombudsman Act 2001* (Qld) s 20(1)(b).

⁶²¹ Queensland Ombudsman, *FAQ*, (2013) Queensland Ombudsman <<http://www.ombudsman.qld.gov.au/Makeacomplaint/FAQ/tabid/81/Default.aspx#1207>>.

⁶²² Office of the Public Advocate, *About systems advocacy* (1 February 2016) Office of the Public Advocate <<http://www.justice.qld.gov.au/public-advocate/systems-advocacy/about>>; Office of the Public Advocate, *Our office* (3 February 2016) Office of the Public Advocate <<http://www.justice.qld.gov.au/public-advocate/about-us/office>>.

⁶²³ Office of the Public Advocate, *Our role* (1 February 2016) Office of the Public Advocate <<http://www.justice.qld.gov.au/public-advocate/about-us/role>>.

⁶²⁴ *Guardianship and Administration Act 2000* (Qld) s 210; Office of the Public Advocate, *Our role* (1 February 2016) Office of the Public Advocate <<http://www.justice.qld.gov.au/public-advocate/about-us/role>>.

⁶²⁵ *Guardianship and Administration Act 2000* (Qld) s 209; Office of the Public Advocate, above n 624.

10.10 Recent developments

10.10.1 Australian Law Reform Commission

The ALRC recommended that safeguards should make certain that interventions for people who require decision-making support are least restrictive of a person’s human rights, subject to appeal and subject to regular, independent and impartial monitoring and review.⁶²⁶ Further, the Commission recommended that the appointment of any decision-maker should be a last resort and not a substitute for appropriate support; limited in scope, proportionate to need and apply for the shortest time possible; and subject to review.⁶²⁷

“Safeguards need to be considered at all relevant points along the spectrum of decision-making support, and in relation to all persons and organisations involved in the particular category of decision.”⁶²⁸

The Commission also recommended that supported decision-making arrangements must be independent of conflict of interest and undue influence.⁶²⁹

10.10.2 Queensland Government inquiry into the adequacy of existing financial protections for Queensland’s seniors

In 2015, the Communities, Disability Services and Domestic and Family Violence Prevention Committee made a number of recommendations in relation to safeguards. In response, the Queensland Government has committed to:

- developing the Queensland Financial Resilience and Inclusion Action Plan as part of the broader Financial Literacy and Resilience Program;
- exploring options for working with service providers to develop strategies to assist people to manage their financial affairs in the least restrictive and supported way possible;
- addressing information and support needs relating to elder abuse through the Queensland Government’s Strategy on Domestic and Family Violence for Queensland; and
- developing a communication strategy based on a review into the prevalence and characteristics of elder abuse in Queensland.⁶³⁰

10.11 Recommendations

Recommendation 21: The process of applying for a review of an appointment should be as simple and accessible as possible. In support of this, public guardianship agencies (QCAT, OPG and the Public Trustee) should develop easy-to-understand resources to inform people of the review process and where they can obtain support.

⁶²⁶ Australian Law Reform Commission, above n 6, 91 [Rec 3-4].

⁶²⁷ Ibid 92 [Rec 3-4].

⁶²⁸ Ibid 89 3.105.

⁶²⁹ Ibid 92 [Rec 3-4].

⁶³⁰ Queensland Government, above n 90.

Recommendation 22: Public agencies must ensure that the views and wishes of a person subject to an order are included to the greatest extent practicable (with support from an expanded registry/screening process as per recommendation 16) in all reviews of guardianship and administration appointments, including those conducted on the papers.

Recommendation 23: The Queensland Government include the objective of improving the awareness of agencies that can be approached regarding concerns about the abuse, neglect and/or exploitation of people with impaired decision-making capacity in any strategies aimed at increasing the awareness and knowledge of the guardianship system.

Recommendation 24: The Queensland Government should ensure that there is adequate funding for independent advocacy (including legal advocacy) and representation services to meet future demand. Where advocacy and representation relates to Commonwealth programs, the Queensland Government should campaign for these accordingly. Further, funded advocacy and support services must remain independent and the value of upholding this independence must not be diminished.

Recommendation 25: The Queensland Government should develop strategies to increase family and community engagement and connectedness, inclusive of approaches that may link people to potential decision-making supports, particularly for people who are socially isolated.

Part C: Future directions

11 Less restrictive alternatives to guardianship and administration

11.1 Human rights and policy context

The current international and national trends in decision-making support reflect the changing view of people with disability being seen as limited rights-bearers to people with equal legal rights. This paradigm shift was brought about by decades of activism by the disability community,⁶³¹ which resulted in the coming into force of the Convention in 2008. The Convention has been a significant influence in the movement away from what is seen as paternalistic substitute decision-making towards supporting people with disability to exercise their rights, including their legal capacity.

The impetus for supported decision-making has grown out of a general challenge to the appropriateness and acceptability of guardianship for people with intellectual disability or cognitive impairment.⁶³²

In particular, even though guardianship is intended as an intervention of last resort, evidence suggests that can be overused and misapplied. This is of concern due to the significant impact on a person's civil rights as a result of being deemed to lack capacity and having a substitute decision-maker appointed.⁶³³ Substitute decision-making can disempower people when they are not involved in the process of making decisions about their lives. Substitute decision-making can therefore have an anti-therapeutic effect, undermining a person's physical and psychological wellbeing by reducing their sense of choice and control over their lives.⁶³⁴

Advocates for supported decision-making are supportive of the concept because of its potential to replace paternalistic substitute decision-making approaches, and its consistency with the principles of the Convention. The fact that supported decision-making has the potential to enable a person to retain their legal capacity also means that there is greater protection of a person's autonomy and capacity for self-determination.⁶³⁵

Supported decision-making is consistent with the 'social model of disability', which underpins the Convention and recognises that disability is a social construct; the result of a society that places physical, social and attitudinal barriers in the way of people with disability.

⁶³¹ Kristin Booth Glen, above n 273, 123.

⁶³² Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 70, 1117.

⁶³³ Ibid.

⁶³⁴ Ibid 1120.

⁶³⁵ Terry Carney, 'Participation and Service Access Rights for People with Intellectual Disability: A Role for Law?' (2013) 38(1) *Journal of Intellectual and Developmental Disability*, 59; Office of the Public Advocate (South Australia), 'Annual Report 2012' (2012) 54.

The potential to develop and enhance the overall physical and psychological wellbeing of people with disability is also recognised through the process of supported decision-making, which in turn could have positive health outcomes and improve the person's quality of life.⁶³⁶

These normative aspects of supported decision-making are well articulated in literature, and arguably underpin the current momentum as an alternative to guardianship and administration.

The incorporation of supported decision-making frameworks and principles is essential to evolving practice.⁶³⁷

Supported decision-making is increasingly being recognised as a viable “alternative to guardianship and as a decision-making paradigm within the framework of future nationally recognised best practices for assisting persons with cognitive disabilities”.⁶³⁸ Guardianship and administration should only be applied when other less restrictive supports are not available. Supported decision-making, and other alternatives to guardianship and administration should always be identified and considered ahead of guardianship and/or administration.⁶³⁹

Guardianship and administration must return to being a true last resort intervention in Queensland and, when it is used, supported decision-making practices and principles should be applied by decision-makers. Respect for individual rights requires that people are enabled to participate in making decisions about their lives to the greatest extent possible.

11.1.1 *Convention on the Rights of Persons with Disabilities*

In addition to the principles and obligations stipulated in Queensland's guardianship legislation, article 12 of the Convention⁶⁴⁰ recognises the right of persons with disability to have legal capacity ‘on an equal basis with others in all aspects of life’. This creates an obligation to not only accord people with disability legal capacity on the same basis as others, but to also ensure appropriate measures to provide people with access to the support they require in exercising their capacity. It further requires that all measures related to the exercise of capacity have appropriate and effective safeguards to prevent abuse.⁶⁴¹

In the Draft General Comment, the United Nations Committee on the Rights of Persons with Disabilities suggested abolishing substitute decision-making regimes, and replacing such regimes through the development of supported decision-making alternatives. The Committee commented: “[t]he development of supported decision-making systems in parallel with the retention of substituted decision-making regime is not sufficient to comply with Article 12.”⁶⁴²

⁶³⁶ Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 70, 1127.

⁶³⁷ National Guardianship Association (United States), *Position Statement on guardianship, surrogate decision making, and supported decision making* National Guardianship Association, Inc. <http://www.guardianship.org/documents/NGA_Policy_Statement_052016.pdf>.

⁶³⁸ *Ibid.*

⁶³⁹ *Ibid.*

⁶⁴⁰ *Convention on the Rights of Persons with Disabilities* art 12.

⁶⁴¹ *Ibid.*

⁶⁴² United Nations Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the CRPD: Equal Recognition Before the Law [24].

Australia has made a number of Interpretative Declarations in relation to the Convention. In respect of article 12, “Australia declares its understanding that the CRPD 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”.⁶⁴³

When Australia appeared before the Committee on the Rights of Persons with Disability, the Committee recommended that Australia review its Interpretative Declarations in order to withdraw them.⁶⁴⁴ The Committee expressed concern “about the possibility of maintaining the regime of substitute decision-making, and that there is still no detailed and viable framework for supported decision-making in the exercise of legal capacity”.⁶⁴⁵

11.1.2 Australian Law Reform Commission model

The ALRC’s report on *Equality, Capacity and Disability in Commonwealth Laws* recommended shifting from substitute to supported decision-making.⁶⁴⁶ In its report, the ALRC proposed a set of National Decision-Making Principles and Guidelines to ensure that:

- supported decision-making is encouraged;
- representative (substitute) decision-makers are appointed only as a last resort; and
- the will, preferences and rights of persons direct decisions that affect their lives.⁶⁴⁷

The models of the ‘supporter’ (for supported decision-making) and ‘representative’ (for substitute decision-making) were proposed. Both models allowed the person to appoint the decision-maker if possible.⁶⁴⁸ It was also recommended that proper safeguards be in place through laws and legal frameworks that are appropriate and effective in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.⁶⁴⁹ Importantly, the ALRC noted that emphasis should be shifted from the ‘best interests’ approach’ to that of the ‘will and preference’ of the person. However, a representative may still override the person’s will and preferences where necessary to prevent harm.⁶⁵⁰

11.1.3 Queensland Law Reform Commission review of guardianship laws

The QLRC has long recognised the inter-dependent process of decision-making and that “many people with a decision-making disability will be able to make some, if not all, of their decisions, provided that adequate support is available”.⁶⁵¹ In the 1996 QLRC report that shaped the

⁶⁴³ *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

⁶⁴⁴ Committee on the Rights of Persons with Disability, ‘Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2-13 September 2013)’ (United Nations, 4 October 2013) 9.

⁶⁴⁵ Committee on the Rights of Persons with Disability, ‘Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session (2-13 September 2013)’ (United Nations, 4 October 2013) [24].

⁶⁴⁶ Australian Law Reform Commission, above n 6, 47 2.51.

⁶⁴⁷ *Ibid* Rec 3-1.

⁶⁴⁸ *Ibid* 102 [4.48]; 112-113 [4.100-4.108].

⁶⁴⁹ *Ibid* Rec 3-1.

⁶⁵⁰ *Ibid* 76 [3.54], Rec 3-3.

⁶⁵¹ Queensland Law Reform Commission, above n 2, vol 1 ch 7, 201.

legislative framework of Queensland’s guardianship system, the Commission recommended that Queensland guardianship legislation “provide that the tribunal may appoint an assistant decision-maker to assist a person with a decision-making disability to make the person’s own decisions”.⁶⁵²

The proposed assistant decision-maker would not have the power to make substitute decisions or act on behalf of the person, however would be appointed to provide support and advice. The intention of this type of appointment was to enable decision-making support to be provided to those people who required it, for example people with no informal support network.⁶⁵³

Any future reforms to Queensland’s guardianship system should re-consider this recommendation as a means by which to increase the range of available options for promoting and retaining legal capacity and autonomy.

11.1.4 Victorian Law Reform Commission report on guardianship

The VLRC’s report on guardianship recommended a new legislative regime that incorporated the principles from the Convention to more effectively promote autonomy and participation.⁶⁵⁴

The VLRC proposed an expanded range of mechanisms to assist people with impaired decision-making capacity, allowing assistance to be tailored to the needs of different groups and be a more proportionate response to different needs.⁶⁵⁵ The VLRC proposed models of supported decision-making and co-decision-making, while keeping existing substitute and informal decision-making arrangements. The wider range of decision-making arrangements and the encouragement of people to consider the decisions that the assisted person would make could be seen as a positive means of promoting the participation of people with impaired capacity.⁶⁵⁶

However, the VLRC noted that there may be circumstances where a person’s will and preferences may lead to unacceptable harm, and that there must be some point where a decision-maker must prevent harm from occurring. Therefore, the goal for decision-makers should be to ‘promote the personal and social wellbeing’ of the represented person.⁶⁵⁷

The VLRC also recommended personal appointments of supported and substitute decision-makers and that greater autonomy is provided through this choice of a trusted person who is well placed to know and implement the wishes of the person when it becomes necessary for someone else to make decisions.⁶⁵⁸

In response to the VLRC report, Victoria has so far introduced Supportive Attorneys through the *Powers of Attorney Act 2014*.⁶⁵⁹ This new legislative role is discussed in section 12.1.3.

⁶⁵² Ibid vol 1 ch 7, 204.

⁶⁵³ Ibid vol 1 ch 7, 201-202.

⁶⁵⁴ Victorian Law Reform Commission, above n 42, 53 [5.13].

⁶⁵⁵ Ibid 54 [5.17].

⁶⁵⁶ Ibid 56 [5.23].

⁶⁵⁷ Ibid 395 [17.118, 17.122].

⁶⁵⁸ Ibid 56 [5.24].

⁶⁵⁹ *Powers of Attorney Act 2014* (Vic) s 85.

11.1.5 Queensland inquiry into the adequacy of existing financial protections for Queensland’s seniors

In August 2015, the Communities, Disability Services and Domestic and Family Violence Prevention Committee tabled its report on its inquiry into the adequacy of existing financial protections for Queensland’s seniors.⁶⁶⁰

The Committee reported that an “over-reliance on substitute decision-making does not accord with Australia’s international human rights obligations, which require the promotion of supported and assisted modes of decision-making which support personal autonomy, in preference to substituted decision-making arrangements”.⁶⁶¹ Further, the Committee considered that “the Government should examine its existing decision-making framework and provisions and identify opportunities to better support seniors’ financial autonomy and ownership of their decisions, in accordance with their legal entitlements”.⁶⁶²

In March 2016, the Queensland Government announced it “supports or supports in principle 41 of the 43 recommendations” resulting from the Parliamentary Inquiry.⁶⁶³ The Government committed to developing a whole of government strategy for seniors and a range of other supports and programs designed to assist older Queenslanders to “access the right tools and support so they can protect themselves financially”. The Government also indicated that it would explore ways to provide greater financial protection to vulnerable older people.⁶⁶⁴

11.1.6 Review of the *Guardianship Act 1987 (NSW)*

The NSW Law Reform Commission is currently reviewing the desirability of changes to the *Guardianship Act 1997 (NSW)*. The Commission’s mandate includes consideration of the desired model/s of decision making for people who experience difficulty making their own decisions, and the basis and parameters for decisions made under a supported decision-making model (if adopted).⁶⁶⁵

In undertaking the review, the Commission has been directed to have regard for the Convention, the ALRC report on *Equality, Capacity and Disability in Commonwealth Laws* and developments in law, policy and practice in other Australian and international jurisdictions.⁶⁶⁶

⁶⁶⁰ Queensland Parliament, *The adequacy of existing financial protections for Queensland’s seniors* (2015) Queensland Parliament <<http://www.parliament.qld.gov.au/work-of-committees/committees/CDSDFVPC/inquiries/current-inquiries/01TheAdequacySeniors>>.

⁶⁶¹ Communities, Disability Services and Domestic and Family Violence Prevention Committee, above n 87, 144.

⁶⁶² Ibid.

⁶⁶³ The Honourable Coralee O’Rourke, above n 89.

⁶⁶⁴ Ibid.

⁶⁶⁵ NSW Law Reform Commission, *Review of the Guardianship Act 1987* (6 January 2016) NSW Law Reform Commission <http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Guardianship.aspx>.

⁶⁶⁶ Ibid.

11.2 Unprecedented pressure on Queensland's guardianship system

The sometimes excessive use of guardianship, and the excessive breadth of some guardianship and administration orders is of concern.⁶⁶⁷ The accessibility and low cost of the guardianship system has resulted in guardianship applications being sought in preference to other options that are less restrictive and do not infringe on people's rights.⁶⁶⁸

In Queensland, a number of systemic pressures, demographic trends and changes within society are increasing the demand for guardianship and administration, including public guardianship and administration. These pressures are placing an unprecedented and potentially overwhelming strain on Queensland's guardianship system.

Further, forthcoming systems changes will see the demands on Queensland's guardianship and administration system continue to grow. In particular, the NDIS, national aged care reforms and the remodelling of Queensland's mental health system are likely to have a significant impact on people with impaired decision-making capacity and Queensland's guardianship and administration system.

The sustainability of the guardianship system must be examined in terms of ensuring ongoing appropriate use, financial sustainability, and the appropriateness of it bearing the cost for shortcomings in other human service systems.

Considering the current human rights and policy context and the mounting pressures on the guardianship system, the sustainability of Queensland's guardianship system must be thoroughly reviewed. While some level of ongoing need for substituted decision-making will likely remain, consideration should be given to exploring whether the current level of reliance on guardianship and administration, particularly public guardianship and administration, is warranted. Consideration should also be extended to whether there are other less restrictive ways to support a person with impaired decision-making capacity to make decisions.

⁶⁶⁷ Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 70, 1118.

⁶⁶⁸ D Tait and T Carney, above n 66, 445.

12 Contemporary approaches

12.1 Legislated regimes

“What is not open to debate is the fact that supported decision-making is receiving ever-increasing legal articulation and recognition”.⁶⁶⁹

Legislative regimes for supported decision-making have been introduced in some provinces of Canada as well as various Scandinavian and European countries. In September 2015, Victoria became the first Australian jurisdiction to enact a mechanism affording legal authority to people who provide decision-making support.

12.1.1 Canada

Canada has been at the forefront of guardianship reform in terms of embedding alternatives to substitute decision-making in guardianship legislation. This process has sometimes been referred to as the ‘third wave’ of guardianship reform.⁶⁷⁰

The first wave of reform occurred in the 1970s and was associated with reviewing the laws dealing with ‘committeeship’ (court ordered guardianship and trusteeship) and focused on legislative models built around functional disability and partial guardianship as well as an avoidance of characterising adults as ‘lunatics’ or ‘incapable’.⁶⁷¹

The second wave of reform was concentrated on adult protection, with many provinces introducing comprehensive adult protection schemes designed to deal with cases of abuse and neglect, particularly of the elderly.⁶⁷²

The third wave focused on new concepts of decision-making and liberal tests for capacity,⁶⁷³ culminating in the recognition of assisted or supported decision-making in the guardianship legislation of many provinces of Canada such as Alberta, Saskatchewan, the Yukon and British Columbia.

A description of the various legislative models of decision-making support in Canada is presented in Appendix Six.

12.1.2 Europe

Some unique models of alternatives to guardianship have been developed in several European countries including Norway, Sweden, Denmark and the Netherlands. In these countries, there is a focus on alternative ways to provide support and assistance for decision-making for adults

⁶⁶⁹ Brenda Burgen and John Chesterman, ‘Supported Decision-making and the Office of the Public Advocate’ (Paper presented at the 8th La Trobe Annual Roundtable on Intellectual Disability Policy, La Trobe University, Bundoora, 10 December 2014) 3.

⁶⁷⁰ Robert M Gordon, ‘The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making’ (2000) 31(1) *International Journal of Law and Psychiatry* 61, 61.

⁶⁷¹ Sarah Burningham, ‘Developments in Canadian Adult Guardianship and Co-decision Making Law’ (2009) 18 *Dalhousie Journal of Legal Studies* 119, 123; Robert M Gordon, above n 670.

⁶⁷² Sarah Burningham, above n 671, 138; Robert M Gordon, above n 670.

⁶⁷³ Robert M Gordon, above n 670, 62.

with disability, without removing their legal capacity. Unique to these approaches is the dependence (at least in Sweden) on an inclusive system of entitlement to support services for people with disability.

Further detail about the various legislative models of decision-making support in Europe is contained in Appendix Six.

12.1.3 Australia

In Victoria, a person can appoint another person to be a ‘supportive attorney’ under the *Powers of Attorney Act 2014* (Vic).⁶⁷⁴

The introduction of the supportive attorney role was predicated by the VLRC’s report on guardianship, which also recommended the introduction of the ‘supportive guardian’ role. The debate about supportive guardians stalled and the *Guardianship and Administration Bill 2014* (Vic) lapsed with a State Election and change of government.⁶⁷⁵

While the supportive attorney concept reflects a more contemporary framework for decision-making support and is a manifestation of article 12 of the Convention, it attracted some criticism. The decision to include the term ‘attorney’ in ‘supportive attorney’ was considered to accord “considerable risk of the public mistakenly assuming that supporters are actually proxy decision-makers, even though no such power is actually conferred”.⁶⁷⁶

12.1.3.1 Overview of supportive attorneys

Under the *Powers of Attorney Act 2014* (Vic), there are three types of powers that a supportive attorney can be appointed to exercise:

- Information power – authorisation to access, collect or obtain any personal information about the principal that is relevant to a supported decision, and that may lawfully be collected or obtained by the principal. The supportive attorney may also disclose information given to them for the purpose of anything that is relevant and necessary to the attorney to carry out their role or for any other lawful reason;⁶⁷⁷
- Communication power – authorisation to communicate any information about the principal that is relevant or necessary to the making of or giving effect to a supported decision, or to communicate or assist the principal to communicate a supported decision of the principal;⁶⁷⁸ and/or
- Power as to giving effect to decisions – authorisation to take any reasonable action or to do anything that is reasonably necessary to give effect to a supported decision, other than a decision about a significant financial transaction.⁶⁷⁹

⁶⁷⁴ *Powers of Attorney Act 2014* (Vic) pt 7.

⁶⁷⁵ Terry Carney, ‘Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?’ (2015) 4 *Laws* 2015 37, 52.

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Powers of Attorney Act 2014* (Vic) s 87.

⁶⁷⁸ *Ibid* s 88.

⁶⁷⁹ *Ibid* s 89(1); A significant financial transaction includes making/continuing an investment (other than one under \$10,000 in an interest bearing account), or deal with real property – *Powers of Attorney Act 2014* (Vic) s 89(2).

A person (the principal) may make a supportive attorney appointment if they are 18 years of age or older, and the principal has decision-making capacity in relation to making the supportive attorney appointment.⁶⁸⁰ The principal under the *Powers of Attorney Act 2014* (Vic) must understand the information relevant to the decision and the effect of the decision being made to be found to have decision-making capacity,⁶⁸¹ amongst other criteria.⁶⁸²

Understanding the effect of the decision to make a supportive attorney appointment includes understanding:

- that the appointment enables the principal to make and give effect to his or her own decisions with support;
- that the appointment allows the principal to choose a person to support the principal to make and give effect to his or her own decisions;
- that supported decisions are decisions of the principal and not the supportive attorney;
- when the appointment commences; and
- that the principal may revoke the appointment at any time when the principal has decision-making capacity in relation to making the supportive attorney appointment.⁶⁸³

The appointment of a supportive attorney commences at a time, circumstance or occasion on which the principal specifies that such an appointment should commence. If there is no such specification, then the appointment commences immediately.⁶⁸⁴

A supportive attorney appointment does not have effect for any period (after the making of the appointment) during which the principal does not have the decision-making capacity for the matters to which the supportive attorney appointment applies.⁶⁸⁵

The principal may revoke a supportive attorney appointment at any time⁶⁸⁶ and may appoint more than one supportive attorney to act separately. If more than one supportive attorney is appointed, the principal may specify the matters for which each supportive attorney is to act.⁶⁸⁷

A principal who is under a supportive attorney appointment may also appoint an alternative supportive attorney. An alternative supportive attorney is authorised to act in the circumstances specified in the appointment, or if there are no circumstances specified, if the supportive attorney for whom the alternative supportive attorney is appointed dies, experiences impaired capacity themselves, is unwilling or unable to act, becomes insolvent or a paid support worker for the principal, or is found guilty of an offence involving dishonesty (if the supportive attorney is appointed for financial matters).⁶⁸⁸

⁶⁸⁰ *Powers of Attorney Act 2014* (Vic) s 86(1).

⁶⁸¹ *Ibid* s 4(1)(a).

⁶⁸² A person must also be able to: retain that information to the extent necessary to make the decision; and use or weigh that information as part of the process of making the decision; and communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means – *Powers of Attorney Act 2014* ss 4(1)(b)-(d).

⁶⁸³ *Powers of Attorney Act 2014* (Vic) s 86(2).

⁶⁸⁴ *Ibid* ss 101(1), (2).

⁶⁸⁵ *Ibid* s 102.

⁶⁸⁶ *Ibid* s 103.

⁶⁸⁷ *Ibid* ss 92(1), (2).

⁶⁸⁸ *Ibid* ss 93(1), (2).

A person is eligible to be appointed as a supportive attorney if they satisfy the eligibility criteria in the *Powers of Attorney Act 2014* (Vic). The criteria includes that an eligible person must not be a care worker, a health provider or an accommodation provider for the principal.⁶⁸⁹

A supportive attorney must comply with the duties and obligations under the *Powers of Attorney Act 2014* (Vic), which includes not being entitled to receive any remuneration for acting as supportive attorney.⁶⁹⁰

12.1.3.2 Safeguards

12.1.3.2.1 Appointment / Revocation

When a supportive attorney appointment form is being executed, it must be signed by the principal and by two other witnesses. If the principal is unable to physically sign the form (due to a physical disability, for example), another person may sign the form on the principal's behalf as long as they are over 18, not one of the witnesses, and not the supportive attorney.⁶⁹¹

One witness must be authorised to witness statutory declarations, and one witness must not be a relative of the principal or the supportive attorney, or a care worker/accommodation provider for the principal. Both witnesses must also be over 18, not signing the form on behalf of the principal and not be a supportive attorney.⁶⁹²

The witnesses of the forms must ensure that the legislated certification requirements, which include a series of safeguarding qualifications, are met before they sign the form. The supportive attorney must also meet legislated certification requirements and sign the form in front of a witness.⁶⁹³

A revocation of the supportive attorney appointment can be made using the prescribed form by being signed by the principal (or a person designated by the principal), and one witness.⁶⁹⁴ Akin to the appointment form, a person can sign on behalf of the principal if they are 18 years of age or older and are not the witness or the supportive attorney.⁶⁹⁵ The witness to a revocation must meet the legislated criteria, which act as a safeguard for the principal.⁶⁹⁶

A supportive attorney may resign at any time using the prescribed form.⁶⁹⁷ In addition, a supportive attorney appointment will be automatically revoked under a number of specified circumstances, including the death of the principal or supportive attorney, impaired decision-making capacity being experienced by the supportive attorney or other particular changes to the supportive attorney's circumstances.⁶⁹⁸

⁶⁸⁹ Ibid s 91.

⁶⁹⁰ Ibid ss 90(1), (2).

⁶⁹¹ Ibid ss 95, 96(1).

⁶⁹² Ibid ss 97(1), (2).

⁶⁹³ Ibid ss 98-100.

⁶⁹⁴ Ibid s 105.

⁶⁹⁵ Ibid s 106(1).

⁶⁹⁶ Ibid s 107(1).

⁶⁹⁷ Ibid s 111.

⁶⁹⁸ Ibid s 109.

12.1.3.2.2 Victorian Civil and Administrative Tribunal

The Victorian Civil and Administrative Tribunal can make an order about:

- the principal's decision-making capacity at the time of appointment or afterwards as it complies with the requirement of such an appointment;
- the effect of the supportive attorney appointment of any failure to comply with a requirement of the *Powers of Attorney Act 2014* (Vic);
- whether the supportive attorney has failed to comply with the terms of the appointment or is exercising undue influence over the principal; or
- any other matter that VCAT considers necessary in relation to the supportive attorney appointment.⁶⁹⁹

The Victorian Civil and Administrative Tribunal may then revoke, suspend or vary the effect of the supportive attorney appointment, or make any other order it considers necessary in relation to the supportive attorney appointment.⁷⁰⁰

An application can also be made to the Tribunal to give an advisory opinion on any matter related to the appointment.⁷⁰¹

12.1.3.2.3 Offences

A supportive attorney may be charged with a criminal offence under the *Powers of Attorney Act 2014* (Vic) if:

- a person dishonestly obtains the supportive attorney appointment to obtain financial advantage for the person or another person, or to cause loss to the principal or another person; or
- a supportive attorney dishonestly uses the supportive attorney appointment to obtain financial advantage for the supportive attorney or another person, or to cause loss to the principal or another person.⁷⁰²

The penalty for such action has the maximum penalty of 5 years imprisonment and/or 600 penalty units.⁷⁰³

12.2 Australian supported decision-making trials

A key strategy being trialled in other jurisdictions is to provide support to people, including those who are subject to public guardianship and/or administration, to develop their decision-making capacity. Government trials of supported decision-making have been conducted in South Australia, the Australian Capital Territory, New South Wales and Victoria. A summary of these trials is presented in Appendix Seven.

⁶⁹⁹ Ibid s 116(2).

⁷⁰⁰ Ibid s 120(3).

⁷⁰¹ Ibid s 121.

⁷⁰² Ibid s 136.

⁷⁰³ Ibid s 136.

The trials have shown that Australia can deliver on the intent of article 12 of the Convention by enhancing the legal capacity of some of the people subject to guardianship and administration.⁷⁰⁴ They also demonstrated that the provision of decision-making support can be a viable alternative to substitute decision-making undertaken by public agencies.⁷⁰⁵

The trials highlighted a range of benefits to those provided with decision-making support, including:

- improved decision-making skills and experience, and increased confidence in decision-making;
- making new types of decisions e.g. financial, accommodation, social;
- a greater feeling of control over their lives;
- growth in support networks;
- increased engagement in the community; and
- improved health, independence, relationships and/or life circumstances.⁷⁰⁶

There were also benefits for the people who provided decision-making support, such as positive changes to the ways in which they considered making decisions, an increased use of supported decision-making and positive changes to their relationships with the person/s to whom they provided decision-making support.⁷⁰⁷

However, the trials highlighted numerous challenges and barriers, which included:

- the absence of informal support networks and poor availability of supporters;
- the ability of a person to make and/or action some decisions being dependent on other service agencies e.g. their administrator permitting access to funds or their service provider enabling decisions to be actioned;
- the ability of people to sustain their supporter role and the need for legal recognition of supporters;
- managing the inherent tensions between duty of care and dignity of risk, best interests and expressed wishes;
- the need for resources, materials and/or training to provide information and guidance;
- the importance of safeguards;
- the cultural change that is required to fully embrace supported decision-making; and
- the time and costs associated with facilitating supported decision-making programs and assisting people to become 'decision-ready'.⁷⁰⁸

⁷⁰⁴ Westwood Spice (for the Department of Family and Community Services (New South Wales)), above n 550, 13.

⁷⁰⁵ Margaret Wallace, above n 550, 5; Office of the Public Advocate (South Australia), above n 550; ADACAS Advocacy, above n 550, 48-49.

⁷⁰⁶ Margaret Wallace, above n 550, 4-5, 18-20, 23, 26; Office of the Public Advocate (South Australia), above n 550; Westwood Spice (for the Department of Family and Community Services (New South Wales)), above n 550, 49, 52-53; ADACAS Advocacy, above n 550, 32.

⁷⁰⁷ Margaret Wallace, above n 550, 5.

⁷⁰⁸ Office of the Public Advocate (South Australia), above n 635, 59, 63; Margaret Wallace, above n 550, 44-46, 54-55; Office of the Public Advocate (South Australia), 'Annual Report 2011' (2011) 114; Westwood Spice (for the Department of Family and Community Services (New South Wales)), above n 550, 63, 66, 70; ADACAS Advocacy, above n 550.

12.3 Views of Queensland stakeholders

Many Queensland stakeholders who were either interviewed by, or made a submission to, the Office of the Public Advocate were supportive of the concept of supported decision-making.⁷⁰⁹ The provision of decision-making support to those who require it was seen as being integral to a person's autonomy and legal capacity.⁷¹⁰ As articulated by one stakeholder, "all people as a matter of law have capacity to make the decisions for themselves. Every individual therefore has the right to support, care, advice which they themselves choose to receive. That is part of their exercise of capacity".⁷¹¹ Further, there was consensus among the Public Advocate's Decision-Making Support Advisory Group⁷¹² that there is a real need in Queensland to consider less restrictive approaches than guardianship and administration.

Stakeholders held varied perspectives about the extent and way in which a model more actively promoting decision-making support should be adopted and/or formalised in Queensland. Perspectives ranged from disbanding the existing guardianship system and replacing it with a supported decision-making model, to offering a range of decision-making interventions and mechanisms to address the differing needs and circumstances of individuals.⁷¹³

While it was generally acknowledged that there would continue to be some need for guardianship and administration, general consensus was that its use should be minimal and a true 'last resort'.⁷¹⁴ As articulated by one advocacy organisation, "the legal right of people with disabilities to make their own decisions should only ever be interrupted in extraordinary circumstances".⁷¹⁵

Some advocates felt that the guardianship system should better emphasise a person's independence by promoting supported rather than substitute decision-making⁷¹⁶ and that this would mean that "guardianship and administration orders are in some cases no longer necessary".⁷¹⁷

Some stakeholders felt there was a gap between legislation and practice, that is that Queensland's guardianship legislation is adequate and offers opportunities to facilitate supported decision-making, however there were concerns that these opportunities are not well translated into practice.⁷¹⁸ As a result, many potential enablers for a decision-making support model were considered to sit in the policy and practice realms. Some held the view that decision-making support should be part of the suite of social or community services and

⁷⁰⁹ Office of the Public Advocate interviews B9X, C2W, MXS, GHP, HPK, KC8, MDZ (2014); Queensland Advocacy Incorporated, above n 24, 2, 7; Queensland Aged and Disability Advocacy Inc., above n 24, 3-4.

⁷¹⁰ Office of the Public Advocate interviews B9X, C2W (2014); Queensland Advocacy Incorporated, above n 24, 2.

⁷¹¹ Queensland Advocacy Incorporated, above n 24, 7.

⁷¹² Office of the Public Advocate interview B9X (2014).

⁷¹³ Based on the Advisory Group members who attended the December 2015 meeting.

⁷¹⁴ Queensland Advocacy Incorporated, above n 24, 2; Professor Malcolm Parker, above n 24, 1; Queensland Aged and Disability Advocacy Inc., Submission No 148 to Queensland Law Reform Commission as cited in Queensland Law Reform Commission, above n 10, vol 3, 16 [14.49]; Office of the Public Advocate, above n 34; Office of the Public Advocate interviews B9X, DRN (2014).

⁷¹⁵ Queensland Advocacy Incorporated, above n 24, 9; Office of the Public Advocate interviews B9X, C2W, DRN, DXC (2014); Office of the Public Advocate, above n 34.

⁷¹⁶ Queensland Advocacy Incorporated, above n 24, 5.

⁷¹⁷ Ibid 2; Queensland Aged and Disability Advocacy Inc., Submission No 148 to Queensland Law Reform Commission as cited in Queensland Law Reform Commission, above n 10, vol 3, 16 [14.49].

⁷¹⁸ Queensland Advocacy Incorporated, above n 24, 5.

⁷¹⁹ Office of the Public Advocate interview B9X (2014); Queensland Aged and Disability Advocacy Inc., above n 24, 1, 3.

civil society measures aimed at advancing the rights of people with disability to participate in society as active citizens, with choice and control over their lives.⁷¹⁹

A number of stakeholders who were involved in delivering government guardianship and administration services held more conservative views. They supported the concept and underlying ideals of supported decision-making, however their views were generally more protective and cautious.⁷²⁰

A challenge raised by some interviewees was how a decision-making support model would successfully support vulnerable people who have few or no other people in their lives, except for support or service staff or someone similar.⁷²¹ Some people have lost all contact with their family or are estranged from them, as illustrated by one stakeholder who commented that “what constantly surprises me here is how many people out there in the world have no one. No family, no friends, particularly as they age and particularly people with profound disability. We find cases of people who’ve been in nursing homes forty odd years and never been visited. And their world is the nursing home bed. Their only social contact is the nursing home workers and the doctor who comes by and maybe the Minister who comes by. They’ve just been abandoned. And there is no one.”⁷²²

The challenge of enabling effective decision-making support for those lacking an informal support network is not unique to Queensland. Government departments, academic bodies and non-government organisations across Australia are working to find ways to most appropriately provide ongoing support to those with little or no informal support network. Citizen advocacy programs and paid decision-making supporters are examples of the programs that are being explored.

There were mixed views about formalising the role of decision-making supporters through legislation. For example, one stakeholder said that legal recognition and authority of supporters is needed, while another suggested that legal and policy definitions of a supporter need exploration before pursuing legislation. Another warned that an unintended consequence of adopting decision-making support model could be ‘widening the net’ of guardianship.⁷²³

There were contrasting views about safeguards, for example, an advocacy organisation felt that the supported decision-making model offered an in-built safeguard, as it is built around notions of respect, autonomy, empowerment and appropriate support. In contrast, another stakeholder raised concerns around the questionable motivations and poor knowledge, skills and resources of supporters.⁷²⁴

Ensuring that appropriate safeguards are in place is a key challenge. An absence of adequate safeguards may unfortunately lead to an increase in the exploitation and/or abuse of people with impaired decision-making capacity. It may also trigger an increase in the number of guardianship and administration applications, appointments and investigations.

⁷¹⁹ Office of the Public Advocate interview HB5 (2014); Office of the Public Advocate, above n 34.

⁷²⁰ Office of the Public Advocate interviews PNJ, QNC, QRD, Q4B (2014).

⁷²¹ Office of the Public Advocate interviews B9X, KC8, HB5 (2014).

⁷²² Office of the Public Advocate interview B9X (2014).

⁷²³ Carers Queensland Inc., above n 24, 5; Office of the Public Advocate interviews B9X, DXC (2014).

⁷²⁴ Office of the Public Advocate interview B9X (2014); Queensland Advocacy Incorporated, above n 24, 17.

12.4 Recommendation

Recommendation 26: Given the inaction since the QLRC’s guardianship law review, the pressures on the guardianship system, and the move towards positive obligations in support of rights and autonomy, the adequacy of the current range of responses and mechanisms in relation to impaired decision-making capacity should be examined with a view to ensuring that Queenslanders have access to appropriate decision-making support when they need it and in a manner that is the least restrictive of their rights and legal capacity.

13 Conclusion

There is a growing number of people in Queensland who experience difficulty in following through the process of reaching a decision and putting the decision into effect. This course is set to continue in light of current health, social and demographic trends and will place increasing and significant pressure on Queensland's guardianship system, some aspects of which are already under strain.

Growing pressure on the guardianship system also stems from the many systemic barriers to maintaining legal capacity that arise from legal, regulatory and human service system requirements. The relative low cost and accessibility of the guardianship system has resulted in it bearing the cost for the shortcomings of other systems.

The Australian legal and policy landscape is being repositioned to ensure that people are able to exercise and maintain their legal capacity to the greatest extent possible. There is a resultant need to examine the structure, mechanisms and delivery of decision-making supports in Queensland. While substitute decision-making is likely to have an ongoing role in the foreseeable future, there exists a need to give considered attention to other less restrictive ways to support a person with impaired decision-making capacity to make decisions.

No enhancements have been made to Queensland's guardianship system since the QLRC delivered its review findings in 2010. Further, discussion about legal capacity and supported decision-making has notably progressed since this time, resulting in a greater need to explore enhancements to the guardianship system.

The extent of the pressures currently impacting Queensland's guardianship system, the anticipated future impact of reforms in the disability, aged care and mental health sectors, and the move towards effecting positive obligations in support of rights and autonomy support the need for reform.

It is timely for the Queensland Government to reconsider the adequacy of the current range of responses and mechanisms available for people with impaired decision-making capacity and ensure that Queenslanders have access to appropriate and proportionate decision-making support when they need it and in a manner that is the least restrictive of their rights and legal capacity. In doing so, due consideration must also be given to appropriate safeguards.

There is a lot to be done to promote the uptake of supported decision-making in Queensland, both within the guardianship system and in the legal and human services systems.

There are roles for both law and policy, however many opportunities to advance supported decision-making sit in the practice realm. They exist in the everyday lives of people who experience difficulty with one or more aspects of making a decision. Family members, carers, service and support providers and others have the opportunity to positively support the decision-making of people who experience difficulty with an aspect or aspects of making and actioning a decision.

This Report highlights the opportunities that exist for Government to take a leadership approach to this issue and to effect changes that provide the foundation for cultural and societal shifts that reflect contemporary directions in decision-making support.

Appendix One – Data collection

Organisational information

QCAT, the OPG and the Public Trustee provided organisational data and operational information (including organisational policies and procedures) to support this research. The Public Advocate made the requests for information within the authority of section 210A of the *Guardianship and Administration Act*.⁷²⁵

Queensland Civil and Administrative Tribunal interviews

Interviews with members from the Human Rights Division of QCAT were conducted in June and July 2014. The 36 members who, at that time, presided over guardianship and administration matters were invited to participate in the research. Ten Tribunal members participated in the interview process, which equated to a 28% participation rate. Around half (56%) of the ordinary members and one fifth (20%) of the sessional members were interviewed.

The two-part interview comprised a 10 minute online survey designed to gather members' views about specific issues and a 1.5 hour interview which further explored the issues in the survey. The purpose of the interview was to gather the expert and unique perspective of Tribunal members on making capacity determinations, appointing decision-makers and other matters relevant to upholding the general principles in the *Guardianship and Administration Act*. The interview also sought their views on broader issues relating to Queensland's guardianship system.

It is acknowledged that a degree of interest bias is likely to be present in the interview data. Some Tribunal members may have participated in the interview because they had a particular interest in the topic of decision-making support. There is therefore a risk that some of the results in relation the interview topics are positively skewed.

Office of the Public Guardian and Public Trustee interviews

Face-to-face interviews were conducted with executives from the OPG in August 2014. A group discussion with nine Regional Managers and Team Leaders took place in October 2014. The purpose of the individual and group interviews was to gain insight into the application of the *Guardianship and Administration Act*, upholding the general principles, the agency's service model, challenges faced by the agency, the participation of clients in decision-making and broader issues relating to Queensland's guardianship system.

⁷²⁵ *Guardianship and Administration Act 2000* (Qld) s 210A stipulates that the Public Advocate has a right to all information necessary to perform the functions of the Public Advocate. This includes information about the policies and procedures of an agency that relate to the provision of services to adults.

Information was gathered from the Office of the Public Trustee via the same method. In October 2014, face-to-face interviews were conducted with executives from the Public Trustee and a group discussion was held with Regional Managers. The objectives of the discussion were to explore, from the Public Trustee's perspective, how the agency fulfils its functions under the *Guardianship and Administration Act*, the way in which the agency upholds the general principles, the agency's approach to developing budgets and making decisions for clients, the participation of clients in decision-making and broader issues relating to, and challenges facing, Queensland's guardianship system.

Online surveys with public guardians and administrators

Public guardians

A 15 minute online survey was designed to gain a frontline perspective about the way in which the OPG implements the *Guardianship and Administration Act*. In October 2014, all members of the Adult Guardianship Team were invited to participate in the survey. Legal officers were excluded from the survey due to the nature of their work.

The survey comprised short-answer questions about the application of the general principles, making decisions for people with impaired capacity for a matter, and the participation of clients in decision-making. It also explored the challenges that public guardians face when undertaking their role and other practical aspects of the guardianship system.

The survey was available for completion for three weeks. A total of 30 staff completed the survey, which equated to a 55% response rate. Based on the survey response rate and the profile of research participants, the results from the survey are considered to be generally representative of the Adult Guardianship Team.

The sample size of the surveys conducted with the OPG and the Public Trustee (discussed below) restricted the ability to conduct cross-tabulation analysis or statistical significance testing. The survey analysis presents aggregated results to preserve the anonymity of respondents and excludes 'unsure' and 'not applicable' responses.

Public administrators

A 10-15 minute online survey was administered to gain insights from the Public Trustee officers who are involved in administration for Queenslanders who are deemed to lack capacity for financial matters. The survey consisted of short-answer questions that explored the practical application of the general principles, developing budgets and making decisions for clients, the participation of clients in the decision-making process, the profile of clients and the various interactions that officers have with them. The survey also examined the challenges of making substitute financial decisions and other practicalities of undertaking the role of administrator.

The survey was available for completion for three weeks from mid-November until early December 2014. A total of 43 surveys were completed, delivering a 12% response rate. The

results from the online survey of public administrators are not considered to be representative of the broader group of officers involved in the administration area of the Public Trustee. The low response rate of this survey means that the survey results were not publishable.

Issues Paper

An Issues Paper was publicly released in November 2014. The paper presented a brief discussion about some of the issues that arose during the conduct of the research, including advance planning, informal decision-making, capacity determinations and the appointment of guardians and administrators. The Paper invited interested people and organisations to make a submission on the issues. Table 8 presents the nine submissions that were received.

Table 8: Issues Paper submissions

No.	Name of person/organisation
1	Karen Kline
2	Professor Malcolm Parker, Professor of Medical Ethics & Head, Discipline of Medical Ethics, Law & Professional Practice, University of Queensland (School of Medicine)
3	Holly Brennan, General Manager, Education and Community Services, Family Planning Queensland
4	Michelle O'Flynn, Director, Queensland Advocacy Incorporated
5	Sarah Walbank, Policy & Research Officer, Carers Queensland Inc.
6	Tess Patterson, Support Counsellor, Seniors Legal and Support Service
7	Geoff Rowe, Chief Executive Officer, Queensland Aged and Disability Advocacy Inc.
8	Mr and Mrs Semple
9	Anonymous

The submissions received by the Office of the Public Advocate were not published, however they have been referred to and/or quoted in this report. The identity of submission authors has only been suppressed for those who requested to remain anonymous.

Examination of published decisions and transcripts

The examination of published decisions and selected transcripts provided insights into decision-making support in practice. The exploration of decisions was undertaken via the Supreme Court of Queensland Library website where QCAT decisions are published.

A list of cases that included discussion about decision-making support and/or upholding the right of a person to make their own decisions was compiled. The transcripts for these cases were canvassed, identifying real examples of the *Guardianship and Administration Act* in practice. The transcripts included 'restricted' material. Guardianship legislation stipulates that decisions from proceedings can be published, however any information that may lead to the identification of the person who is the subject of the hearing involved must be removed. Due to these requirements, information from the transcripts was carefully screened and edited.

Exploration of contemporary literature and reports

A review of literature formed a foundational part of this research. Promoting decision-making support consistent with the Convention is a fast moving field of research that required the research team to keep up to date with contemporary literature and publications as they emerged.

In addition, the research was informed by a number of significant Australian reports, in particular the QLRC's report *A Review of Queensland's Guardianship Laws*, the ALRC's Report *Equality, Capacity and Disability in Commonwealth Laws* and the VLRC's *Guardianship: Final Report*.⁷²⁶

Profile of research participants

Queensland Civil and Administrative Tribunal⁷²⁷

Ten Tribunal members who preside over guardianship and/or administration matters participated in the research. This group comprised five ordinary members and five sessional members. Seven of the Tribunal members who participated in the research were legal members and four were professional members.⁷²⁸ The majority of members were based in Brisbane (eight members), three were based in regional Queensland.⁷²⁹

The Tribunal members who were interviewed averaged 11 years of service with the Tribunal. The length of time serving as a member of the Tribunal ranged from six years of service up to 17 years of service.

Table 9: Length of time as Tribunal member⁷³⁰

	Count
Up to 5 years	0
5 years up to 10 years	2
10 years up to 15 years	5
15 years or more	3
Total	10

Base: All respondents.

⁷²⁶ Queensland Law Reform Commission, above n 10; Australian Law Reform Commission, above n 6; Victorian Law Reform Commission, above n 42.

⁷²⁷ Office of the Public Advocate, Interviews with Tribunal members (2014).

⁷²⁸ The total of legal and professional members exceeds the number of members interviewed as a member may qualify for both categories.

⁷²⁹ The total of Brisbane and regional members exceeds the number of members interviewed as a member may qualify for both categories.

⁷³⁰ Includes service on any of the Tribunals that formed the Queensland Civil and Administrative Tribunal.

Office of the Public Guardian⁷³¹

As seen in Table 10, half (50%) of survey participants were based in Brisbane (including South Brisbane). Twenty-seven (27%) of participants were based in Townsville and 23% were based in Ipswich.

Table 10: Office of the Public Guardian office location

	Percent
South Brisbane	33%
Townsville	27%
Ipswich	23%
Brisbane	17%
Total	100%

Base: All respondents.

Staff with varied lengths of employment at the OPG completed the survey. Twenty-seven percent (27%) of survey respondents had been with the OPG for up to 2 years, while 37% had been employed by the office from 2 years up to 5 years and a further 37% had been employed by the office for more than five years.

Table 11: Length of employment at the Office of the Public Guardian⁷³²

	Percent
Up to 2 years	27%
2 years up to 5 years	37%
More than 5 years	37%
Total	100%

Base: All respondents. Note: Sum of percentages may not equal 100% as percentages have been rounded to whole numbers.

Survey respondents were asked about their position within the OPG. Approximately three-quarters of respondents (76%) held the position of Guardian, Senior Guardian or Principal Guardian. A further 13% of respondents were Team Leaders/Business Improvement Officers and 10% were Regional Managers. Surveys were not completed by any Liaison Officers or Senior Guardians (Positive Behaviour Support).⁷³³

⁷³¹ Office of the Public Advocate, above n 52.

⁷³² Length of employment includes any period of employment with the Office of the Adult Guardian.

⁷³³ Percentages may not total 100%.

Appendix Two – Advisory Group members

Table 12: List of Advisory Group members

Organisation	Name	Position
Anti-Discrimination Commission Queensland	Kevin Cocks AM	Commissioner
Caxton Legal Centre	Vivienne Campion Ros Williams	Manager Lawyer
Department of Communities, Child Safety and Disability Services	Professor Karen Nankervis	Chair, Centre of Excellence for Clinical Innovation and Behaviour Support Executive Director, Disability Practice and Service Improvement
Griffith University	Professor Jayne Clapton	Program Lead, Year 1 Experience, Health Ideas, School of Human Services & Social Work
(Independent advocate)	Karen Kline	
National Disability Services	Richard Nelson	State Manager, Qld
Office of the Public Guardian	Kevin Martin/Julia Duffy Amy Wicks	Public Guardian Regional Manager
Queensland Advocacy Incorporated	Michelle O'Flynn David Manwaring	Director Lawyer, Human Rights Legal Services
Queensland Aged and Disability Advocacy	Nick Collyer Geoff Rowe/Margaret Deane	Systems Advocate Chief Executive Officer
Queensland Alliance for Mental Health	Kris Trott	Chief Executive Officer
Queensland Civil and Administrative Tribunal	Clare Endicott	Senior Member, Human Rights Division
Mental Health Alcohol and Other Drugs Branch, Queensland Health	Janet Ceron	Director, Legislation Team, Office of the Chief Psychiatrist
Queensland Law Society	Brian Herd Julie McStay	Deputy Chair, Elder Law Committee Elder Law Committee
Queensland Law Society/ Queensland Aged and Disability Advocacy	Karen Williams	Elder Law Committee/ Guardianship Coordinator
Queensland Law Society/Legal Aid Queensland	Nigel Miller	Children's Law Committee Guest (QLS)/Principal Lawyer, Family Law Service (LAQ)

Organisation	Name	Position
Queensland Mental Health Commission	Dr Lesley van Schoubroeck	Queensland Mental Health Commissioner
	Nicole Hunter	Senior Policy Advisor
Queensland University of Technology	Professor Ben White	Director, Health Law Research Centre
	Professor Lindy Willmott	Director, Health Law Research Centre
	Dr Shih-Ning Then	Senior Lecturer
The Advocacy and Support Centre	Philippa Whitman	Chief Executive Officer
The Public Trustee	Tony Steinmetz	Executive Director, Client Services
	Clinton Miles	Director, Disability Services
University of Queensland	Professor Jill Wilson AO	Social Policy and Research, School of Social Work & Human Services
	Associate Professor Cheryl Tilse	Director, Postgraduate Research Studies, School of Social Work & Human Services

Appendix Three – Queensland’s legislative framework for guardianship

Current decision-making mechanisms

In Queensland and other Australian jurisdictions, the legal response to impaired decision-making capacity has primarily been a range of substitute decision-making mechanisms. In contrast to providing support for a person to make their own decision, substitute decision-making typically refers to situations where a decision is made for a person by another person or entity (such as a tribunal). Consistent with the common law *parens patriae* jurisdiction, a decision-maker must make decisions to ensure the proper care and protection of the person. Under Queensland’s guardianship legislation, several types of decision-makers are recognised, both informal and formal, but in effect they are all substitute decision-makers.

Informal decision-makers

Decisions made informally by the adult’s existing support network

Queensland’s guardianship legislation recognises that decisions for a person can be made informally by the person’s existing support network.⁷³⁴ This may include members of the person’s family, close friends of the person, and other people recognised by the Tribunal as providers of support to the person.⁷³⁵

While there is no specific legislative framework for informal decision-makers in Queensland’s guardianship legislation, the Tribunal has authority to ratify or approve a decision of an informal decision-maker (for a Queensland adult who has impaired capacity for the matter).⁷³⁶ Such an order may be of value in situations where there is doubt about the appropriateness of a decision or if ratification is required by a third party organisation.

Statutory health attorneys

Queensland’s guardianship legislation provides for consent to health care to be provided by a decision-maker who is not formally appointed by the Tribunal, but is in a close personal relationship with the person, known as a statutory health attorney. A statutory health attorney can only make decisions about a health matter in circumstances where the person does not have capacity for the matter and:

- there is no direction in an advance health directive;
- the Tribunal has not appointed a guardian or made an order; and
- the adult has not made an enduring document nominating an attorney.⁷³⁷

⁷³⁴ *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

⁷³⁵ *Ibid* sch 4 (definition of ‘support network’).

⁷³⁶ *Ibid* s 154.

⁷³⁷ *Ibid* ss 66(1)-(5); *Powers of Attorney Act 1998* (Qld) s 62(1).

Guardianship legislation sets out a priority order of people who may act as a person's statutory health attorney: a person's spouse (including a de facto or registered partner) with a close and continuing relationship; an unpaid carer; or a close friend or relation who is not the person's paid carer. The first of these people who is readily available and culturally appropriate to make a decision at a point in time will be the person's statutory health attorney. The Public Guardian is the statutory health attorney of last resort if no other person is appropriate and available.⁷³⁸

Decision-making in advance

There are a range of mechanisms provided under the *Powers of Attorney Act* that allow a person to make arrangements for future decision-making on their behalf in the event that their decision-making capacity becomes impaired. Such mechanisms, which include advance health directives and attorneys appointed under either an advance or enduring document, arguably provide people with greater control over who makes decisions for them should they lose decision-making capacity in the future and what types of decisions can be made.

Advance health directive

Advance health directives form an important part of the broader activity of advance care planning. In Queensland, an advance health directive is a way for a person (the principal) to give directions about their future health care should they, at some point, lose capacity. The advance health directive only comes into effect, and the appointed attorney can only exercise power, if the principal's decision-making capacity becomes impaired.⁷³⁹

Through an advance health directive, the principal can outline the future medical treatment and/or health care that they would like to receive and include information for the consideration of health professionals (e.g. health conditions and spiritual/cultural beliefs that may impact the health care they receive). The principal may also provide specific instructions about particular medical treatments such as life-sustaining measures and describe the quality of life that they would accept.⁷⁴⁰ The principal may also use the advance health directive to appoint one or more persons as attorneys to exercise powers for health matters.⁷⁴¹ The principal may also provide for terms or information about the exercise of the attorney's powers in the advance health directive. In exercising power as the attorney under an advance health directive, the attorney is subject to the terms of that directive.⁷⁴²

Attorneys appointed under an advance or enduring document

A power of attorney is a legal document that allows the principal to appoint another person or persons of their choosing to be their decision-maker in relation to personal or financial matters should they lose the capacity to make those types of decisions. In Queensland, there are two classifications of power of attorney: general and enduring powers of attorney.⁷⁴³

⁷³⁸ *Powers of Attorney Act 1998* (Qld) ss 63(1)-(2).

⁷³⁹ *Ibid* ss 36(1), (3).

⁷⁴⁰ *Ibid* s 35; Queensland Government, *Power of attorney and making decisions for others: Advance health directive* (16 September 2014) Queensland Government <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/advance-health-directive/>>.

⁷⁴¹ *Powers of Attorney Act 1998* (Qld) s 35(1)(c).

⁷⁴² *Ibid*.

⁷⁴³ *Ibid* ss 5(1)-(2).

General power of attorney

A general power of attorney allows the principal to appoint one or more attorneys to make financial decisions on their behalf⁷⁴⁴ for a specific event or period of time,⁷⁴⁵ for example when the principal is overseas for an extended period of time and requires their house to be sold or accounts to be paid.

A general power of attorney can only be made by a person who has capacity to make their own decisions. It is activated while the principal has capacity to make their own decisions⁷⁴⁶ and ends either at the time specified on the document or at a point in time when the principal's decision-making capacity becomes impaired.⁷⁴⁷

Enduring power of attorney

An enduring power of attorney allows for the principal to appoint one or more attorneys to make personal and/or financial decisions on their behalf in the future should their decision-making capacity become impaired.⁷⁴⁸

A person must have sufficient capacity to create an enduring power of attorney i.e. they must understand the nature and effect of the enduring power of attorney at the time it is created.⁷⁴⁹ In particular, the principal must understand that the attorney will have full control over matters once their power begins, subject to any terms or information contained in the instrument. The principal must also understand that, whilst their capacity is impaired, they cannot monitor or dictate the use of the power.

In relation to financial matters, an attorney may only exercise power at the time or upon any circumstances specified in the enduring document.⁷⁵⁰ If the enduring document does not specify when the power becomes exercisable, the attorney may exercise power from the time the document was created.⁷⁵¹ If an attorney's power for a matter is dependent on the principal having impaired decision-making capacity for the matter, then evidence to substantiate the principal's impaired capacity may be required.⁷⁵²

In relation to personal matters, an attorney may only exercise power under the enduring document for the period when the principal has impaired decision-making capacity for the matter.⁷⁵³

⁷⁴⁴ Ibid s 8(a).

⁷⁴⁵ Ibid s 9(1).

⁷⁴⁶ Ibid s 18(1).

⁷⁴⁷ Ibid ss 9(1), 18(1).

⁷⁴⁸ Ibid s 32(1)(a).

⁷⁴⁹ Ibid ss 41(1)-(2).

⁷⁵⁰ Ibid s 33(1).

⁷⁵¹ Ibid s 33(2).

⁷⁵² Ibid s 33(5).

⁷⁵³ Ibid s 33(4).

Appointment of guardians and administrators

Queensland's guardianship legislation also allows for QCAT to appoint either or both a guardian or administrator to make decisions on behalf of a person who lacks capacity for particular decision-making matters.

Guardians can make decisions about *personal matters* such as where a person will live, their health care and what services they will access. *Personal matters* is defined in schedule two of the *Guardianship and Administration Act* and is an inclusive definition.⁷⁵⁴

Administrators can make decisions about *financial matters*, such as paying the person's day-to-day bills and accommodation expenses, buying and selling property, making investments, etc. The term, *financial matters*, is defined in schedule two of the *Guardianship and Administration Act* and is an inclusive definition.⁷⁵⁵

In order to appoint a guardian or administrator, QCAT must be satisfied not only that a person has impaired capacity for one or more matters but also that:

- there is a need for a decision in relation to the matter or the person 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
- the person's needs will not be adequately met and/or their interests will not be adequately protected without an appointment.⁷⁵⁶

Therefore if a person already has someone in their life who can act as their statutory health attorney, and the only decisions that need to be made are health care decisions, the Tribunal may not find it necessary to appoint a guardian for health matters.

While the scope of both personal matters and financial matters are theoretically undefined, and a guardian or administrator may do anything in relation to those matters for which they are appointed that the person could have done if the person had capacity for the matter,⁷⁵⁷ they must still act within the terms of their appointment by the Tribunal.

Queensland Civil and Administrative Tribunal

The Tribunal may also make decisions regarding a matter for which an adult has impaired capacity. In some circumstances, the Tribunal may consent to special health care and the withholding or withdrawal of life sustaining-measures.⁷⁵⁸ The Tribunal may also consent to the use of some restrictive practices under certain circumstances.⁷⁵⁹

⁷⁵⁴ *Guardianship and Administration Act 2000* (Qld) sch 2, s 2.

⁷⁵⁵ *Ibid* sch 2, s 1.

⁷⁵⁶ *Ibid* s 12(1).

⁷⁵⁷ *Ibid* ss 33(1)-(2).

⁷⁵⁸ *Ibid* ss 68-74, 81.

⁷⁵⁹ *Ibid* s 81(1)(i).

Public agencies

Queensland Civil and Administrative Tribunal

The Tribunal is established under the *Queensland Civil and Administrative Tribunal Act 2009*⁷⁶⁰ and is effectively the gatekeeper of the guardianship system. It has an exclusive role in Queensland's guardianship system as the only entity with jurisdiction to appoint guardians and administrators⁷⁶¹ for people with impaired decision-making capacity for a matter.

The Tribunal carries out a number of other important functions under Queensland's guardianship legislation such as:

- making declarations of capacity of a Queensland adult, guardian, administrator or attorney for a matter;
- considering applications for the appointment of guardians and administrators;
- appointing guardians and administrators and reviewing the appointments;
- making declarations, orders or recommendations or giving directions or advice in relation to guardians, administrators, attorneys, enduring documents and other related matters;
- ratifying an exercise of power or approving a proposed use of power by informal decision-makers;
- consenting to the withholding or withdrawal of life-sustaining measures for adults with impaired capacity for the health matter; and
- other functions listed under section 81 of the *Guardianship and Administration Act*.⁷⁶²

The original intent for the Tribunal (whose jurisdiction was originally exercised by the Guardianship and Administration Tribunal, which was subsumed by QCAT in 2009) was for it to only be used if matters could not be resolved by less formal means. In other words, it was intended as a resolution and protection mechanism of last resort. In the 1996 QLRC report that shaped the legislative framework of Queensland's guardianship and administration system, the Commission recommended "the establishment of a specialist tribunal to determine assisted and substituted decision-making issues which cannot be resolved by less formal means or which arise because there is a risk to the personal wellbeing or financial security of someone with a decision-making disability."⁷⁶³

Similar to other administrative tribunals, proceedings before QCAT are intended to be conducted with as little formality and technicality and with as much speed as the requirements of the legislation permit.⁷⁶⁴

⁷⁶⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(a).

⁷⁶¹ In relation to settlements and damages awards, the Court may exercise all powers of the Tribunal as per *Guardianship and Administration Act 2000* (Qld) ss 245 (2-3).

⁷⁶² *Guardianship and Administration Act 2000* (Qld) s 81.

⁷⁶³ Queensland Law Reform Commission, above n 2, vol 1, Preface.

⁷⁶⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(d).

Public Guardian

The Public Guardian is an independent statutory officer established under the *Public Guardian Act 2014*.⁷⁶⁵ As part of Queensland's guardianship system, the Public Guardian has a key role in protecting the rights and interests of Queensland adults who have impaired capacity for a matter.⁷⁶⁶ With respect to decision-making, the Public Guardian can be appointed by the Tribunal as a guardian for personal matters. However, the *Guardianship and Administration Act* stipulates that the Public Guardian should only be appointed as a guardian if there is no other appropriate person available for appointment for the matter.⁷⁶⁷

The Public Guardian may also act as a person's statutory health attorney, similarly as a last resort option, if there is no other appropriate person available to exercise power for the matter.⁷⁶⁸ A person may also appoint the Public Guardian as their attorney to make health care decisions under an advance health directive,⁷⁶⁹ or an attorney (to make personal decisions only) under an enduring power of attorney.⁷⁷⁰

Generally, the legislative functions of the Public Guardian in relation to people with impaired decision-making capacity include:

- protecting them from abuse, neglect or exploitation;
- delivering the Community Visitor Program;
- investigating complaints and allegations about the actions of an attorney, guardian, administrator or other people appointed by enduring documents or QCAT order;
- mediating and conciliating between attorneys, guardians, administrators and other people (e.g. health providers);
- acting as a last resort attorney and guardian;
- educating professionals and the community about the *Guardianship and Administration Act*; and
- other functions listed under section 12 of the *Public Guardian Act 2014*.⁷⁷¹

Public Trustee

The role of the Public Trustee of Queensland and the corporation it constitutes is given authority under the *Public Trustee Act 1978* (Qld).⁷⁷² The Public Trustee delivers financial and legal services, including the administration of deceased estates, management of trusts, document making including wills and enduring powers of attorney, and financial administration for people with impaired decision-making capacity.⁷⁷³ The organisation also

⁷⁶⁵ *Public Guardian Act 2014* (Qld) s 9.

⁷⁶⁶ *Ibid* s 10(1).

⁷⁶⁷ *Guardianship and Administration Act 2000* (Qld) s 14(2).

⁷⁶⁸ *Powers of Attorney Act 1998* (Qld) s 63(2).

⁷⁶⁹ *Ibid* s 29(2)(c).

⁷⁷⁰ *Ibid* s 29(1)(d).

⁷⁷¹ *Public Guardian Act 2014* (Qld) s 12.

⁷⁷² *Public Trustee Act 1978* (Qld) ss 7-8.

⁷⁷³ The Public Trustee of Queensland, above n 114, 3.

provides a free will-making service to Queenslanders and delivers public education in relation to wills and enduring powers of attorney.⁷⁷⁴

With respect to decision making in Queensland's guardianship system, a person may appoint the Public Trustee as their attorney to make health care decisions under an advance health directive, or an attorney under an enduring power of attorney.⁷⁷⁵ The Tribunal may appoint the Public Trustee to act as a person's administrator,⁷⁷⁶ although there is no requirement (as there is for the Public Guardian) that this should be a last resort appointment where no other appropriate person is available.

Public Advocate

The Public Advocate is an independent statutory position appointed in accordance with the *Guardianship and Administration Act*.⁷⁷⁷ The functions of the Public Advocate are:

- Promoting and protecting the rights of adults with impaired capacity for a matter;
- Promoting the protection of adults from neglect, exploitation or abuse;
- Encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy;
- Promoting the provision of services and facilities for the adults; and
- Monitoring and reviewing the delivery of services and facilities to the adults.⁷⁷⁸

The Public Advocate undertakes systems advocacy by engaging in formal and informal discussions with government, associations and organisations to positively influence the laws, policies and practices that affect people who experience impaired decision-making capacity. The Public Advocate promotes and pursues systemic change that enhances the lives of people with impaired decision-making capacity, and creates improved outcomes, greater opportunities and a just and inclusive society.

⁷⁷⁴ The Public Trustee of Queensland, above n 114, 8.

⁷⁷⁵ *Powers of Attorney Act 1998* (Qld) ss 29(1)(b), 29(2)(b).

⁷⁷⁶ *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

⁷⁷⁷ *Guardianship and Administration Act 2000* (Qld) ss 209, 211.

⁷⁷⁸ *Ibid* s 209.

Appendix Four – Purpose, acknowledgements and principles of the *Guardianship and Administration Act*

Purpose and acknowledgements

The purpose of the *Guardianship and Administration Act* is to strike an appropriate balance between the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making and the adult's right to adequate and appropriate support for decision-making.⁷⁷⁹ The Act seeks to achieve this purpose by (amongst other things):

- presuming that adults have capacity;
- stating the principles to be observed by those performing a function or exercising a power under the *Guardianship and Administration Act* or the *Powers of Attorney Act*; and
- encouraging an adult's support network to be involved in decision-making for the adult.⁷⁸⁰

The preliminary sections of the *Guardianship and Administration Act* specifically acknowledge that the capacity to make a decision of an adult with impaired capacity may be affected by the support available to them from their support network and that they have a right to adequate and appropriate support for decision-making.⁷⁸¹ Specifically, the Act acknowledges that:

- an adult's right to make decisions, including those with which others do not agree, is fundamental to their inherent dignity;
- the capacity of an adult with impaired capacity may differ according to:
 - the nature and extent of their impairment;
 - the type of decision to be made, including, for example, the complexity of the decision to be made; and
 - the support available to them from members of the adult's support network;
- an adult's right to make decisions should be restricted and interfered with to the least possible extent; and
- an adult with impaired capacity has a right to adequate and appropriate support for decision-making.⁷⁸²

⁷⁷⁹ Ibid s 6.

⁷⁸⁰ Ibid s 7.

⁷⁸¹ Ibid ss 5(c)(iii), 5(e).

⁷⁸² Ibid s 5.

General principles

Both the *Guardianship and Administration Act* and the *Powers of Attorney Act* also contain eleven general principles and a health care principle (collectively, ‘the principles’).⁷⁸³ The principles must be applied or complied with by any person or entity who performs a function or exercises a power under the guardianship legislation for a matter in relation to an adult who has impaired capacity.⁷⁸⁴ The community is also encouraged to apply and promote the principles.⁷⁸⁵

There is also a specific obligation for guardians and administrators to apply these principles.⁷⁸⁶ The collective effect of these provisions is that decision-makers (inclusive of statutory health attorneys, attorneys, guardians, administrators and the Tribunal) must apply the principles.

It is unclear whether an informal decision-maker is subject to these principles as the legislation does not expressly require that they apply the general principles.⁷⁸⁷ It is arguable, however, that by virtue of section 9, an informal decision-maker is performing a function or exercising a power and would therefore be bound to apply the general principles.⁷⁸⁸ Regardless, the QLRC made a recommendation that the *Guardianship and Administration Act* be amended to put this beyond doubt.⁷⁸⁹

As seen in Table 13, the principles include strong statements of human rights and respect for dignity and self-determination that are consistent with the Convention. Some of the most relevant principles for the purposes of this discussion about support for decision making are general principles six, seven and eight.

Principle six (encouragement of self-reliance) recognises that without appropriate support and assistance, an adult may not be empowered to achieve their full potential. Providing support to an adult to make their own decisions would arguably assist the adult to reach their potential and increase self-reliance.

Principle seven (maximum participation, minimal limitations and substituted judgement) preserves an adult’s right to be involved in decision-making about matters that relate to them, and to make their own decisions whenever possible. The provision of decision-making support is a requirement of this principle.

This principle also provides guidance to inform the way in which substituted decisions for an adult with impaired capacity are made. Importantly, this principle imposes an obligation to seek the adult’s views and wishes and to take them into account when exercising any power under the *Guardianship and Administration Act*.

⁷⁸³ Ibid sch 1, pt 1; Powers of Attorney Act 1998 (Qld) sch 1, pt 1.

⁷⁸⁴ *Guardianship and Administration Act 2000* (Qld) s 11; *Powers of Attorney Act 1998* (Qld) s 76.

⁷⁸⁵ *Guardianship and Administration Act 2000* (Qld) s 11(3).

⁷⁸⁶ Ibid s 34.

⁷⁸⁷ Queensland Law Reform Commission, above n 10, vol 1, 62.

⁷⁸⁸ Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, Working Paper No 64 (2008) 37.

⁷⁸⁹ Queensland Law Reform Commission, above n 10, vol 1, 143 [rec 4-2].

There is an aspect of principle seven that may be seen to inhibit the ability of adults to make their own decisions whenever possible. Principle seven requires that any person or entity who performs a function or exercises power under the *Guardianship and Administration Act*, must do so in a manner that is consistent with the proper protection and care of the adult.⁷⁹⁰

The substituted judgement principle provides that substitute decision-makers must, when making a decision, take into account what the adult would have done if they had capacity.

Applying a purposive approach, the explanatory sections and general principles⁷⁹¹ operate as a guide to the implementation and interpretation of the later substantive provisions of the *Guardianship and Administration Act*, including the decision-making regime that is established by this Act and the *Powers of Attorney Act*. It is therefore arguable that the *Guardianship and Administration Act* and the decision-making regime as a whole are to be approached in a way that recognises and promotes a person’s autonomy and the provision of appropriate decision-making support.⁷⁹²

Table 13: General principles and health care principle⁷⁹³

No.	Principle
1	Presumption of capacity An adult is presumed to have capacity for a matter.
2	Same human rights (1) The right of all adults to the same basic human rights regardless of a particular adult’s capacity must be recognised and taken into account. (2) The importance of empowering an adult to exercise the adult’s basic human rights must also be recognised and taken into account.
3	Individual value An adult’s right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.
4	Valued role as member of society (1) An adult’s right to be a valued member of society must be recognised and taken into account. (2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.
5	Participation in community life The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.
6	Encouragement of self-reliance The importance of encouraging and supporting an adult to achieve the adult’s maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.
7	Maximum participation, minimal limitations and substituted judgement (1) An adult’s right to participate, to the greatest extent practicable, in decisions affecting the adult’s life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.

⁷⁹⁰ *Guardianship and Administration Act 2000* (Qld) ch 2; sch 1, pt 1.

⁷⁹¹ *Ibid* ch 2; sch 1, pt 1.

⁷⁹² Office of the Public Advocate, ‘Autonomy and decision-making support in Queensland: A targeted overview of guardianship legislation’ (2014) 10.

⁷⁹³ *Guardianship and Administration Act 2000* (Qld) sch 1.

No.	Principle
7	<p data-bbox="327 268 1268 302">Maximum participation, minimal limitations and substituted judgement (continued)</p> <p data-bbox="327 302 1361 369">(2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.</p> <p data-bbox="327 369 1361 604">(3) So, for example,</p> <ul style="list-style-type: none"> <li data-bbox="375 403 1361 470">(a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and <li data-bbox="375 470 1361 537">(b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and <li data-bbox="375 537 1361 604">(c) a person or other entity performing a function or exercising a power under this Act must do so in a way least restrictive of the adult's rights. <p data-bbox="327 604 1361 772">(4) Also, the principle of substituted judgement must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity performing a function or exercising a power under this Act must take into account what the person or other entity considers would be in the adult's views and wishes.</p> <p data-bbox="327 772 1361 840">(5) However, a person or other entity performing a function or exercising a power under this Act must do so in a way that is consistent with the adult's proper care and protection.</p> <p data-bbox="327 840 1361 907">(6) Views and wishes must be expressed orally, in writing or in another way, including, for example, by conduct.</p>
8	<p data-bbox="327 907 869 940">Maintenance of existing supportive relationships</p> <p data-bbox="327 940 1361 1008">The importance of maintaining an adult's existing supportive relationships must be taken into account.</p>
9	<p data-bbox="327 1008 782 1041">Maintenance of environment and values</p> <p data-bbox="327 1041 1361 1120">(1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.</p> <p data-bbox="327 1120 1361 1243">(2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.</p>
10	<p data-bbox="327 1243 662 1276">Appropriate to circumstances</p> <p data-bbox="327 1276 1361 1355">Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs.</p>
11	<p data-bbox="327 1355 494 1388">Confidentiality</p> <p data-bbox="327 1388 1361 1456">An adult's right to confidentiality of information about the adult must be recognised and taken into account.</p>
12	<p data-bbox="327 1456 558 1489">Health care principle</p> <p data-bbox="327 1489 1361 1601">(1) The health care principle means power for a health matter, or special health matter, for an adult should be exercised by a guardian, public guardian, the tribunal, or for a matter relating to prescribed health care, another entity-</p> <ul style="list-style-type: none"> <li data-bbox="375 1601 1361 1635">(a) in the way least restrictive of the adult's rights; and <li data-bbox="375 1635 1361 1769">(b) only if the exercise of power- <ul style="list-style-type: none"> <li data-bbox="422 1668 1361 1736">(i) Is necessary and appropriate to maintain or promote the adult's health or wellbeing; or <li data-bbox="422 1736 1361 1769">(ii) Is, in all the circumstances, in the adult's best interests. <p data-bbox="375 1769 1361 1803"><i>Example of exercising power in the way least restrictive of the adult's rights-</i></p> <p data-bbox="375 1803 1361 1870">If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.</p>

No. Principle

12 Health care principle (continued)

- (2) In deciding whether the exercise of power is appropriate, the guardian, the public guardian, tribunal or other entity must, to the greatest extent practicable-
 - (a) seek the adult's views and wishes and take them into account; and
 - (b) take the information given by the adult's health provider into account.
 - (3) The adult's views and wishes may be expressed-
 - (a) orally; or
 - (b) in writing, for example, in an advance health directive; or
 - (c) in another way, including, for example, by conduct.
 - (4) The health care principle does not affect any rights an adult has to refuse health care.
 - (5) In deciding whether to consent to special health care for an adult, the tribunal or other entity must, to the greatest extent practicable, seek the views of the following person and take them into account-
 - (a) a guardian appointed by the tribunal for the adult;
 - (b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult;
 - (c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the statutory health attorney for the adult.
-

Appendix Five – Registration of enduring documents

Other jurisdictions - Australia

Tasmania is the only Australian jurisdiction where the registration of enduring powers of attorney is mandatory. In Tasmania, an enduring power of attorney does not have any legal effect until it is registered with the Land Titles Office. A copy of the document is kept on the register.⁷⁹⁴ A fee is payable to register/revoke an enduring power of attorney and to conduct a search of the register.⁷⁹⁵

The Northern Territory Government recommends that Advance Personal Plans are registered with the Public Trustee and noted on Medicare eHealth records.⁷⁹⁶ The Public Trustee does not charge a fee to register or search for an Advance Personal Plan, however a person wishing to search for a Plan must state the reason for their search request on a search application form.⁷⁹⁷

Other jurisdictions – International

Singapore

In Singapore, the Office of the Public Guardian (OPG) is responsible for a register of Lasting Power of Attorney (LPA) documents and the court orders that appoint a ‘deputy’, a person or Trust company who can make certain decisions for a person should they ‘lack mental capacity’.⁷⁹⁸ Two types of LPA documents are available:

- LPA-Form 1, which primarily comprises a series of check boxes for a person to grant power to their donee/s (attorney/s) and allows the person to select basic conditions or limitations to powers; and
- LPA-Form 2, which mainly comprises areas for free text to be inserted so the person can tailor the specific powers to their circumstance and needs. This form requires the involvement of a lawyer.⁷⁹⁹

⁷⁹⁴ Land, Property and Titles, Department of Primary Industries, Parks, Water and Environment, *Enduring Powers of Attorney Fact Sheet* (18 February 2015) Tasmanian Government <<http://dpipwe.tas.gov.au/Documents/Fact-sheet-on-Enduring-Powers-of-Attorney.pdf>>.

⁷⁹⁵ Land, Property and Titles, Department of Primary Industries, Parks, Water and Environment, *LTO Gazette Fees 2014-15* (27 October 2014) Tasmanian Government <<http://dpipwe.tas.gov.au/Documents/Gazette%20Fees%202014-15.pdf>>.

⁷⁹⁶ Department of Attorney-General and Justice, *Advance Personal Planning* (24 November 2014) Northern Territory Government <<http://www.nt.gov.au/justice/pubtrust/app/index.shtml>>.

⁷⁹⁷ Department of Attorney-General and Justice, *Application to search or obtain information from the Advance Personal Planning Register* (22 July 2014) Northern Territory Government <<http://www.nt.gov.au/justice/pubtrust/app/documents/APP-Search-Request.doc>>.

⁷⁹⁸ Office of the Public Guardian (Singapore), *Guide to the Lasting Power of Attorney* (2011) Office of the Public Guardian, 6, 31 <[http://m.opg.gov.sg/Resources/Flipbooks/Guide_to_LPA\(English\).pdf](http://m.opg.gov.sg/Resources/Flipbooks/Guide_to_LPA(English).pdf)>.

⁷⁹⁹ Office of the Public Guardian (Singapore), *The LPA: Choose and complete the appropriate Lasting Power of Attorney (LPA) Form* (29 October 2014) Office of the Public Guardian <<https://www.publicguardian.gov.sg/opg/Pages/The-LPA-Choose-appropriate-LPA.aspx?ParentTag=The+LPA>>.

There are two fees payable when making an LPA: a charge payable to the lasting power of attorney Certificate Issuer (the fee varies between issuers); and an application fee payable to the OPG. For Singapore residents, there is currently no fee payable to lodge a LPA-Form 1 (however a fee will soon be payable) and a fee of \$200SGD is payable to lodge a LPA-Form 2.⁸⁰⁰

The OPG charges two fees for accessing the register: a \$20SGD to search the register; and \$25SGD to access a true certified copy of a registered LPA.⁸⁰¹

The register is linked to relevant government agencies. Limited information is provided to government agencies to protect the privacy of individuals; the only shared information is the list of lasting power of attorney certification numbers. No personal information is shared.

Since the introduction of the *Mental Capacity Act* in 2010,⁸⁰² an investment in infrastructure (including the short-form lasting power of attorney and lasting power of attorney register), a public awareness campaign in relation to LPAs, and enhancements to the process of making a LPA, there has been continued and strong increases in the number of registered lasting power of attorneys.⁸⁰³

United Kingdom (England and Wales)

Under the *Mental Capacity Act 2005* (UK), the registration of a lasting power of attorney (known as an enduring power of attorney in Australia) is mandatory, that is, the instrument is not fully created until it has been registered.⁸⁰⁴ Instruments made before the *Mental Capacity Act 2005* (UK) came into force are referred to as enduring powers of attorney.⁸⁰⁵

There were 1.2 million lasting powers of attorney registered in the United Kingdom (England and Wales) as at 30 June 2015. Almost 400,000 of these were received in 2014-15, an increase of 34% on the previous year.⁸⁰⁶ This increase is being attributed to a recent reduction in fees and the establishment of an online lasting power of attorney form.⁸⁰⁷

It costs £110 to register a lasting power of attorney. People experiencing financial hardship may receive a reduced fee.⁸⁰⁸

The *Mental Capacity Act 2005* (UK) requires that certain people be notified of a registration application. These people have a prescribed time to lodge an objection to the registration, which is currently three weeks.⁸⁰⁹

⁸⁰⁰ Office of the Public Guardian (Singapore), *Fees*, Office of the Public Guardian, <https://www.publicguardian.gov.sg/opg/Documents/CSC.MSF.OPGWebsite/Forms/ApplicationAndCancellationFeesFinal_26Aug.pdf>.

⁸⁰¹ Office of the Public Guardian (Singapore), *Search fees* (2011) Office of the Public Guardian, <[http://www.publicguardian.gov.sg/Portals/0/Search%20Fees%20\(final\)_27Dec13.pdf](http://www.publicguardian.gov.sg/Portals/0/Search%20Fees%20(final)_27Dec13.pdf)>.

⁸⁰² *Mental Capacity Act* (Singapore, cap 177A 2010 rev ed).

⁸⁰³ Office of the Public Guardian (Singapore), 'Annual Report 2013' (2014), 5; Office of the Public Guardian (Singapore), 'Annual Report 2014' (2014) 4, 7.

⁸⁰⁴ *Mental Capacity Act 2005* (UK) c 9 pt 1 s 9(2)(b).

⁸⁰⁵ *Ibid* c 9 sch 1 pt 2 paras 6-9.

⁸⁰⁶ Office of the Public Guardian (UK), 'Office of the Public Guardian Annual Report and Accounts 2014-2015' (2015), 3, 13.

⁸⁰⁷ Office of the Public Guardian (UK), 'Office of the Public Guardian Annual Report and Accounts 2013-2014' (2014), 3, 6, 8; Office of the Public Guardian (UK), above n 806, 3.

⁸⁰⁸ Government of the United Kingdom, *Make, register or end a lasting power of attorney: 4. Register a lasting power of attorney* (9 February 2015) GOV.UK <<https://www.gov.uk/power-of-attorney/register>>.

⁸⁰⁹ *Mental Capacity Act 2005* (UK) c 9 pt 1 s 9(2)(b); Office of the Public Guardian (UK), above n 808, 3.

The Office of the Public Guardian (OPG) also maintains a register of court orders appointing ‘deputies’, who are people appointed by the Court “to make decisions on behalf of a person who lacks capacity to make particular decisions”.⁸¹⁰ Searching the lasting power of attorney or court appointed deputies registers does not attract a financial charge.⁸¹¹

The registers of the OPG (UK) feature two tiers of searching. The first tier search results in the provision of names of the donor (the principal), the name/s of any attorneys or deputies, the matters in which the instrument relates, whether multiple attorneys or deputies are appointed jointly or severally, any relevant conditions or restrictions on the instrument, and other administrative details of the instrument.⁸¹²

An application for a second tier search can only be lodged following the provision of information under a tier one search. Reasons for requesting the second tier search must be provided on the application form. The provision of information about a donor under a second tier search is at the discretion of the OPG (UK).⁸¹³

Scotland

In Scotland, there is a system of mandatory registration for ‘continuing’ or ‘welfare power of attorney’ instruments. Such instruments do not have legal effect until they are registered with the Office of the Public Guardian (OPG).⁸¹⁴ Registration of a power of attorney document is at the discretion of the Public Guardian and attracts a fee of £74.⁸¹⁵

The intention behind the register was to ensure “that information about the power is openly available”.⁸¹⁶ The only details recorded on the register are the details of the person for whom the instrument applies and their nominated attorney/s.⁸¹⁷

Upon registration, the OPG provides a copy of the instrument to the person to whom it applies and up to two other individuals nominated by the person.⁸¹⁸

Searching the register does not attract a fee and must be applied for in writing. There is no prescribed application form, but rather applicants must provide as much personal information as possible about the person who is the subject of the search (e.g. names, address, date of birth, etc.).⁸¹⁹

⁸¹⁰ Office of the Public Guardian (UK), *Office of the Public Guardian Registers* (5 March 2014) GOV.UK, 11 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397043/LPA109_Office_of_the_Public_Guardian_Registers_guidance.pdf>.

⁸¹¹ Office of the Public Guardian (UK), above n 810, 6; Office of the Public Guardian (UK), *Find out if someone has an attorney or deputy acting for them* (12 November 2014) GOV.UK, <<https://www.gov.uk/find-someones-attorney-or-deputy>>.

⁸¹² Office of the Public Guardian (UK), above n 810, 7-8.

⁸¹³ *Ibid* 8-9.

⁸¹⁴ *Adults with incapacity (Scotland) Act 2000* pt 2 s 19(1).

⁸¹⁵ *Ibid* pt 2 s 19(2); Office of the Public Guardian (Scotland), Fees, Office of the Public Guardian (Scotland) <<http://www.publicguardian-scotland.gov.uk/power-of-attorney/fees>>.

⁸¹⁶ Explanatory Notes, *Adults with incapacity (Scotland) Act 2000* 75.

⁸¹⁷ *Ibid* 76.

⁸¹⁸ *Ibid* 81.

⁸¹⁹ Office of the Public Guardian (Scotland), Public register, Office of the Public Guardian (Scotland) <<http://www.publicguardian-scotland.gov.uk/general/what-we-do/general-faqs>>.

Appendix Six – Supported decision-making regimes in Canada and Europe

Canada

Alberta

The *Adult Guardianship and Trusteeship Act* became law in 2009. While it retained and modernised a system of adult guardianship and trusteeship in Alberta,⁸²⁰ it also introduced two new decision-making options: supported decision-making authorisations and co-decision-makers.

Supported decision-making authorisations

Supported decision-making authorisations are personal appointments where an adult forms an agreement with one to three other people, known as supporters, to assist them when making a lifestyle decision.⁸²¹ The adults who might utilise these supported decision-making authorisations are described as having the capacity to make their own decisions but “would like to have someone they trust help them in the decision-making process”.⁸²² The supporter does not have the power to make legally enforceable decisions on behalf of the person, but a decision made or communicated with the assistance of a supporter is considered to be a decision of the person.⁸²³

The legislative provisions authorise supporters to obtain personal information they need to assist the person to make a decision⁸²⁴ and public authorities, custodians or organisations are authorised to disclose personal information about a supported adult to a supporter who is authorised to access it.⁸²⁵ Supporters are also protected from liability if they act in good faith while exercising their authority or carrying out the duties of the supporter in accordance with the *Adult Guardianship and Trusteeship Act*.⁸²⁶

Co-decision-makers

In contrast to supported decision-making authorisations, co-decision-making orders are court appointments for joint decision-making, however they must be made with the consent of the adult.⁸²⁷ They are described as appropriate where an adult’s capacity to make decisions is significantly impaired but they can still make decisions with appropriate support.⁸²⁸

⁸²⁰ Victorian Law Reform Commission, *Guardianship: Consultation Paper 10* (released March 2011) 120.

⁸²¹ *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 4.

⁸²² Alberta Human Services, *Supported Decision-Making: Adult Guardianship and Trusteeship Act* (5 September 2013) Government of Alberta <<http://humanservices.alberta.ca/guardianship-trusteeship/opg-guardianship-supported-decision-making.html>>.

⁸²³ *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 6.

⁸²⁴ *Ibid* s 9.

⁸²⁵ *Ibid* s 9(2).

⁸²⁶ *Ibid* s 10.

⁸²⁷ *Ibid* s 13.

⁸²⁸ Alberta Human Services, above n 822.

Co-decision-making orders only apply to non-financial decisions and operate by requiring the appointed co-decision-maker and the person to work together and agree before proceeding with a decision.⁸²⁹ The adult, however, has the final say and their view takes precedence.⁸³⁰

Like supporters, co-decision-makers are protected from liability if they act in good faith while exercising the responsibilities of the role.⁸³¹ They are also entitled to all personal information from public bodies, except financial information, about the assisted adult relevant to carrying out the duties and responsibilities of the co-decision-maker.⁸³²

British Columbia

The *Representation Agreement Act* (RSBC 1996, c405) was enacted in 2000 as part of a package of reforms to the guardianship laws in British Columbia.⁸³³ Guardianship in British Columbia, called 'Committeeship', is governed by the *Patient's Property Act* (RSBC 1996, c349) and can occur via a court order or a Certificate of Incapability, signed by the director of a provincial mental health facility, which includes most public hospitals. Committeeship requires a finding that the adult is 'mentally incompetent' and results in the appointment of a substitute decision-maker (either a private party such as a family member or the Public Guardian and Trustee).⁸³⁴

Representation agreements

The stated purpose of the *Representation Agreement Act* (RSBC 1996, c405) is to provide a mechanism for adults to decide in advance how, when and by whom decisions about their health care, personal care or routine management of their financial affairs will be made if they become incapable of making decisions independently. It is also intended to avoid the court having to appoint a person to help the adult make decisions should they become 'incapable'.⁸³⁵

A representation agreement is therefore somewhat similar to a power of attorney,⁸³⁶ except that there is a positive obligation on the representative to consult with the adult when helping the adult to make decisions or making decisions on behalf of the adult.⁸³⁷

Furthermore, an adult may make a representation agreement even if they do not have capacity for certain matters. For example, an adult can make a standard representation agreement even if the adult is incapable of making a contract; managing his or her own health care, personal care or legal matters; or attending to the routine management of his or her own

⁸²⁹ *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, ss 12, 18; Victorian Law Reform Commission, above n 71, 121.

⁸³⁰ *Adult Guardian and Trusteeship Act*, SA 2008, c A-4.2, s 18; Victorian Law Reform Commission, above n 820, 121.

⁸³¹ *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 23.

⁸³² *Ibid* s 22(1).

⁸³³ Nidus Personal Planning Resource Centre and Registry, *A Study of Personal Planning in British Columbia: Representation Agreements with Standard Powers* (2010) Nidus <http://www.nidus.ca/PDFs/Nidus_Research_RA7_InAction.pdf>; Nidus Personal Planning Resource Centre and Registry, *Experiences of adults living with Fetal Alcohol Spectrum Disorder and their personal supporters in making and using a Representation Agreement* (2009) Nidus <http://www.nidus.ca/PDFs/Nidus_Research_RA_FASD_Project.pdf>.

⁸³⁴ Nidus Personal Planning Resource Centre and Registry, *A Study of Personal Planning in British Columbia: Representation Agreements with Standard Powers* (2010) Nidus <http://www.nidus.ca/PDFs/Nidus_Research_RA7_InAction.pdf>; Nidus Personal Planning Resource Centre and Registry, *Experiences of adults living with Fetal Alcohol Spectrum Disorder and their personal supporters in making and using a Representation Agreement* (2009) Nidus <http://www.nidus.ca/PDFs/Nidus_Research_RA_FASD_Project.pdf>.

⁸³⁵ *Representation Agreement Act*, RSBC 1996, c 405, s 2.

⁸³⁶ Victorian Law Reform Commission, above n 820, 122.

⁸³⁷ *Representation Agreement Act*, RSBC 1996, c 405, s 16.

financial affairs.⁸³⁸ A representation agreement with standard provisions enables authorisation for the representative to make decisions about the adult's personal care, routine management of financial affairs, health care and legal services.⁸³⁹

An adult can only make a non-standard representation agreement if the adult is capable of understanding the nature and consequences of the agreement.⁸⁴⁰

Representatives must consult with the adult when helping them to make decisions, and must comply with the wishes of the adult to the extent it is reasonable to do so. However, they can also make decisions on behalf of the adult.⁸⁴¹

A representative can access all information and records that relate to the incapability of the adult or an area of authority granted to the representative.⁸⁴² A representative complying with their duties under the *Representation Agreement Act* (RSBC 1996, c405) is not liable for injury to or death of the adult or for loss or damage arising from the routine management of the adult's financial affairs.⁸⁴³

Where a representative is appointed to assist in making, or to make, decisions in relation to an adult's financial affairs, a monitor must also be appointed to ensure that a representative is acting in accordance with their duties.⁸⁴⁴ Monitors may also be appointed for decision-making in relation to non-financial matters.⁸⁴⁵

A qualitative study of representation agreements in British Columbia

A qualitative study of 989 representation agreements with standard powers was undertaken between 2006 and 2009. This study found that:

- people of all ages (from 19 to 99 years old) made representation agreements suggesting that the agreements were an important planning tool for the transition from youth to adulthood;
- monitors were appointed in over half of the cases, which was interpreted to reflect that people valued that safeguard;
- 84% of representation agreements named more than one person, which was interpreted to reflect that people valued a 'team approach' to support; and
- friends were chosen as representatives as often as relatives, which was interpreted to reflect that people's support networks extended beyond their immediate family.⁸⁴⁶

⁸³⁸ Ibid s 8(1).

⁸³⁹ Ibid s 7(1).

⁸⁴⁰ Ibid s 10.

⁸⁴¹ Ibid s 16.

⁸⁴² Ibid s 18.

⁸⁴³ Ibid s 23.

⁸⁴⁴ Ibid ss 12(1), 20(1).

⁸⁴⁵ Ibid s 12(3).

⁸⁴⁶ Nidus Personal Planning Resource Centre and Registry, *A Study of Personal Planning in British Columbia: Representation Agreements with Standard Powers* (2010) Nidus <http://www.nidus.ca/PDFs/Nidus_Research_RA7_InAction.pdf>; Nidus Personal Planning Resource Centre and Registry, *Experiences of adults living with Fetal Alcohol Spectrum Disorder and their personal supporters in making and using a Representation Agreement* (2009) Nidus <http://www.nidus.ca/PDFs/Nidus_Research_RA_FASD_Project.pdf>.

Saskatchewan

The *Adult Guardianship and Co-decision Making Act* (SS 2000, c A-5.3) has been in force since 2001. It provides for both personal and property co-decision-makers. In its commentary about this Act, the VLRC noted that while co-decision-making appointments have been available for many years, only a handful have ever been made, which may be due to the cost involved in making an application to the Supreme Court.⁸⁴⁷

Personal co-decision-maker

Personal co-decision-makers are appointed by the court and do not require the consent of the adult.⁸⁴⁸ They are considered to be appropriate when an adult does not have full capacity to make decisions, but can still participate in the decision-making process.⁸⁴⁹ While a personal co-decision-maker may advise the adult and shares decision-making authority, the co-decision-maker must acquiesce in a decision made by an adult. A co-decision-maker cannot, for example, refuse to sign a contract to give effect to a decision if a reasonable person could have made the decision and no harm to the adult is likely to result from the decision.⁸⁵⁰

The appointment of a personal co-decision-maker requires a capacity assessment.⁸⁵¹ The court must be satisfied that the adult's capacity is impaired to the extent that the adult requires assistance in decision-making in order to make reasonable decisions with respect to some or all of the matters listed in the *Adult Guardianship and Co-decision Making Act* (SS 2000, c A-5.3).⁸⁵² The personal co-decision-maker is protected from liability if acting in good faith and pursuant to this Act.⁸⁵³

Property co-decision-maker

Property co-decision-makers are similar to personal co-decision-makers except that the co-decision-maker advises the adult in respect of matters relating to his or her estate.⁸⁵⁴ Decisions are made jointly, however a co-decision-maker must also acquiesce in a decision made by an adult. For example, the co-decision-maker must not refuse to sign a document to give effect to a decision if a reasonable person could have made the decision and no loss to the adult's estate is likely to result from the decision.⁸⁵⁵

Further, any decision made, action taken, consent given or thing done by a property co-decision-maker in good faith respecting any matter within her or her authority with the adult is deemed for all purposes to have been made as though the adult had capacity in respect of the matter.⁸⁵⁶ Property co-decision-makers are protected from liability if they act in good faith and pursuant to the *Adult Guardianship and Co-decision Making Act* (SS 2000, c A-5.3).⁸⁵⁷

⁸⁴⁷ Victorian Law Reform Commission, above n 820, 122.

⁸⁴⁸ *Adult Guardianship and Co-decision Making Act*, SS 2000, c A-5.3, s 14(1)(a).

⁸⁴⁹ Law Foundation of Saskatchewan, *Adult Guardianship in Saskatchewan: Application Manual* (2002) Government of Saskatchewan <<http://www.publications.gov.sk.ca/details.cfm?p=9265>>.

⁸⁵⁰ *Adult Guardianship and Co-decision Making Act*, SS 2000, c A-5.3, s 17(2).

⁸⁵¹ *Ibid* s 12(1).

⁸⁵² *Ibid* s 14(1)(a).

⁸⁵³ *Ibid* s 70.

⁸⁵⁴ *Ibid* s 40(1)(a).

⁸⁵⁵ *Ibid* s 42.

⁸⁵⁶ *Ibid* s 49.

⁸⁵⁷ *Ibid* s 70.

Yukon

The *Decision Making, Support and Protection to Adults Act* commenced in 2003. As well as containing a provision for the Supreme Court to appoint guardians, it also provides for supported decision-making agreements and representation agreements.

Supported decision-making agreements

A supported decision-making agreement is entered into voluntarily by an adult, however must be in the prescribed form.⁸⁵⁸ The agreement authorises associate decision-makers to assist a person with making and communicating decisions. These agreements are for adults who can make their own decisions with some help. The associate assists the individual to make decisions. An adult must understand the nature and effect of the agreement to enter into it.⁸⁵⁹ The purpose of the supported decision-making agreement is to:

- enable trusted friends and relatives to help adults who do not need guardianship and are substantially able to manage their own affairs, but whose ability to make or communicate decisions with respect to some or all of those affairs is impaired; and
- give legal status to persons providing support to adults to enable them to participate in discussions with others when the adult is making decisions or attempting to obtain information.⁸⁶⁰

The role of the associate decision-maker under the agreement is to assist the adult to obtain and assess relevant information, make and express a decision, communicate the decision, and endeavour to ensure that the adult's decision is implemented.⁸⁶¹ The agreement does not give authority to make decisions on behalf of the adult.⁸⁶² An associate decision-maker has a right to assist the adult to obtain any information that the adult is entitled to in relation to a decision they are assisting the adult to make.⁸⁶³ An associate decision-maker is protected from liability if he or she acts honestly, in good faith and in the best interests of the adult; and exercises the care, diligence, and skill of a reasonably prudent person.⁸⁶⁴

Representation agreements

A representation agreement authorises a representative to make a limited range of daily living decisions regarding the adult's personal or financial affairs, as set out in the agreement. It is described as appropriate for adults who recognise that they experience difficulty when making some decisions.⁸⁶⁵ A representation agreement is entered into voluntarily by the adult,⁸⁶⁶ who must understand the nature and effect of the agreement.⁸⁶⁷ The agreement is not made by a court, but must be in a prescribed form.⁸⁶⁸

⁸⁵⁸ *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, schedule A, ss 6, 8(1).

⁸⁵⁹ *Ibid* c 21, schedule A, s 6.

⁸⁶⁰ *Ibid* c 21, schedule A, s 4.

⁸⁶¹ *Ibid* c 21, schedule A, s 5(1).

⁸⁶² *Ibid* c 21, sch A, s 5(2); Yukon Health and Social Services, *Adult Protection and Decision Making Act- Supported Decision Making Agreements* (25 August 2010) Yukon Health and Social Services <http://www.hss.gov.yk.ca/supported_agreements.php>.

⁸⁶³ *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, schedule A, s 10(1).

⁸⁶⁴ *Ibid* c 21, schedule A, s 13(1).

⁸⁶⁵ *Ibid* c 21, sch A, s 14; Yukon Health and Social Services, above n 130.

⁸⁶⁶ *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, schedule A, s 14.

⁸⁶⁷ *Ibid* c 21, schedule A, s 15(1).

⁸⁶⁸ *Ibid* c 21, schedule A, s 17.

Although representatives are authorised to make decisions,⁸⁶⁹ they must consult with the adult, comply with the adult's wishes if it is reasonable to do so, and encourage and assist the adult to make decisions or participate in decision-making.⁸⁷⁰ A decision made with the assistance of, or by, a representative shall be recognised at law as a decision of the adult.⁸⁷¹ A representative has the right to assist the adult to obtain any information related to the performance of the duties of the representative under the agreement,⁸⁷² and is protected from liability if they act within the limits of their authority in the agreement.⁸⁷³

Europe

Sweden

In Sweden there are two forms of support: the *god man* (which translates to 'mentor' or 'good man'), which is the preferred and dominant model of support; and a trustee (*forvaltare*), which is an appointment of last resort, similar to a guardian.⁸⁷⁴

The *god man* (mentor) must act in consultation with, and with the consent of, the person and assists the person with personal, legal and financial decisions. The appointment of a *god man* does not involve a loss of legal capacity for the adult.⁸⁷⁵ Procedures for appointment are relatively informal, and without cost to the person. While applications can be made to the district court, most cases are based on consent so while there is usually a review of documents by the court, no appearance or hearing is necessary.⁸⁷⁶ Most *god men* are close relatives or friends and every *god man* is paid a fee; the amount of the fee varying with the complexity of the case. Professionals (e.g. lawyers, social workers, accountants) can also be appointed.⁸⁷⁷

The *forvaltare* is the intervention of last resort and, unlike the *god man*, results in the loss of legal capacity for the person.⁸⁷⁸ It is mainly used in situations involving financial interests such as funds above a certain value.⁸⁷⁹

In addition, Sweden has legislated for the right of every person with severe physical or mental disabilities to have an entitlement to support services. The Bill (*Lag om stöd och service till vissa funktionshindrade*) came into effect in 1994 and gives people with functional disabilities the legal right to ten different kinds of support and services.⁸⁸⁰ For example, the law provides for a personal assistant to be a mandated support service for people with disability covered by the scope of the legislation, which can be provided directly by the government or by a cash allowance to the person with disability who can employ their own personal assistant.⁸⁸¹

⁸⁶⁹ Ibid c 21, schedule A, s 15(2).

⁸⁷⁰ Ibid c 21, schedule A, s 23(1).

⁸⁷¹ Ibid c 21, schedule A, s 25.

⁸⁷² Ibid c 21, schedule A, s 24(1).

⁸⁷³ Ibid c 21, schedule A, s 26.

⁸⁷⁴ Kristin Booth Glen, above n 273, 140; Stanley S Herr, *Self Determination, Autonomy and Alternatives for Guardianship* <<http://ruralinstitute.umt.edu/transition/Handouts/Self-Determination.Herr.pdf>>.

⁸⁷⁵ Kees Blankman, 'Guardianship Models in the Netherlands and Western Europe' (1997) 20(1) *International Journal of Law and Psychiatry* 47, 55.

⁸⁷⁶ Stanley S Herr, above n 874.

⁸⁷⁷ Ibid

⁸⁷⁸ Kristin Booth Glen, above n 273, 141.

⁸⁷⁹ Kees Blankman, above n 875, 55.

⁸⁸⁰ Ibid.

⁸⁸¹ Stanley S Herr, above n 874.

Each of Sweden's 270 municipalities has an office of public trusteeship administration that is charged with oversight of *god men* and *forvaltares*. Mentorship is by far predominant over *forvaltares*. Mentorship has been in existence since 1976, where at the time some 30,000 Swedes were under guardianship. But by 1985, the availability of the mentor option reduced the number of people subject to guardianship to 17,000.⁸⁸²

Advocates for the Swedish system argue that it provides for a range of least restrictive alternatives, from support services to mentorships, which do not result in the loss of legal decision-making capacity for the adult,⁸⁸³ and suggest that it is a good model for other countries that are faced with similar challenges. These challenges include how to support people with disability to navigate the array of social services they need without disempowering or disenfranchising them; and how to provide assistance with medical, financial and other issues that were once taken care of by institutional staff who exerted a *de facto* guardianship.⁸⁸⁴ Arguably, the entitlement to social support, including personal assistance also diminishes the need for guardianship.

Norway and Denmark

Since 1990, legislation in Norway and Denmark has made provision for two levels of intervention for adults who need assistance with decision-making: the 'assisting representative' (*hjelpeverge*); and the 'support person'. A support person assists the adult to manage their personal needs and with the expression of their interests,⁸⁸⁵ and their involvement does not result in the adult losing their legal capacity. If an assisting representative is appointed, the adult's legal capacity is removed only when necessary and the representative's decision will prevail only under carefully defined circumstances.⁸⁸⁶

Ireland

The *Assisted Decision-Making (Capacity) Act 2015* was enacted in Ireland on December 2015, and introduces various mechanisms for supporting decision-making for a person including: assisted decision-making; co-decision-making; decision-making representatives; enduring powers of attorney; advance health directives; and decision-making orders by the High Court or the Circuit Court.

The explanatory memorandum explains that this Act "changes the existing laws on capacity, shifting from the current all or nothing status approach to a flexible functional one, whereby capacity is assessed on an issue- and time-specific basis".⁸⁸⁷

⁸⁸² Ibid.

⁸⁸³ Kristin Booth Glen, above n 273, 142.

⁸⁸⁴ Stanley S Herr, above n 874; Kristin Booth Glen, above n 273, 141.

⁸⁸⁵ Kees Blankman, above n 875, 55.

⁸⁸⁶ Robert M Gordon, above n 670, 63.

⁸⁸⁷ Explanatory Memorandum, *Assisted Decision-Making (Capacity) Bill 2013* (Ireland), 1.

Assisted decision-making

The Bill provides for a person who believes that their capacity is in question, or may shortly be in question, to appoint another person (such as a trusted friend or relative) to be a decision-making assistant. The appointment occurs by way of a decision-making assistance agreement.⁸⁸⁸ While the decision-making authority stays with the appointer, the decision-making assistant helps the person to access and understand information and to make and express decisions.⁸⁸⁹

Co-decision-makers

A person who considers that their capacity is, or shortly will be, in question may appoint a suitable person to make joint decisions with them.⁸⁹⁰ The co-decision-making agreement does not come into effect however until it has been registered.⁸⁹¹ An agreement is to be registered with the Director of the Decision Support Service who ensures that the co-decision-maker is both suitable and eligible for that role, and that the person lacks capacity to make certain decisions.⁸⁹² While the co-decision-maker and the person make joint decisions, the co-decision-maker must acquiesce in a decision made by the person and cannot, for example, refuse to sign a document required to implement the decision if a reasonable person could have made the decision and if no harm is likely to result to the person from the decision.⁸⁹³

The role of the co-decision-maker is to explain relevant information and considerations relating to a decision, ascertain the will and preferences of the person, assist the person to communicate their preferences in making a decision, discuss with the person the known alternatives and likely outcomes of a relevant decision, make a relevant decision jointly with the appointer, and make reasonable efforts to ensure that a relevant decision is implemented.⁸⁹⁴

Decision-making representatives

A court may appoint a decision-making representative where the court is unable to make a co-decision-making order or has made a declaration that a person lacks capacity even with the assistance of a co-decision-maker.⁸⁹⁵

⁸⁸⁸ *Assisted Decision-Making (Capacity) Act 2015* (Ireland), s 10.

⁸⁸⁹ *Ibid* s 14.

⁸⁹⁰ *Ibid* s 17(1).

⁸⁹¹ *Ibid* s 21(1).

⁸⁹² *Ibid* s 22(1).

⁸⁹³ *Ibid* s 19(5).

⁸⁹⁴ *Ibid* s 19(1).

⁸⁹⁵ *Ibid* s 38.

United Kingdom

The *Mental Capacity Act 2005* (United Kingdom) came into effect in England and Wales in 2007. It provides a legal framework for the care, treatment or support of people who are unable to make decisions for themselves. The *Mental Capacity Act 2005* (United Kingdom) allows for personal welfare, health care and treatment to be provided to people who lack decision-making capacity by health care professionals as long as it is in their best interests and the care providers abide by the principles of the Act.⁸⁹⁶

The *Mental Capacity Act 2005* (United Kingdom) emphasises supporting people to make their own decisions and/or participating in decisions. This is provided for in the principles, which include, for example, that “(3) a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success; and (4) a person is not to be treated as unable to make a decision merely because he makes an unwise decision”.⁸⁹⁷

The *Mental Capacity Act 2005* (United Kingdom) also provides for people to make a Lasting Power of Attorney.⁸⁹⁸

The Court of Protection may appoint deputies, to manage the affairs of a person who does not have capacity when they have not planned ahead by making a Lasting Power of Attorney. Deputies may be for property and affairs or health and welfare.⁸⁹⁹ There is no public guardian of last resort, but there is a list of professional panel deputies who may be appointed if there is no one else to act as a deputy in the person’s life.⁹⁰⁰

Consistent with section 42 of the *Mental Capacity Act 2005* (United Kingdom), a Code of Practice has been established that provides guidance and information about how the Act works in practice.⁹⁰¹ The *Mental Capacity Act 2005* Code of Practice, which has statutory force, provides guidance to anyone working with, and/or caring for, an adult who may lack capacity to make certain decisions. For example, the Code provides guidance on how to implement the Act’s five statutory principles, including how to assist a person to make a decision.⁹⁰²

⁸⁹⁶ *Mental Capacity Act 2005* (UK) c 9, s 16.

⁸⁹⁷ *Ibid* c 9, s 1.

⁸⁹⁸ *Ibid* c 9, ss 9, 10.

⁸⁹⁹ *Ibid* c 16.

⁹⁰⁰ GOV.UK, *Panel deputies: list of court-approved professionals* (16 December 2015)

<<https://www.gov.uk/government/publications/panel-deputies-list-of-court-approved-professionals>>.

⁹⁰¹ Department for Constitutional Affairs (United Kingdom), above n 146.

⁹⁰² *Ibid* 29.

Appendix Seven – Australian supported decision-making trials

South Australia – Office of the Public Advocate

South Australia was the first Australian State to embark on a supported decision-making trial. The South Australian Office of the Public Advocate conducted a trial of supported decision-making from late December 2010 to October 2012.⁹⁰³ The objectives of the trial were to:

- advance the implementation of article 12 of the Convention;
- provide assistance to individuals to exercise autonomy and self-determination over their lives through personal decision-making;
- develop resources and assistance tools for people who may provide decision support;
- develop supported decision-making options that may serve as a guardianship alternative; and
- develop new systems of supported decision-making within guardianship practice, so the use of substitute decisions is limited wherever possible, even for those with a statutory Guardian.⁹⁰⁴

The trial model included a Supported Decision-Making Agreement and people in three main roles: participants; supporters; and monitors. Supported Decision-Making Agreements were established between people with disability and their decision-making supporter/s.⁹⁰⁵

The monitor role was established as a safeguard. The role was to provide oversight of decision-making processes and the decisions made using it. The issues of risk and safety were seen as a function of informed choice expressed by participants, and by extension, their supporters. Decisions included the dignity of risk and its consequences.⁹⁰⁶

No participants made a complaint during the pilot, and there was no evidence of abuse, exploitation or undue influence.⁹⁰⁷

The trial also involved a project coordinator and peer worker. The project coordinator was a government practitioner who assisted participants and supporters to set up their agreements and provided education and support. The peer worker assisted with recruitment and had an educative and skill-building role during the trial.⁹⁰⁸

The trial participants considered healthcare, accommodation and lifestyle decisions. Financial decisions were excluded from the trial.⁹⁰⁹

⁹⁰³ Margaret Wallace, above n 550, 4.

⁹⁰⁴ Ibid 7-8.

⁹⁰⁵ Office of the Public Advocate (South Australia), above n 635, 57; Margaret Wallace, above n 550, 8-9.

⁹⁰⁶ Margaret Wallace, above n 550, 9, 45.

⁹⁰⁷ Ibid 43.

⁹⁰⁸ Office of the Public Advocate (South Australia) above n 635, 57; Margaret Wallace, above n 550, 46.

⁹⁰⁹ Margaret Wallace, above n 550, 9; Office of the Public Advocate (South Australia), 'Annual Report 2010' (2010) 94.

Participants

Twenty-six people whose capacity for decision-making was impaired as a result of a brain injury, intellectual disability, autism or a neurological disease formed agreements with supporters.⁹¹⁰ Participants could broadly be described as being ‘decision-ready’ i.e. they could articulate a decision, express a desire to receive support, identify from whom they would like to receive support and being able to actively make a decision.⁹¹¹ People with dementia or a primary diagnosis of mental illness were not included in the trial.⁹¹²

The trial involved two groups of participants: an ‘early intervention’ group and an ‘alternative to guardianship’ group.⁹¹³ Recruitment occurred via referrals from disability service providers and the Office of the Public Advocate.⁹¹⁴

A range of adult participants were engaged, from younger adults who were studying to older people living in residential aged care.⁹¹⁵ Supporters included friends and a range of immediate family members.⁹¹⁶

Successes

The trial resulted in numerous benefits to individuals in relation to their personal, situational and relationship circumstances e.g. increased confidence and interpersonal skills, greater self-determination, success within the workplace, the ability to sustain important relationships and being able to transition from a guardianship order.⁹¹⁷

The benefits to supporters included being able to provide better quality support and maintain a positive relationship with the person to whom they provide support.⁹¹⁸

Some service providers became more receptive of supported decision-making practices and indicated that they would continue with supported decision-making practices.⁹¹⁹

The Supported Decision-Making Agreements were considered to be useful and resulted in positive decision-making experiences for the decision-makers and their supporters.⁹²⁰

The trial suggested that supported decision-making can operate alongside guardianship and be a viable alternative to guardianship.⁹²¹ In this context, supported decision making should be considered as an option each time that guardianship is proposed for a person. The approach could also work when an order is in place, as a means by which to prepare for seeking to have an order revoked.⁹²²

⁹¹⁰ Margaret Wallace, above n 550, 9, 28; Office of the Public Advocate (South Australia), above n 635, 59.

⁹¹¹ Office of the Public Advocate (South Australia), above n 708, 115.

⁹¹² Office of the Public Advocate (South Australia), above n 909, 94; Margaret Wallace, above n 550, 10.

⁹¹³ Margaret Wallace, above n 550, 9.

⁹¹⁴ Office of the Public Advocate (South Australia), above n 635, 59.

⁹¹⁵ Ibid.

⁹¹⁶ Ibid 60.

⁹¹⁷ Office of the Public Advocate (South Australia), above n 635, 63, 65; Margaret Wallace, above n 550, 37-39.

⁹¹⁸ Margaret Wallace, above n 550, 35.

⁹¹⁹ Ibid 39-40.

⁹²⁰ Ibid 11, 39.

⁹²¹ Office of the Public Advocate (South Australia), above n 635, 63; Margaret Wallace, above n 550, 5.

⁹²² Office of the Public Advocate (South Australia), above n 635, 65.

However, the demand for guardianship cannot be completely mitigated by supported decision-making as the need for an order can be driven by other factors e.g. family conflict, service provider issues, community incapacity to provide adequate care and options.⁹²³

Challenges

Less than half of the people who expressed interest in making a Supported Decision-Making Agreement proceeded to do so. The most common barriers to establishing agreements were an absence of informal support networks and the existence of conflict within informal support networks.⁹²⁴

Some supporters experienced difficulty sustaining their supporter role due to other personal commitments. The mentoring role of the project coordinator assisted supporters with this and their motivation to continue in their role.⁹²⁵ In the future, this issue may be partially addressed by individuals having multiple supporters. The recruitment of community members as supporters for people without an informal support network was unsuccessful.⁹²⁶ There was a need for the project co-ordinator and supporters to act as advocates and case managers.⁹²⁷

The achievement of making and/or actioning some decisions was dependent on other service agencies e.g. administrator permitting access to funds or service provider enabling decisions to be actioned.⁹²⁸

Other learnings

Other learnings from the trial included, but were not limited to:

- service providers sometimes prioritise risk management over people making their own decisions;
- there can be community confusion about decision-making options and instruments;
- There is a need to distinguish the role of supported decision-making from guardianship (when the person is subject to guardianship);
- the need for any supported decision-making programs to have multiple entry points, including community access;
- there are benefits to establishing a Supported Decision-Making Agreement before a person's capacity becomes impaired;
- non-government/community organisations should be responsible for establishing Supported Decision-Making Agreements, as done in British Columbia; and
- legal recognition of supporters would validate the supporter role for third party organisations.⁹²⁹

⁹²³ Ibid.

⁹²⁴ Ibid 59.

⁹²⁵ Margaret Wallace, above n 550, 36.

⁹²⁶ Ibid 51.

⁹²⁷ Margaret Wallace, above n 550, 17, 25, 30, 40, 51-53.

⁹²⁸ Office of the Public Advocate (South Australia), above n 635, 63.

⁹²⁹ Margaret Wallace, above n 550, 16, 44, 54-55; Office of the Public Advocate (South Australia), above n 909, 90, 93.

Recommendations

The South Australian Public Advocate recommended two legislative changes:

- modifying the principles of the *Guardianship and Administration Act 1993 (SA)*, so that key principles in the Act, which are identical to the *Advance Care Directives Act 2013 (SA)*, would require supported decision-making; and
- adding new sections to the *Guardianship and Administration Act 1993 (SA)* to recognise SDM arrangements.⁹³⁰

It was proposed that the following principle be added to the *Guardianship and Administration Act 1993 (SA)*, “a person must be allowed to make their own decisions about their health care, residential and accommodation arrangements and personal affairs to the extent that they are able, and be supported to enable them to make such decisions for as long as they can”.⁹³¹

The Public Advocate proposed the legal recognition of making decisions with support, Supported Decision-Making Agreements and the roles of supporters.⁹³²

The Office of the Public Advocate suggested that supported decision-making could be further developed by considering: a population-based model; current and future supported decision-making projects; and specific options for law reform.⁹³³

South Australia – Health and Community Services Complaints Commissioner

The Office of the Health and Community Services Complaints Commissioner (HCSCC) undertook a project to train and mentor disability service workers (known as ‘trainee facilitators’) to implement the supported decision-making model trialled by the South Australian Office of the Public Advocate. More specifically, the project aimed to train workers in disability agencies to establish and facilitate social support systems that support people with disabilities to make decisions.⁹³⁴ The project therefore operated at four levels: agencies; trainee facilitators; decision-makers (i.e. people with disability); and their nominated support people.⁹³⁵

A Project Coordinator oversaw the project and was required to temporarily act as a facilitator for a short period during the project.⁹³⁶ Trainee facilitators from two service agencies participated in a six day training program focussing on human rights, supported decision-making concepts, capacity and autonomy, rights and responsibilities, the role of facilitators, strengths-based practice, lateral thinking and problem solving and other relevant topics. Individual mentoring was also provided for each trainee facilitator by the Project Coordinator.⁹³⁷

⁹³⁰ Office of the Public Advocate (South Australia), above n 17, 56.

⁹³¹ Office of the Public Advocate (South Australia), above n 909, 93.

⁹³² Office of the Public Advocate (South Australia), above n 17, 56.

⁹³³ Ibid 52, 59.

⁹³⁴ Community Matters Pty Ltd, *HCSCC Supported Decision Making Program 2014-15 Evaluation Report (2015)* 9.

⁹³⁵ Ibid.

⁹³⁶ Ibid 5.

⁹³⁷ Ibid 9, 12, 36.

The role of trainee facilitators was to:

- conduct particular processes to recruit decision-makers;
- support decision-makers to choose their supporters;
- assist with recruitment of supporters when required, and provided ongoing support to supporters;
- facilitate meetings involving the decision-maker and their supporters in which the decision-maker selects the decisions they wish to make, and is supported to make them;
- facilitate meetings between the decision-maker, their supporters and other 'team members' who could assist with actioning decisions;
- follow-up people between meetings to ensure the progression of processes.⁹³⁸

Monthly Community of Practice meetings were held and were open to facilitators from an earlier phase of the program and those involved in the current program. Meetings involved information sharing and peer problem solving, guest speakers, and presentations by trainee facilitators.⁹³⁹

Participants

Ten trainee facilitators and ten decision-makers were recruited.⁹⁴⁰ The decision-makers were clients of the service providers and were recruited by trainee facilitators and the Project Coordinator.⁹⁴¹ Supporters were drawn from the immediate family or social networks of the decision-maker. They committed to assist the decision-maker to make decisions in areas of the decision-makers choosing.⁹⁴² For various reasons, only five facilitators and seven decision-makers completed the program.⁹⁴³

Successes

There was overwhelming positive feedback from trainee facilitators about the six day training program. It was recommended that the training program be continued.⁹⁴⁴ Outcomes for trainee facilitators included increased skills and knowledge, and improved ways of working, not just with decision-makers but also with other clients.⁹⁴⁵

A wide array of decisions were made by decision makers, ranging from small practical outcomes to life changing decisions. Positive outcomes occurred in the areas of autonomy, wellbeing, behaviour and practical aspects of life.⁹⁴⁶ Some supporters reported positive outcomes, including increased satisfaction and greater awareness of the capacities of the decision-maker. However, one supporter reported increased tension in their relationship with the decision-maker.⁹⁴⁷ Outcomes for organisations included changed practice by participating

⁹³⁸ Ibid 10.

⁹³⁹ Ibid 41.

⁹⁴⁰ Ibid 43.

⁹⁴¹ Ibid 12.

⁹⁴² Ibid 10.

⁹⁴³ Ibid 43.

⁹⁴⁴ Ibid 7, 36.

⁹⁴⁵ Ibid 6.

⁹⁴⁶ Ibid 16-23.

⁹⁴⁷ Ibid 35.

staff, a degree of knowledge and skills transfer to other staff and some small changes to the approach of management. No significant policy or service changes were made.⁹⁴⁸

Mentoring was a crucial element in the development of facilitator skills and in developing their confidence to apply new skills. The majority of trainee facilitators reported finding the Community of Practice sessions very useful.⁹⁴⁹

The supported decision-making project was effective where:

- decision-makers had sufficient cognitive capacity to make decisions, a mode of communication, adequate mental health, an interest in making changes in their lives, and where they have time to commit to the project.;
- at least one committed supporter was identified within the time frame for the project;
- there was stability in the availability of a facilitator; and
- facilitators were appropriately supported, both in practical and emotional terms, by the program and by their own agencies.⁹⁵⁰

Challenges

One trainee facilitator was not able to demonstrate the required skills to successfully undertake the facilitator role after participating in the training. The use of a 'skill checklist' may ensure the most appropriate people are recruited as facilitators. Potential facilitators could self-assess their skills and their confidence in applying those skills.⁹⁵¹

Some of the challenges in appointing direct service delivery staff to trainee facilitator roles was managing their shifts, part-time work, backfilling their roles and other operational issues.⁹⁵²

It was difficult to find supporters for decision-makers who experienced high degrees of social isolation. Supporter recruitment can also be impacted by the challenging role of providing support (as was experienced by some supporters).⁹⁵³

The sustainability of supporters can be partially impacted by the personal benefits gained by supporters. During the program, the supporters who devoted significant time to performing their role, generally reported that their personal positive outcomes did not equate to their investment in the role.⁹⁵⁴

There were differing views in relation to the economic costs and benefits of the program. Some respondents felt that increased skills and autonomy for decision-makers, along with improved behaviours (for some), would eventually lower costs for organisations. Many project participants believed that the actual costs of conducting the program had been underestimated. It was noted that the cost-effectiveness and flow-on effects of the program were negatively impacted by the withdrawal of five trainee facilitators during the project.⁹⁵⁵

⁹⁴⁸ Ibid.

⁹⁴⁹ Ibid 39, 41.

⁹⁵⁰ Ibid 69-70.

⁹⁵¹ Ibid 43-44.

⁹⁵² Ibid 50-51.

⁹⁵³ Ibid 45.

⁹⁵⁴ Ibid 46.

⁹⁵⁵ Ibid 43, 52.

Australian Capital Territory

A supported decision-making research project was conducted by ADACAS (and funded by Disability ACT) to examine supported decision-making in the lead up to the launch of the NDIS. It further explored the application of the supported decision-making model trialled in South Australia and concluded in June 2013.⁹⁵⁶

The project inquired into how supported decision-making might be accessed by people with complex communication needs or whose social isolation restricted their ability to identify natural decision-making supports.⁹⁵⁷ A project coordinator was employed to oversee the project, including establishing and overseeing the research, undertaking community engagement, providing support to monitors, creating coaching resources and developing processes and approaches to meet the diverse needs of decision-makers and supporters.⁹⁵⁸ The project also included the development of easy-English materials e.g. on the right to decide, principles for decision-making support, important concepts of decision-making etc.⁹⁵⁹

The trial model included a Supported Decision-Making Agreement and people in three main roles: participants; supporters; and monitors. Three service providers were also involved in the project.⁹⁶⁰ The monitor was a key role, providing oversight of the Supported Decision-Making Agreement in practice. The monitor facilitated the creation of the agreements, oversaw the support relationships and provided coaching support as needed.⁹⁶¹

Participants

Participants either had a decision-making impairment, or their capacity to make decisions was unrecognised or undervalued, reflective of a social model of disability.⁹⁶² The six participants had varying degrees of decision-making capacity. Two decision-makers expressed interest in the program through community engagement, two were ADACAS clients and two contacted ADACAS on the recommendation of the ACT Civil and Administrative Tribunal.⁹⁶³ The participation of decision-makers in the project occurred in five phases:

1. Raising awareness – understanding right to self-determination and the availability of support.
2. Becoming decision ready – monitor worked with participants to build decision-readiness.
3. Decision support – identifying and securing support.
4. Being a decision-maker and learning to support decisions.
5. Fulfilling a decision.⁹⁶⁴

Decisions were made in the areas of work, shopping, contact and accommodation.⁹⁶⁵

⁹⁵⁶ ADACAS Advocacy, above n 550, 9.

⁹⁵⁷ Ibid.

⁹⁵⁸ Ibid 13.

⁹⁵⁹ Ibid 15, 17-18.

⁹⁶⁰ Ibid 12.

⁹⁶¹ Ibid 13.

⁹⁶² Ibid 13-14.

⁹⁶³ Ibid 14, 16.

⁹⁶⁴ Ibid 16-19.

⁹⁶⁵ Ibid 21.

Successes

The project facilitated positive change for the individual decision-makers, families, service providers and the community.⁹⁶⁶ It evidenced that supported decision-making can enable people to have choice and control over their lives.⁹⁶⁷ The project also demonstrated that people who have moderately high support needs have the ability to make their own decisions.⁹⁶⁸ The project participants transitioned from not being 'decision-ready' to become 'decision-ready'. This was achieved through attending 5-6 sessions and utilising easy-English materials. Supporters were also provided with resources.⁹⁶⁹

Recommendations

The recommendations in the evaluation report included:

- support to develop decision readiness be provided for individuals, families and care workers;
- A training program be created that recognises the role of care workers as a decision-making resource for people with disability and promotes their capacity to fulfil this role;
- training programs with care workers highlight the limitations of guardianship to important and increasingly specific decisions, and provide information to empower care workers to advocate on behalf of those they support;
- community based education programs which facilitate cultural change are implemented as part of a broader supported decision-making agenda;
- that supported decision-making programs accommodate individual needs around timeliness;
- decision support programs recognise that Supported Decision-Making Agreements may have multiple purposes for the decision-maker and that the documents need to be flexible to meet individual need;
- an approach be made to the ACT Civil and Administrative Tribunal to fund the development of easy English materials that describe the responsibilities and limitations of guardianship under the current legislation; and
- relationships between individual advocacy and supported decision-making initiatives be integral to the development of decision support.⁹⁷⁰

⁹⁶⁶ Ibid 6.

⁹⁶⁷ Ibid 54.

⁹⁶⁸ Ibid 46.

⁹⁶⁹ Ibid 16-21.

⁹⁷⁰ Ibid 7-8.

Other learnings

Other learnings from the trial included:

- some people don't know that they have decisions to make, or the ability to make them. Expertise is required to develop the decision-readiness of these people;
- a lack of decision-making does not necessarily reflect a person's capacity to decide, but can reflect a lack of expectation to be respected and supported to fulfil a decision due to the socio-cultural context of their situation (including family and service systems);
- cultural change is needed to enable people who are highly embedded in family or services to be respected as decision-makers and access appropriate decision-making support;
- the provision of decision-making support can be a timely process, as is transitioning a person to become 'decision-ready'. Expertise is needed to develop decision readiness;
- a number of carers realised that daily choice (e.g. what to wear) did not constitute decision-making, particularly in enabling people to learn from bad decisions;
- while support workers were in favour of the right to decide, many were unable to reconcile this with their perceived duty of care;
- service providers recognised the potential of their role in providing opportunity for people to practise decision-making in their daily lives, gaining experience with small decisions to become ready for the more important ones;
- overreach by guardians was evident in the small, day-to-day decisions of participants. This left some people with little opportunity to develop decision-making experience; and
- decision-making support models need to be diverse, flexible and responsive to individual needs, and must be carefully implemented to ensure a focus on capacity building. Decision-making support should not become another service encouraging dependency.⁹⁷¹

New South Wales

In 2013-14, the New South Wales (NSW) Office of Ageing, Disability and Home Care, the Public Guardian and the NSW Trustee and Guardian, partnered in a supported decision-making trial. It focused on the practice of providing decision-making support, with attention given to how decision-making support relationships work, what tools and resources are useful, and what issues require consideration for greater application of supported decision-making. The pilot also aimed to develop and assess educative material that related to the practice of supported decision-making (pilot booklet, pilot handbook and a tools and resources kit).⁹⁷² The pilot did not involve Supported Decision-Making Agreements between decision-makers and their supporters, however informal agreements were used on two occasions.⁹⁷³

⁹⁷¹ Ibid 6, 7, 13-14, 20-23, 24, 26, 29-32, 47, 56.

⁹⁷² Westwood Spice (for the Department of Family and Community Services (New South Wales)), above n 550, 9.

⁹⁷³ Ibid 11.

Decisions were made in four domains: day-to-day (e.g. clothing, food); big decisions (e.g. accommodation, work), medical decisions (e.g. take medication, go to doctor) and financial decisions (what to buy, how to save).⁹⁷⁴ The project was managed by a full-time Senior Policy Officer. A part-time Project Officer commenced at the recruitment stage.⁹⁷⁵

Participants

Nineteen (19) people acted as decision-making ‘supporters’ to 16 decision-makers. The majority of decision-makers joined the pilot without having a supporter identified, while a number of individuals had difficulty identifying an appropriate supporter.⁹⁷⁶ Nine participants were subject to administration orders made to the NSW Trustee and Guardian.⁹⁷⁷

Decision-makers ranged in age. Two decision-makers were Aboriginal and two were from non-English speaking backgrounds. The majority of decision-makers had an intellectual disability, some had an acquired brain injury. Eighty-five percent were able to communicate verbally. Half of the decision-makers lived in their family home, while others lived in group homes, aged care accommodation or public housing (with drop-in support).⁹⁷⁸

Nine of the supporters were paid service providers, while seven were family members, one was a friend of the decision-maker, and one was a paid advocate. Supporters were most commonly recruited through face-to-face and telephone contact with the pilot facilitator. This often occurred when facilitators were actively recruiting via visits to services.⁹⁷⁹

Successes

The trial demonstrated that it was possible to enhance the legal capacity of people with disability to make their own decisions and deliver on the intent of article 12 of the Convention.⁹⁸⁰ Trial participants gained a greater level of control over their lives, increased confidence in decision-making and made new types of decisions.⁹⁸¹

Nine participants made decisions in new areas since joining the trial. The most significant increase was in the area of financial decision-making, which was the most common area where people indicated they wanted to make more of their own decisions. Two-thirds of participants said that they now made most or all of their financial decisions compared to one in five at the beginning of the trial.⁹⁸²

The educative component of the trial was considered a success.⁹⁸³ Further, the majority of the supporters reported they received enough information to meet their needs as a supporter.⁹⁸⁴

⁹⁷⁴ Ibid 46.

⁹⁷⁵ Ibid 10.

⁹⁷⁶ Ibid 39.

⁹⁷⁷ Ibid 64.

⁹⁷⁸ Ibid 36-38.

⁹⁷⁹ Ibid 40.

⁹⁸⁰ Ibid 13.

⁹⁸¹ Ibid 49, 52-54.

⁹⁸² Ibid 11.

⁹⁸³ Ibid 44.

⁹⁸⁴ Ibid 59.

Challenges

Identifying supporters proved to be more challenging than expected. Project staff had to take on the role of supporter for a number of decision-makers part way through the project.⁹⁸⁵

The achievement of making and/or actioning some decisions was dependent on other service agencies e.g. administrator allowing the person to make decisions and/or permitting access to funds. Some of the other challenges experienced by decision-makers were the difficulty making a decision in which other people might disagree, communication difficulties and mobility difficulties.⁹⁸⁶

The trial highlighted that supporters required support for themselves to enable them to undertake the supporter role successfully. It also highlighted a need to build the capacity of service providers to be facilitators or supporters. This is most important for people with a small or no informal support network.⁹⁸⁷

Some inherent tensions were identified, such as the tension that supporters who are paid carers have to manage when a decision-maker identifies a decision they want to make, but their family does not agree with it. Balancing duty of care and dignity of risk requires consideration and appropriate safeguards.⁹⁸⁸

The written tools and resources as stand-alone supports were viewed to be insufficient to enable supported decision-making, however the facilitator role was crucial to successful supported decision-making. Facilitators spent significant amounts of time providing one-on-one support to both decision-makers and supporters.⁹⁸⁹

Interestingly, the main barriers to supported decision-making were not central to the decision-maker, but their life circumstances such as social isolation, lack of experience making decisions, the low expectations of others, conflict of interest in relationships and relationships with a power imbalance.⁹⁹⁰

Other learnings

Other learnings from the trial included:

- the enablers of supported decision-making in the trial were access to facilitators, one-on-one support and training of participants by a trusted person, availability of supporters, time to work through decision-making processes, the education and training of supporters and the flexibility of facilitators to act as supporters when needed;
- supporters need to be aware of the context in which a participant is making a decision e.g. a person who does not have any discretionary money may want to go on an overseas holiday; and

⁹⁸⁵ Ibid 66, 68.

⁹⁸⁶ Ibid 51-52.

⁹⁸⁷ Ibid 67-69.

⁹⁸⁸ Ibid 69-70.

⁹⁸⁹ Ibid 67, 74-75.

⁹⁹⁰ Ibid 63.

- there is a need to train all those involved in the participants' life in supported decision-making as it can be seen as being bothersome and inconvenient. There is a need for widespread change in community attitudes and perceptions.⁹⁹¹

Guardianship and administration

The Public Guardian's office indicated that supported decision-making was valuable and the techniques aligned with their current practices, however considerable time needed to be dedicated to properly enact supported decision-making processes.⁹⁹²

The involvement of a supporter was helpful to guardians and administrators. Guardians felt that the involvement of a supporter gave them confidence that decisions were those of the participant.⁹⁹³ Administrators saw value in supporters helping identify what decisions the participant could make, identifying budgeting strategies and ensuring meaningful engagement of the participant.⁹⁹⁴

Only one-third of the NSW Trustee and Guardian decision-makers reported an increase in financial decision-making. In light of the success in this area of people not subject to public administration, this may suggest once having become subject to administration, it might be difficult for a person to regain decision-making control.⁹⁹⁵

The trial identified a need to develop supports to assist people subject to administration to increase their participation in decision-making and ultimately make their own financial decisions. This may require further exploration of the barriers that prevent people subject to administration from exercising supported decision-making.⁹⁹⁶

The NSW Trustee and Guardian indicated that there is a need for people to receive basic budgeting training/skills before they can engage in supported decision-making for financial decisions. The type of agency best-placed to deliver such training needs to be identified.⁹⁹⁷

Further developments

The New South Wales Public Guardian, the New South Wales Public Trustee and Guardian and the Department of Family and Community Services are undertaking a new supported decision-making trial. It focuses on building the financial literacy of people subject to administration. Over the next 12 months, the trial aims to build the skills of people who need help making financial decisions and provide training to service providers to help promote and deliver supported decision-making.⁹⁹⁸

⁹⁹¹ Ibid 13, 61, 63.

⁹⁹² Ibid 63.

⁹⁹³ Ibid.

⁹⁹⁴ Ibid 64.

⁹⁹⁵ Ibid 11.

⁹⁹⁶ Ibid.

⁹⁹⁷ Ibid 64.

⁹⁹⁸ Public Guardian (New South Wales), *Supported Decision Making Project 2016 Factsheet* (7 April 2016) Public Guardian (New South Wales) <<http://www.publicguardian.justice.nsw.gov.au/Documents/SDM%20Project%20Factsheet%202016.pdf>>.

Victoria

The supported decision-making trial overseen by the Office of the Public Advocate in Victoria concluded in June 2015⁹⁹⁹. The aim of the trial was to provide assistance to people who wanted to exercise their legal capacity. This was interpreted to mean support to make the type of decisions that are sometimes made by guardians.¹⁰⁰⁰

Unique to this trial was the recruitment of socially isolated people with cognitive impairments who were ‘matched’ to volunteer decision-making supporters who were previously unknown to them. Volunteers participated in a training program before they were matched with decision-makers.¹⁰⁰¹ The key areas of training were developing trust and rapport, problem-solving and decision-making.¹⁰⁰² Decisions were made in the areas of accommodation, employment, education, health and social activity.¹⁰⁰³

A project coordinator oversaw the conduct of the trial.¹⁰⁰⁴

Participants

The trial involved 17 ‘participants’ aged between 19 and 68 years, and 17 ‘decision-making supporters’. Most decision-makers were identified through programs of the Office of the Public Advocate. Some participants were sourced from service providers and relevant government departments.¹⁰⁰⁵

Decision-makers ranged in age and had borderline impairments. Almost half lived independently and appeared to be in a permanent state of crisis. Those living in group homes demonstrated high levels of functioning, but were restricted by the expectations of, and options offered by, service staff. Participants evidenced varying degrees of ‘decision-readiness’. Six decision-makers were subject to guardianship orders.¹⁰⁰⁶

All but two volunteer supporters were recruited from the Office of the Public Advocate’s volunteer base and participated in interview and induction processes before being matched with their participant. It was an advantage that most volunteers were already known to the Office of the Public Advocate and were oriented with the agency’s philosophy, practices etc. It also meant that volunteers had undertaken police checks.¹⁰⁰⁷

⁹⁹⁹ Brenda Burgen and John Chesterman, above n 669, 2.

¹⁰⁰⁰ Ibid 9.

¹⁰⁰¹ Ibid 5.

¹⁰⁰² Ibid.

¹⁰⁰³ Ibid 9.

¹⁰⁰⁴ Office of the Public Advocate (Victoria), *Supported Decision Making Pilot Project description*, Office of the Public Advocate (Victoria) <<http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/supported-decision-making/59-supported-decision-making-pilot-project-description/file>>.

¹⁰⁰⁵ Brenda Burgen and John Chesterman, above n 669, 1, 7.

¹⁰⁰⁶ Ibid 8, 10.

¹⁰⁰⁷ Ibid 5.

Challenges

The recruitment of decision-makers was found to be difficult and time consuming. The complexity of some people's needs and circumstances posed a challenge to their participation in the trial. Accepting the decision-makers who were often in a state of crisis into the trial was a challenge as it was difficult to establish a relationship of trust (while the decision-maker was in crisis).¹⁰⁰⁸

Half of the volunteers who expressed interest in being supporters, withdrew after receiving the initial information about the role. Many were unable to meet the level of personal time and commitment required.¹⁰⁰⁹

Trial evaluation

The trial was independently evaluated by the University of Melbourne, however the trial report is not yet available. More details about the trial will be available upon release of the evaluation report.¹⁰¹⁰

Learnings

Some of the learnings from the trial included:

- the recruitment of decision-makers highlighted that many people do not want decision-making support, even if it seems like they would benefit from it;
- the willingness of the decision-maker to engage with a volunteer was crucial. Following that, options and potential decisions could be explored as the relationship developed; and
- social dislocation can be a life-long challenge for some people.¹⁰¹¹

Future developments

In September 2015, the Office of the Public Advocate commenced a new collaborative project headed by the Victorian League for Individuals with a Disability (VALID) and funded by the National Disability Insurance Agency.¹⁰¹² The 'OVAL Project' builds on the previous Victorian supported decision-making trial and will involve matching people who are referred by the National Disability Insurance Agency with volunteer decision-making supporters.¹⁰¹³

The project will involve the recruitment, training and matching of volunteer supporters in the Barwon South region with 60 socially isolated people with decision-making disabilities who want decision-making support to assist with their NDIS support plan. The project is funded by

¹⁰⁰⁸ Ibid 10.

¹⁰⁰⁹ Ibid 5.

¹⁰¹⁰ Telephone conversation with Brenda Burgen, Supported decision-making coordinator, Office of the Public Advocate (Victoria) 3 September 2015.

¹⁰¹¹ Brenda Burgen and John Chesterman, above n 669, 7, 10.

¹⁰¹² Office of the Public Advocate (Victoria), *Supported decision making: The OVAL Project* (2015) Office of the Public Advocate (Victoria) < <http://www.publicadvocate.vic.gov.au/advocacy-research/supported-decision-making>>.

¹⁰¹³ Telephone conversation with Brenda Burgen, Supported decision-making coordinator, Office of the Public Advocate (Victoria) 3 September 2015.

the National Disability Insurance Agency, which identified that “further development is required for people with disability to assume significant choice and control over their lives”.¹⁰¹⁴

Volunteer supporters “will assist project participants to build their capacity to make autonomous and informed decisions about their NDIS support plan”.¹⁰¹⁵ The OVAL Project will include the development of a ‘model of practice’ for supported decision-making for NDIS participants. The model will include tools and resources for NDIS participants and supporters.¹⁰¹⁶

Western Australia

In 2013, Western Australia’s Individualised Services (WAIS) undertook a supported decision-making trial focussed on developing the sector’s knowledge and skills in supported decision-making to ensure self-direction was a possibility for all people with disability.¹⁰¹⁷ The trial involved partnering with people, families and the sector to develop a practical approach to supported decision-making and distribute a range of accessible, freely available resources.¹⁰¹⁸

Thirty-six (36) people were recruited for the project, along with their families and their supporters. WAIS facilitated 6 workshops and participants used a reflective journal. The ‘journal’ was an iPad, which was used and kept by each person in the trial. Participants accessed to a WAIS ‘Mentor’ in relation to their project work.¹⁰¹⁹ WAIS developed six videos and four booklets that are freely available on the WAIS website.¹⁰²⁰

¹⁰¹⁴ Office of the Public Advocate (Victoria), above n 1012.

¹⁰¹⁵ Ibid.

¹⁰¹⁶ Ibid.

¹⁰¹⁷ WA’s Individualised Services, *Supported Decision Making Project Resources* (2014) WA’s Individualised Services <<http://waindividualisedservices.org.au/supported-decision-making-project-resources/>>.

¹⁰¹⁸ Ibid.

¹⁰¹⁹ Ibid.

¹⁰²⁰ WA’s Individualised Services, above n 1017; WA’s Individualised Services, *Supported Decision Making Project Resources* (2014) <<https://www.youtube.com/playlist?list=PLC-Tk74kPjIRqGxRU24QTw45mO-PstVtu>>.

