

Research Insights

Aboriginal and Torres Strait Islander Queenslanders with impaired decision-making capacity

Introduction

The Office of the Public Advocate is committed to advocating for inclusive, equitable and culturally sensitive policies and programs for Indigenous Queenslanders with impaired decision-making capacity. This work includes gathering evidence to inform policy makers and promoting the rights and interests of Indigenous people and communities.

Research partnership

The Office of the Public Advocate has partnered with **Griffith University, Central Queensland University** and **James Cook University** to explore the notion of 'impaired capacity' in relation to Indigenous people, and the interaction which Indigenous people and communities have with the guardianship system. The partnership has embarked on a small-scale exploratory research project to gather evidence on issues that require consideration and attention to ensure Queensland's guardianship system improves outcomes for Indigenous Queenslanders with impaired decision-making capacity.

The full report is available online at www.publicadvocate.qld.gov.au.

Initial research

The initial research undertaken by the partnership sought to gain a broad understanding of the cultural and policy issues relating to impaired decision-making capacity and Indigenous Queenslanders' views of, and interactions with, the Queensland guardianship system.

The qualitative research involved a review of Australian and international academic literature, focus groups in North and Central Queensland and semi-structured interviews with key stakeholders across Queensland. Research participants were primarily Indigenous and non-Indigenous professionals from community agencies who work with Indigenous people and communities, particularly with people with impaired decision-making capacity. Community members, health researchers and Indigenous Elders also participated in the research.

The collection of primary data was undertaken in accordance with the *National Health and Medical Research Council's Values and Ethics: Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research*. The diversity of Indigenous cultures was respected through the establishment of research protocols at each data collection location which were guided by local community advice.

The research was designed to gain insights into the views, impressions and experiences of Indigenous people and communities and other stakeholders. Data was collected from a small sample of people in particular locations. The analysis is subjective and the findings do not necessarily represent those of the wider Indigenous community in Queensland, nor do they provide definitive conclusions. The findings do, however, highlight issues to be considered in future decision-making.

The final research findings were delivered in mid-2011.

Research insights

The key insights from this research are presented below. They reinforce findings from previous studies, highlight cultural considerations, policy issues and inadequacies in Queensland's guardianship system as it relates to Indigenous Queenslanders.

There is a knowledge and evidence gap

The literature review highlighted a paucity of research on the legal notion of 'impaired capacity' in Australia, particularly in relation to indicators of impaired capacity for Indigenous Australians and the cross-cultural relevance of the concept. It is also unclear how many Indigenous people with impaired decision-making capacity have had interactions with the guardianship system.

Appropriate support is needed

Despite the evidence gap, appropriate assistance to support these people is needed. Indigenous people have increased vulnerability to disability, mental illness, substance and alcohol abuse, dementia and acquired brain injury, which are all indicators of impaired decision-making capacity.

The current guardianship system is culturally inappropriate

The research suggests that the current guardianship system in Queensland is culturally inappropriate. It highlights fundamental incompatibilities between the values, intentions and practices of the guardianship system, which is imbedded in Western philosophic traditions (individualistic), and the aspirations, culture and social realities for Indigenous people (collective). As a result, the system may not be meeting the needs of Indigenous people with impaired decision-making capacity.

The term 'impaired capacity' is poorly understood and has little relevance

There was consensus among research participants that the legal term 'impaired capacity' was not understood by Indigenous

people (excluding those who were familiar with the term due to their professional backgrounds). 'Impaired capacity' had little relevance for most people until it was assigned to a person by a doctor or authority figure. The research suggested that Indigenous people understand the concept of cognitive impairments, impaired functioning and mental incapacity. People with impaired decision-making capacity were not considered to be a community concern, unless they exhibited behaviour that negatively impacted others.

Capacity assessment tools and process for determining capacity are inadequate

The current tools for assessing the capacity of Indigenous people are inadequate, primarily due to the cultural bias resulting from using a Western framework to determine a Western notion within an Indigenous culture. A cultural bias, referred to as 'gratuitous concurrence', can also commonly occur. This is a widely recognised cultural tendency to appease the person asking questions i.e. politely answer questions in a way in which they think the questioner wants them to answer. Other reasons why current assessment tools and processes are inadequate include language and general communication differences, education levels, remoteness, the lack of baseline measurement of a person's capacity and the inability of the tools to allow for personality and family differences.

Family and community decision-making is undertaken in Aboriginal and Torres Strait Islander cultures

Decisions are typically made according to traditional family protocol whereby the eldest person in the family makes the decision. Indigenous people often seek decision-making support from within their kinship group or from community Elders. Decision-making within Indigenous communities can be a lengthy process often involving extended family members in addition to the immediate family. Conflict within families can occur during and after a decision-making process, particularly when there is a lack of transparency about an issue or a

conflict in roles (e.g. when a person's carer and financial manager are different people).

A dynamic culture and other factors challenge traditional decision-making processes

Traditional Indigenous decision-making practices are slowly changing due to a dynamic culture. Indigenous people who are educated in the Western system often make decisions on their own or within a small group, rather than through traditional larger family groups. Health and social factors including poor health, alcohol and substance abuse, incarceration, conflict and abuse, mental health issues, suicide and low life expectancy have left gaps in family structures and impacted traditional decision-making processes.

Aboriginal and Torres Strait Islanders people can be suspicious of authorities

There was a general suspicion among research participants of any authority seen to have power over a person or their life, money or property (including doctors, trustees and police). There was particular mistrust of authorities in situations where family members could be at risk of being removed from the family. Suspicions have stemmed from the fear of past government policies that resulted in the removal of people from their land, the extraction of children from families and other abuses of power.

Aboriginal and Torres Strait Islanders people are confused by the guardianship system

There was misunderstanding and confusion around the roles of various bodies involved with people with impaired capacity. Research participants interchangeably used the terms Adult Guardian, Public Trustee, Public Advocate, Power of Attorney and Tribunal as though they were one organisation. Participants were generally aware of The Public Trustee, unaware of the roles of the Adult Guardian and thought the functions of the two bodies were the same.

Aboriginal and Torres Strait Islander Queenslanders typically have negative experiences with the guardianship system

Research participants primarily described negative experiences with the Queensland guardianship system. These negative experiences involved difficulties accessing information and navigating the system, inadequate and/or inappropriate consultation, long processing times, excessive forms and paperwork, lack of transparency, lack of genuine care for people's welfare, little continuity of care, deficient awareness of a person's situation and unreasonable and/or unpractical outcomes.

Some focus group participants reported that family members who were under guardianship became distressed at their inability to make their own decisions. These people felt they were not permitted to make decisions even when they felt able to do so. Distress was also experienced when guardianship caused family members to feel distanced or disconnected.

A few research participants described positive experiences with guardianship bodies. These successful interactions were attributed to the experienced staff/officers who formed relationships with individuals and their families. There were reports of positive experiences in situations involving abuse and/or exploitation.

Improved education will help engage Aboriginal and Torres Strait Islander Queenslanders

Current communication materials regarding the guardianship system were viewed as unhelpful and full of legal and government jargon. Information sessions (face-to-face and via video conference) with community members and staff working with Indigenous communities was suggested as a more effective communication tool, provided they were conducted by an appropriate person. It was suggested that the greatest need for guardianship education was on the topics of Enduring Power of Attorney, Advanced Health Directives and the rights and responsibilities of a person 'in the system'.

There was a desire for more culturally appropriate communication and alternative formats such as workshops and DVDs. It was suggested that 'role play' scenarios would cut through literacy and numeracy issues and help explain concepts, agency functions and available support.

Improved consultation with Aboriginal and Torres Strait Islander Queenslanders is needed

Focus group participants felt there was disconnect between guardianship agencies and Indigenous communities. There was an expressed desire for greater community engagement with groups, organisations and communities to address this disconnect. Knowledge of community dynamics was seen to be a critical factor in delivering meaningful service provision and sound decision-making.

There was consensus that people employed to deliver services to Indigenous Queenslanders should participate in cultural awareness programs to better understand Indigenous culture. The need for the training and employment of Indigenous people, including a career pathway, within guardianship bodies was also expressed.

Key issues

While the research sample and design does not allow for definitive conclusions, the research findings highlight a number of important issues relating to the application of the Queensland guardianship system among Indigenous people and communities. These issues stem from the mismatch between the Queensland guardianship model and the cultural practices of Indigenous people.

The incompatibilities between the policies and practices of the guardianship system and Indigenous values and culture are fundamental. The guardianship model is based on western, individualistic practices, whereas Indigenous culture is founded on collective customs. This means the guardianship system is being applied

to Indigenous Queenslanders, rather than it servicing their needs and supporting individuals with impaired decision-making capacity within the context of their culture.

The evidence clearly suggests the need for a broader and more culturally-appropriate range of decision-making alternatives for Indigenous people. Supported decision-making is an approach that may be more compatible with Indigenous culture. If designed appropriately and in conjunction with the Indigenous community, supported decision-making may be a more natural and culturally acceptable way to support Indigenous people with impaired capacity.

Supported decision-making, or other early interventions, could provide more autonomy for Indigenous people and communities, reduce government intervention and lead to better outcomes for Indigenous Queenslanders with impaired decision-making capacity. It may also help address the over-representation of Indigenous young people in the guardianship system.

Steps to improve case management and mediation at the local level should be undertaken. This will allow for more informed and earlier service responses for people with impaired capacity, which in turn, could lead to improved outcomes for Indigenous individuals, families and communities.

There is a need for meaningful consultation and engagement with Indigenous people about 'what works' in their communities. Their input into assessment tools and processes, communication mechanisms and service responses is vital to ensure a culturally appropriate, practical and sustainable approach to support people with impaired decision-making.

Key concepts

Guardianship

Guardianship is the process of making decisions on behalf of an adult about personal matters when they have impaired decision-making capacity (i.e. are unable to do so themselves).

Impaired decision-making capacity (or 'impaired capacity')

The *Guardianship and Administration Act 2000* (Qld) is based on the 'presumption of competence'. This is a legal principle which presumes that people can make their own decisions.

Impaired decision-making capacity is the inability to follow through the process of reaching a decision and putting the decision into effect. For example, impaired decision-making capacity may be due to dementia, intellectual disability, acquired brain injury, or a mental illness.

There are three elements to making a decision including:

- Understanding the nature and effect of a decision,
- Freely and voluntarily making a decision, and
- Communicating the decision in some way.

If an adult is unable to carry out any part of this process for decision making, the adult is said to have impaired decision-making capacity.

Queensland Civil and Administrative Tribunal (QCAT)

The Queensland Civil and Administrative Tribunal determines whether a person has impaired decision-making capacity.

The matters that QCAT decides and reviews include guardianship and administration for adults and matters regarding children and young people, anti-discrimination and other administrative decisions.

References

Cadet-James D., Cadet-James Y., Chenoweth L., Clapton J., Clements N., Pascoe V., Radel K., and Wallace V., 2011, *Impaired Decision-Making Capacity and Indigenous Queenslanders*, Final Report, School of Human Services and Social Work, Griffith University, Brisbane.

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