

Proceedings from a Roundtable on Litigation Guardianship

On 29 November 2024, the Public Advocate hosted a roundtable with various stakeholders to discuss problems with the operation of litigation guardianship and to identify potential solutions. This document captures the discussion from that roundtable, and concludes with the Public Advocate's proposed way forward.

1. Organisations represented

The organisations that attended the roundtable and the number of people from each included:

- Legal Aid Queensland – 6 people
- Justice Policy and Reform (Department of Justice) – 4 people
- Public Trustee Queensland – 3 people
- Queensland Advocacy for Inclusion – 2 people
- LawRight – 2 people
- Queensland Courts, Supreme, District and Land Court Service – 1 person
- Queensland Civil and Administrative Tribunal – 1 person
- Office of the Public Guardian – 1 person
- Queensland Courts – Reform and Support Services – 1 person
- Queensland Human Rights Commission – 1 person
- Queensland Law Society – 1 person
- Caxton Legal Centre – 1 person
- Hopgoodganim Lawyers – 1 person

2. The Problem

There are a number of problems concerning the appointment and role of litigation guardians in Queensland. Although litigation guardians can play an important function in civil proceedings, including for people with impaired decision-making ability, there are considerable uncertainties and concerns regarding issues such as:

- When litigation guardians can and should be appointed;
- Who can and should be appointed as litigation guardians;
- The potential liability of litigation guardians for costs orders;
- The role of public entities that could be appointed as litigation guardians, such as the Public Guardian and the Public Trustee.

3. Background

Queensland courts

The rules regarding the appointment of litigation guardians differ depending upon the jurisdiction.

In Queensland, the *Uniform Civil Procedure Rules 1999* (Qld) provide that a person under a 'legal incapacity' can only start or defend proceedings, or do anything in a proceeding, through that person's litigation guardian unless the rules provide otherwise.¹ If the litigation guardian is not a solicitor, they need to operate through a solicitor.²

A person can be a litigation guardian if they:

- are not a person 'under a legal incapacity';³
- have no interest in the proceedings that are adverse to the interests of the person they are litigation guardian for;⁴ and
- are not a corporation (except for the Public Trustee or a trustee company under the *Trustee Companies Act 1968* (Qld)).⁵

A guardian or administrator appointed under the *Guardianship and Administration Act 2000* (Qld) is entitled to be a litigation guardian as long as their guardianship or administration appointment extends to the matter being litigated in the proceedings.⁶

Under the *Public Trustee Act 1978* (Qld), the Public Trustee can be appointed as a litigation guardian by the court.⁷ The Public Trustee must consent to the appointment.⁸ No equivalent provision exists for the Public Guardian.

Federal courts

Each of the federal courts has specific rules around litigation guardians.

The *High Court Rules 2004* (Cth) state that 'a person under disability' must commence or defend a proceeding by a litigation guardian.⁹ The litigation guardian must also act through a solicitor.¹⁰ Unless the court orders otherwise, if a person is authorised under the law of a state or territory to act as litigation guardian for a person with a disability, that person is entitled to be the litigation guardian in the High Court.¹¹

The *Federal Court Rules 2011* (Cth) state that 'a person under a legal incapacity' can start or defend a proceeding only by the person's 'litigation representative'.¹² A person whose

¹ *Uniform Civil Procedure Rules 1999* (Qld) r 93(1)-(2).

² *Uniform Civil Procedure Rules 1999* (Qld) r 93(3).

³ *Uniform Civil Procedure Rules 1999* (Qld) r 94(1)(a).

⁴ *Uniform Civil Procedure Rules 1999* (Qld) r 94(1)(b).

⁵ *Uniform Civil Procedure Rules 1999* (Qld) r 94(3).

⁶ *Uniform Civil Procedure Rules 1999* (Qld) r 94(2).

⁷ *Public Trustee Act 1978* (Qld) s 27(1).

⁸ *Public Trustee Act 1978* (Qld) s 27(3).

⁹ *High Court Rules 2004* (Cth) r 21.08.1.

¹⁰ *High Court Rules 2004* (Cth) r 21.08.3.

¹¹ *High Court Rules 2004* (Cth) r 21.08.4.

¹² *Federal Court Rules 2011* (Cth) r 9.61.

interests differ from the person under a legal incapacity, another person under a legal incapacity, or a corporation or organisation cannot be a litigation representative.¹³ However, Public Trustees and trustee companies that are authorised under the law to act as a trustee, executor or administrator are not excluded from being litigation representatives.¹⁴

The *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) and the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) have largely similar rules regarding litigation guardians. Under these rules, a person requires a litigation guardian for a proceeding if:

- they do not understand its nature and possible consequences; or
- they cannot adequately provide instructions or conduct proceedings.¹⁵

A person who needs a litigation guardian can only start, continue, respond or seek to be included as a party in a proceeding through a litigation guardian.¹⁶

A litigation guardian must be an adult and have no interest in the proceedings that are adverse to the interests of the person needing the litigation guardian.¹⁷ Under the *Family Law Rules*, the litigation guardian must also be able to fairly and competently conduct proceedings.¹⁸

A person who is authorised under another law (including state or territory laws) to conduct legal proceedings as, or for, the person who needs a litigation guardian is entitled to be a litigation guardian for any proceedings to which their authority extends.¹⁹

4. Queensland Law Reform Commission review

The need for reform in the way litigation guardianship operates in Queensland has been recognised for some time, including when the Queensland Law Reform Commission (QLRC) reviewed Queensland's guardianship laws in 2010.²⁰ Ten reform recommendations were made by the QLRC, as detailed below.

The appointment of a litigation guardian

28-1 Section 27 of the *Public Trustee Act 1978* (Qld) should be amended to ensure that the Public Trustee's consent is not required for the Public Trustee to be appointed as a litigation guardian under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld).

¹³ *Federal Court Rules 2011* (Cth) r 9.62(1).

¹⁴ *Federal Court Rules 2011* (Cth) r 9.62(2).

¹⁵ *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 3.12; *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) r 11.07.

¹⁶ *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 3.13(1); *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) r 11.08(1).

¹⁷ *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 3.14; *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) r 11.09.

¹⁸ *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 3.14.

¹⁹ *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 3.16; *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) r 11.11.

²⁰ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (September 2010).

- 28-2 Rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) should be amended:
- (a) to provide that, generally, the court may appoint a person as litigation guardian for a person under a legal incapacity only if the person consents to being appointed as litigation guardian;
 - (b) to provide that, despite the provision that gives effect to Recommendation 28-2(a), the court may:
 - (i) appoint the Public Trustee, without the Public Trustee's consent, as litigation guardian for an adult with impaired capacity for a proceeding that relates to the adult's financial or property matters; and
 - (ii) appoint the Adult Guardian, without the Adult Guardian's consent, as litigation guardian for an adult with impaired capacity in a proceeding that does not relate to the adult's financial or property matters; and
 - (c) to include a note, in the provision that gives effect to Recommendation 28-2(b)(i), that refers to section 27 of the *Public Trustee Act 1978* (Qld) as the source of the Public Trustee's power to act as a litigation guardian.

- 28-3 The *Guardianship and Administration Act 2000* (Qld) should be amended:
- (a) to include, as an additional function of the Adult Guardian in section 174, 'acting as the litigation guardian of an adult in a proceeding that does not relate to the adult's financial or property matters'; and
 - (b) to provide that the Adult Guardian may exercise the power under rule 95(1) of the *Uniform Civil Procedure Rules 1999* (Qld) to file a written consent to be the litigation guardian of an adult in a proceeding that does not relate to the adult's financial or property matters.

- 28-4 The *Uniform Civil Procedure Rules 1999* (Qld) should be amended:
- (a) to include a rule, based on rule 277(3) of the *Court Procedures Rules 2006* (ACT), to the effect that a litigation guardian for a defendant or respondent is not liable for any costs in a proceeding unless the costs are incurred because of the litigation guardian's negligence or misconduct; and
 - (b) to include a rule, to the following general effect, dealing with the court's power to make an order in relation to the costs of a party who has a litigation guardian:
 - (1) This rule applies if a party to a proceeding has a litigation guardian for the proceeding.
 - (2) If the court considers it in the interests of justice, the court may order that all or part of the party's costs of the proceeding be borne by another party to the proceeding.
 - (3) The court may make an order under this rule at any stage of the proceeding or after the proceeding ends.

The test for impaired capacity for a litigant

- 28-5 The definition of 'person with impaired capacity' in schedule 2 of the *Supreme Court of Queensland Act 1991* (Qld) should be amended to provide that:
person with impaired capacity means a person who is not capable of making the decisions required of a litigant for conducting *the proceeding* or who is deemed by an Act to be incapable of conducting *the proceeding*.

28-6 The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, in deciding whether a person has impaired capacity for the purpose of the *Uniform Civil Procedure Rules 1999* (Qld), the Tribunal must take into account whether or not the person is, or will be, legally represented in the proceeding.

Person appropriate for appointment as litigation guardian

28-7 The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that:

- (a) the Tribunal may make a finding about who would be appropriate to be appointed as the litigation guardian of an adult who is a person under a legal incapacity within the meaning of the *Uniform Civil Procedure Rules 1999* (Qld); and
- (b) the Tribunal's finding is evidence about the appropriateness of the person to be appointed as the adult's litigation guardian.

The power to transfer the issue of an adult's capacity to the Tribunal

28-8 Section 241 of the *Guardianship and Administration Act 2000* (Qld) should be amended:

- (a) to clarify that, for section 241(1), 'proceeding' includes the issue of the capacity of a party to a proceeding before the court; and
- (b) so that the power to transfer the issue of a party's capacity may be exercised not only by the Supreme Court, but also by the District Court or a Magistrates Court.

28-9 The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if a court transfers to the Tribunal the issue of whether an adult is a person under a legal incapacity within the meaning of the *Uniform Civil Procedure Rules 1999* (Qld):

- (a) the Tribunal may make a declaration about the person's capacity; and
- (b) the court is entitled to rely on the Tribunal's declaration.

Jurisdiction of the Supreme Court and District Court to exercise the powers of the Tribunal under Chapter 3 of the Guardianship and Administration Act 2000 (Qld)

28-10 Section 245(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide as follows:

- (1) This section applies if—
 - (a) in a civil proceeding—
 - (i) the court sanctions a settlement between another person and an adult or orders an amount to be paid by another person to an adult; or
 - (ii) an amount is to be paid by another person to an adult under the terms of a settlement of the proceeding; and
 - (b) the court considers the adult is a person with impaired capacity to receive and manage the amount payable under the settlement or order mentioned in subparagraph (a)(i) or the settlement mentioned in subparagraph (ii).

Progress has not been made so far to make changes to the laws as recommended by the QLRC.

5. Other information

Other organisations have acknowledged that reform is necessary in this area, such as Caxton Legal Centre, which commissioned an Issues Paper on this topic, along with Queensland Advocacy for Inclusion, which also commissioned research into the issue.

The Office of the Public Guardian has a policy statement that states that the Public Guardian will not accept appointment as a litigation guardian. The statement notes that the *Public Guardian Act 2014* does not authorise the Public Guardian to act as a litigation guardian. The policy statement further notes that the Public Guardian will not accept potential liability for costs associated with being appointed as a litigation guardian.²¹

6. Key discussion points

Participants at the 29 November 2024 roundtable made the following observations.

There are jurisdictional issues depending upon what court/tribunal the matter is before and whether they are state or federal.

- The Administrative Review Tribunal (federal jurisdiction) now has a process to appoint litigation guardians. This is important for NDIS matters where decisions are appealed to this tribunal.
- The Queensland Civil and Administrative Tribunal did not have a process of appointing a litigation guardian until a recent case.

There is a substantial, unmet demand for litigation guardians in all jurisdictions in a variety of matter types, which can include domestic violence cases.

Should the Public Guardian or Public Trustee be involved, there can be some confusion as to whether certain matters are personal decisions, financial decisions, or both.

- Often, lawyers request the Public Guardian to be litigation guardian for financial matters such as personal injury and property settlement matters.
- There can be some confusion in deciding what kind of cases are what kind of matters, for example whether divorce proceedings are a financial or personal matter, which may depend on factors such as the extent to which property settlement is in contention.

The liability for costs is a barrier for any person or government agency in becoming a litigation guardian.

- Community legal centres in some fields are having to rely on an 'impecunious nun' from Victoria to become litigation guardian in order to avoid the consequences of costs orders.

Safeguards must be in place when litigation guardians are appointed.

- Litigation guardians with no experience could be detrimental to a case, and there are currently little to no criteria required to be met when litigation guardians self-appoint for matters.
- Currently, some people take up the role of litigation guardian without sufficient knowledge of what it entails, or understanding general concepts such as conflicts of interest.

²¹ Office of the Public Guardian, *Policy Statement – Requests to act as a Litigation Guardian*.

- There is a need to ensure that vexatious litigation does not occur by litigation guardians.
- Clearer guidelines and principles that are in line with the rights of the person being represented must be established in order to avoid issues such as a best interests approach.
- It may be that the role of litigation guardians will need to be codified to provide consistency for people being represented.

There are a number of barriers regarding whether the Public Guardian or Public Trustee should become litigation guardians.

- The Public Trustee would need to be resourced to conduct litigation guardianship when increasing the number of cases that they are to take on.
- The Public Guardian's position is that this office does not have the legislative remit to be appointed as a litigation guardian. There are also resourcing issues regarding having the staff necessary to conduct such litigation, as well as the issue about the liability for costs.
- However, there is a question as to whether litigation guardians are required if there is a guardian or administrator appointed, as the guardian or administrator can run the litigation as the party themselves in a proceeding. Whether this approach will work in all jurisdictions is unclear.

Court proceedings would benefit from clear guidelines for identifying when a litigation guardian is required and how they are appointed. Whilst there is a referral pathway in child protection proceedings which enables the referral of matters to QCAT for guardianship appointments, other legal proceedings do not have a similar pathway in instances where a person may need the assistance of a litigation or other guardian.

Guidance for lawyers is also necessary in regard to what to do when a litigation guardian is required for a client. Further comments and questions included:

- What should lawyers do when a report may be required as to a client's capacity?
- Lawyers sometimes seek a litigation guardian because their relationship with their client has fallen apart.
- When lawyers leave a matter, then the client is unable to proceed with the case.
- Defendants may also require a litigation guardian, but there may be situations where it may be of no benefit to have a litigation guardian: if the defendant is impecunious, or litigation against the defendant cannot proceed without one.
- When a client loses capacity to instruct, what should the lawyer tell the court or the opposing side, given confidentiality considerations?
- If the client lacks capacity to instruct, what should the lawyer do if guardianship proceedings under the *Guardianship and Administration Act* will result in detrimental consequences to the client (especially in relation to relatively minor proceedings)?
- Greater support should be provided to clients to enable them to provide instructions to their lawyers.
- Further training for lawyers is needed to better enable them to communicate with their clients.
- It is important to ensure that litigation guardians are not sought for the convenience of others (especially when there are others who may require more support).
- There is a general need throughout the legal system for greater understanding of the concept of capacity; in particular, that capacity is domain and decision-specific.

There is a need to recognise that many people require support before litigation begins to be able to ensure observance of their rights.

The lack of a framework to ensure people can have litigation guardians when needed may contravene the principles of the *Human Rights Act 2019* in relation to the right to equality and equal protection of the law.

7. Proposed way forward

There should be better training and awareness for lawyers to support their clients so that they can provide instructions.

There is a need for the existence of clearer pathways and guidance for the appointment of litigation guardians, which need to take account of the particular jurisdiction. There are unique issues depending on the nature of the case, for example, which could be in relation to a personal injury claim, domestic violence, adult guardianship, a Family Court matter, or could concern child protection. Key questions concern:

- who determines 'capacity'?
- what processes should be followed when a litigation guardian is required? and
- who can be a litigation guardian?

Changes to legislation are required regarding both the Public Guardian and Public Trustee. Possible reforms would be to specify that the Public Guardian can be a litigation guardian, and that the consent of either agency is not needed for them to be appointed.

A board or panel of litigation guardians could be created consisting of people with the required training and experience. This panel could be turned to when it would not be appropriate for the Public Guardian and/or the Public Trustee to be appointed as litigation guardians.

Adequate funding would need to be provided to establish the above.

Liability for costs (except in the case of negligence by the litigation guardian) should be eliminated for those appointed as litigation guardians.

8. The Public Advocate's recommendations

Drawing on the discussions held at the roundtable on 29 November 2024, and in its aftermath, the Public Advocate makes the following recommendations (noting that these views may not be shared by all roundtable participants, and that Recommendations 2, 3, and 4 will have resource implications):

1. The *Uniform Civil Procedure Rules 1999* (Qld) should be amended:
 - a. to require that before a litigation guardian is appointed, reasonable efforts must be made to support a person to enable them to participate in the proceeding without a litigation guardian; and
 - b. to provide that litigation guardians are not liable for costs in a proceeding other than where costs have been incurred due to the litigation guardian's negligence or misconduct (this is consistent with QLRC recommendation 28-4).
2. The *Public Guardian Act 2014* (Qld) should be amended to include, as one of the functions of the Public Guardian: 'to act as a litigation guardian in proceedings not

relating to an adult's financial or property matters' (this is consistent with QLRC recommendation 28-3).

3. The *Public Guardian Act 2014* (Qld) and *Public Trustee Act 1978* (Qld) should be amended to provide that the Public Guardian's and Public Trustee's consent is not required for them to be appointed as a litigation guardian under the *Uniform Civil Procedure Rules 1999* (Qld) (this is consistent with QLRC recommendations 28-1 and 28-2).
4. The Department of Justice should consider establishing, on a trial basis, an expert panel of lawyers who are able to be appointed as litigation guardians in matters where their appointment would be more suitable than the appointment of the Public Guardian or Public Trustee.
5. The Department of Justice, in consultation with judicial representatives and appropriate agencies, including the Queensland Law Society, the Public Guardian, the Public Trustee and the Public Advocate, should develop publicly-available guidelines concerning the role of litigation guardians.