

Guardianship and Administration and Other Legislation Amendment Bill 2017

Submission to the Legal Affairs and Community Safety Committee

Thank you for the opportunity to provide feedback on the *Guardianship and Administration and Other Legislation Amendment Bill 2017* (the Bill).

The role of the Public Advocate was established by the *Guardianship and Administration Act 2000* to undertake systems advocacy on behalf of adults with impaired decision-making capacity in Queensland.¹ The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity in all aspects of community life.

I welcome the progression of the Queensland Law Reform Commission (QLRC) recommendations for the reform of Queensland's guardianship and administration system.² Given that the QLRC recommendations were a result of wide-ranging consultation and extensive research, I support the majority of changes proposed as a result of those recommendations.

This submission presents a number of comments and suggestions regarding these proposals.

General Principles and the Health Care Principle

Location of the General Principles

While I do not have a strong view on the location of the General Principles, the location of the General Principles in their own schedule to the *Guardianship and Administration Act* allowed them to be clearly distinguished from other provisions of the Act. There was significant value in the General Principles sitting alone and separate from the remainder of the Act. If they are now located within the Act, it may be more difficult for people without a legal background to identify the General Principles and distinguish them from the other provisions.

Placing the General Principles closer to the front of the legislation may give them more prominence to members of the public, however it is questionable how many people in the community read legislation in its entirety and interpret the importance of provisions on the basis of their appearing earlier in the Act. Any person with legal training would certainly not evaluate provisions in this way.

¹ *Guardianship and Administration Act 2000* (Qld) ch 9.

² Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010).

As acknowledged in the Explanatory Notes of the Bill, the QLRC in its report recommended keeping the principles in their current location in the schedule.³

Irrespective of where the General Principles are located, I recommend that the Department of Justice and Attorney-General (DJAG) print and promote a version of the General and Health Care Principles separately for use by members of the public. The Public Advocate's *Decision-making support and Queensland's guardianship system* report highlighted significant concerns about the lack of awareness of the General Principles, particularly by those in the community who must implement them when making decisions on behalf of others under the guardianship legislation.⁴

My view regarding the location of the General Principles also applies to the proposal to change the location of the Health Principles.

Redrafting of the General and Health Principles

I have some concerns about the redrafting of the principles.

The redrafting of the General and Health Principles has had the effect of making them far less readable and accessible than the current version. For example, the principles are no longer expressed in clear complete sentences. Some examples of the current principles read as follows:

*An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.*⁵

*An adult's right to be a valued member of society must be recognised and taken into account.*⁶

*Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.*⁷

The proposed General Principle 2(3) in the Bill reads:

The principles on which an adult's human rights and fundamental freedoms are based, and that should inform the way those rights and freedoms are taken into account, include—

- (a) respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons; and*
- (b) non-discrimination; and*
- (c) full and effective participation and inclusion in society, including performing roles valued by society; and...*

The new approach is more difficult to read and understand. It has too many clauses and includes brackets making it less accessible for ordinary people who are not accustomed to reading and interpreting legislation. I support the proposal that the General Principles should more closely reflect the *Convention on the Rights of Persons with Disabilities*,⁸ however to be most effective they must be

³ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) Recommendation 4-9

⁴ Office of the Public Advocate, *Decision-making support and Queensland's guardianship system* (2016) Office of the Public Advocate, 6 <http://www.justice.qld.gov.au/__data/assets/pdf_file/0010/470458/OPA_DMS_Systemic-Advocacy-Report_FINAL.pdf>.

⁵ *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 3.

⁶ *Ibid* s 4(1).

⁷ *Ibid* s 4(2).

⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008).

expressed in more simple language that is accessible and can be understood by the people whose rights they are intended to protect and those assisting them or making decisions on their behalf. Article 9 of the *Convention on the Rights of Persons with Disabilities* deals with accessibility issues and recognises the right of every person with a disability to have ‘access on an equal basis with others to the physical environment, to transportation, to information and communications’ (emphasis added).

By example, I suggest that the proposed General Principle 2(3) could be better expressed as follows:

The human rights and fundamental freedoms outlined below must inform decisions made about or for all persons (with “person” being defined as an adult in the Act) with impaired capacity:

The right to respect for inherent dignity, including the right to life.

The right to respect for individual autonomy, including the freedom to make one’s own choices, and independence.

The right to equality before and under the law without discrimination.

The right to full and effective participation and inclusion in society, including performing roles that are valued by society.

The right to enjoy respect for difference and acceptance as part of human diversity and humanity.

The right to equality of opportunity.

The right to enjoy access on an equal basis with others to facilities and services available to the public.

The language used in the proposed General Principle 3 is of concern. The preamble “The importance of the following matters must be taken into account” is uncertain in its meaning and application. This language has the effect of diluting the power of the principles. The principles would be much stronger and clearer in their meaning and application if they were expressed as rights, as they are currently under the General Principles. See General Principle 7 which states:

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.

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.

The drafting of the new General Principles should use complete sentences and statements of principle that stand alone, rather than being drafted like the provisions of an Act. The General Principles and Charter of rights for a child in care used in the *Child Protection Act 1999* could be used as a guide.

It may also be advantageous to seek advice from communication specialists and experts in writing easy English to develop the final wording of the General Principles to ensure that they are accessible by the people to whom they have relevance.

Decision-making capacity

Guidelines for assessing capacity

I support the creation of guidelines to assist people to make capacity assessments in a manner that is consistent and reflects a best practice approach,⁹ as endorsed by the QLRC.¹⁰ As highlighted in the *Decision-making support and Queensland's guardianship system* report, the establishment of practical guidance and requirements in relation to the assessment of capacity may facilitate an improved understanding of capacity within the community and relevant professions.¹¹

I have some concern that the proposed provisions do not specify a date by which the guidelines will be prepared. The requirement that the guidelines be published on the 'department's website' is also of concern, primarily because the DJAG website is not compliant with the Queensland Government IS26 (the information standard outlining the minimum requirements for Queensland Government agencies in the creation, implementation, and management of agency internet sites for the delivery of information and services).

These standards specifically address issues such as accessibility and usability for all groups of the community, including recognising that customers may access online content using assistive technologies due to disability, impairment or preference, considering the World Wide Web Consortium (W3C) Web Content Accessibility Guidelines (V2.0).

If the DJAG website does not meet the Web Content Accessibility Guidelines, the very people to whom the capacity assessment guidelines will be of particular interest and relevance may not be able to access the guidelines on the department website. As an alternative, I suggest that the Bill provide that the guidelines should be published on the Queensland government's website <https://www.qld.gov.au/> which is consistent with the government's one-stop shop approach for people's interactions with government services and policies.

Capacity to make enduring documents

The level of understanding required to make an enduring document

The proposal to have two different definitions of capacity for different purposes is of concern.¹² Similar concerns were expressed by my predecessor in her submission to the QLRC review of

⁹ *Guardianship and Administration and Other Legislation Amendment Bill 2017* (Qld) cl 41.

¹⁰ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) Recommendation 7-11 – 7-13.

¹¹ Office of the Public Advocate, *Decision-making support and Queensland's guardianship system* (2016) Office of the Public Advocate, 62-63 <http://www.justice.qld.gov.au/__data/assets/pdf_file/0010/470458/OPA_DMS_Systemic-Advocacy-Report_FINAL.pdf>.

¹² *Guardianship and Administration and Other Legislation Amendment Bill 2017* (Qld) cl 62.

guardianship laws.¹³ In our view, having a test for capacity for executing enduring documents and another for impaired capacity creates uncertainty and could have the effect of undermining public confidence in the law in this area. Consideration should be given to standardising the tests, or alternatively, instead of retaining a definition of ‘capacity’ in schedule 3, consideration should be given to providing a definition of ‘impaired capacity’.

Statutory health attorneys

Definition of ‘spouse’

The Bill proposes that a ‘spouse’ will only be eligible to be a statutory health attorney if the person is 18 years old.¹⁴ While the public policy benefit in requiring people who have to make the types of decisions required of a statutory health attorney to be at least 18 years old is recognised, I am concerned about the effect of such an amendment in the rare case where this issue would arise.

Marriage laws allow people to marry when one party is between the ages of 16 to 18,¹⁵ and therefore such situations should be recognised in the circumstances in which decisions are required of a statutory health attorney. I note that this was the position of the Adult Guardian in her submission to the QLRC.¹⁶ The QLRC gave very limited explanation for making this recommendation. The effect of this requirement is to essentially change the nature of the marriage relationship as recognised at law.

In relation to the proposal to make reference to the definition of spouse under the *Acts Interpretation Act 1954*,¹⁷ it may be easier for the health practitioners and members of the community who interpret these provisions to have the actual definition included in the section, or at the very least, have a note that recognises that the definition includes de facto and same sex couples.

The appointment of guardians and administrators

Continuation or change of appointment on review by the Queensland Civil and Administrative Tribunal

I support the amendment to clarify that when the Queensland Civil and Administrative Tribunal is reviewing an appointment for guardian, and the Public Guardian is currently appointed, the Tribunal may make an order removing the Public Guardian if there is another appropriate person.¹⁸ This ensures that the Public Guardian remains the guardian of last resort and will help to ensure that a guardian who knows the person and understands their will and preferences will be appointed.

¹³ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010) 8.96.

¹⁴ *Guardianship and Administration and Other Legislation Amendment Bill 2017* (Qld) cl 67.

¹⁵ *Marriage Act 1961* (Cth) s 12.

¹⁶ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010) 10.88.

¹⁷ *Guardianship and Administration and Other Legislation Amendment Bill 2017* (Qld) cl 67.

¹⁸ *Ibid* cl 17.

However, I note the Bill does not include an amendment to implement QLRC recommendation 14-15. That recommendation proposes a similar amendment in relation to the continuation of appointment of the Public Trustee as administrator. There is no explanation in the Explanatory Notes to the Bill as to why this recommendation has not been acted on when recommendation 14-14, to amend the provision in relation to the Public Guardian, as above has.

I respectfully request that consideration be given to the Bill including an amendment to give effect to QLRC recommendation 14-15. Further, it is unclear why QLRC recommendation 14-13 has not been implemented in this Bill. That recommendation proposed amending section 14 so that the Tribunal should appoint the Public Trustee only if there is no other person who is appropriate and available for appointment as administrator, as is currently the case with the Public Guardian.

The Public Guardian is considered to be the 'last resort' appointment for guardianship, and I can identify no clear basis for departing from this principle in terms of the appointment of administrators to manage the financial affairs of people with impaired capacity. If there is a person in the life of an adult who is the subject of an application for administration, who is appropriate and available to carry out the duties of administrator, there is no reasonable basis to apply a different test from that required to be applied when considering an application for guardianship. Further, given that the Public Trustee charges what can amount to significant fees throughout the period of administration of a person's financial affairs, it is clearly to the financial benefit of people who are placed under administration to have a private appointment if there is a person appropriate and available to be an administrator.

The Public Trustee

Delegation

The amendments to allow the Public Trustee to delegate their powers to appropriately qualified members of the Public Trustee's staff¹⁹ is supported.

However, I have some concerns regarding allowing the delegation to a carer or 'another person'. The process of such delegation should be made clear, including how such delegations can be declined or later refused by the person.

The Public Advocate

I am also pleased to note that the Bill makes provision for the person appointed as Public Advocate to keep all rights accrued or accruing as a public service officer upon appointment.²⁰ This is consistent with the Public Guardian's rights under the *Public Guardian Act 2014*²¹ and other statutory appointments.

¹⁹ Ibid cl 17.

²⁰ Ibid cl 38.

²¹ *Public Guardian Act 2014* (Qld) s 100.

This assures that in the future, any potential applicants to the role will have their experience and knowledge respected and preserved, and will assist in recruiting people with the most appropriate experience and qualifications. Without this recognition of their years of service, prospective candidates for the position who may have been public service officers of long-standing may have been reluctant to apply.

Concluding comments

Thank you again for the opportunity to provide a submission to the Committee in relation to the *Guardianship and Administration and Other Legislation Amendment Bill 2017*. Should the opportunity arise, I would be pleased to be part of any further discussions or hearings conducted by the Committee in relation to the review of this Bill.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mary Burgess', written in a cursive style.

Mary Burgess
Public Advocate