Office of the Public Advocate
Systems Advocacy

Decision-making support in Queensland's guardianship system

An Issues Paper

November 2014

Queensland Government

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Introduction

The Public Advocate

The Public Advocate is established by the *Guardianship and Administration Act 2000* (Qld) to undertake systems advocacy on behalf of adults with impaired decision-making capacity in Queensland. 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.

Position of the Public Advocate

Currently there are a range of means by which to maximise autonomy, preserve a person's decision-making capacity, and/or minimise formal appointments 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 capacity to make decisions; and
- coordinated access to support and services that people who may have impaired capacity for a matter need, including case-management support.

Nonetheless, the Public Advocate is aware of the increasing number of applications being sought for guardianship and/or administration appointments in Queensland and the existence of a number of barriers to people maintaining and exercising their right to make their own decisions.

A number of systemic factors might be influencing the demand for guardianship and/or administration, such as the regulation of restrictive practices, the introduction of recent reforms in aged care and the forthcoming commencement of the National Disability Insurance Scheme in Queensland.

These progressive reforms to various service systems, combined with the effects of an ageing population, mean that the increasing demand on the guardianship system is likely to continue. In reflecting on this issue, many commentators have expressed concern about the long-term sustainability of the Queensland guardianship system; a concern shared by the Public Advocate.

Together with the paradigm shift heralded by the United Nations *Convention on the Rights of Persons with Disabilities*[1], the issue of how best to ensure that people receive the support that they need to exercise their legal capacity and make decisions for themselves warrants further consideration/exploration. This is of particular relevance given the associated possibility that doing so may reduce the demand for guardianship and administration.

In support of this, there may be opportunities in Queensland to further enhance the guardianship system and to encourage the use of mechanisms that better support people to make their own decisions.

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

Research into decision-making support

In early 2013, the Office of the Public Advocate initiated a research project examining decision-making support for Queenslanders with impaired capacity, with a focus on the extent to which relevant provisions of Queensland's guardianship legislation (the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*) are translated into practice.[2]

The aim of the research is to identify the systemic enablers and barriers to protecting and supporting the right of people to make their own decisions. The research will explore this within the context of Queensland's public guardianship system (inclusive of policy, practice and legislation).

In early 2014, the Office of the Public Advocate published a suite of four documents that form the foundation of this research: the conceptual framework, a literature review on supported decision-making, a synopsis of the legislation underpinning Queensland's guardianship system, and a targeted overview of guardianship legislation in other Australian jurisdictions. These documents are available on the Public Advocate website.

The Office will use the research findings to continue its engagement with a range of stakeholders who interact with, and/or have relevant knowledge about, the guardianship system in Queensland to identify opportunities for systemic enhancements that reflect contemporary developments in understanding with respect to the provision of decision-making support for people who may have impaired capacity for a matter.

As part of the research, information is being gathered through interviews with members of the Queensland Civil and Administrative Tribunal, interviews with executives from the Office of the Public Guardian and the Public Trustee, and surveys and discussion groups with staff from the Office of the Public Guardian and the Public Trustee.

[2] 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 are not being examined as part of this research.

An Issues Paper on decision-making support and the current guardianship system

To complement the above activities, the Public Advocate has released this Issues Paper to gather the views of interested individuals and organisations on the current guardianship system in Queensland. In particular, the Public Advocate would appreciate your views on:

- the extent to which Queensland's guardianship regime upholds the right of an adult to make their own decisions;
- the current barriers to protecting and supporting the right of people to make their own decisions;
- how the use of substitute decision-making, particularly within the context of formal guardianship and administration, can be reduced;
- how to better enable autonomy through advance planning mechanisms and informal decision-making support;
- the opportunities to enhance the current system to maximise decision-making autonomy; and
- the necessary safeguards for people who require support to make decisions.

This Issues Paper contains a series of questions that are designed to guide your submission in relation to these issues.

Making a submission

Submissions are your own or an organisation's ideas or opinions about the issue under review. Your submission should relate to the issues identified above about the current guardianship system in Queensland and, where possible, relate to the guiding questions that are articulated in the Issues Paper. The Public Advocate would be particularly interested in any case examples you may have.

When compiling your submission, you may choose to respond to all or only some of the guiding questions. It is **not** a requirement that your submission addresses the guiding questions.

Your submission may be composed in a number of formats. For example, it may be hand written, typed or recorded in an audio or video format.

The Public Advocate will not publish any of the submissions received, but may refer to the submissions and/or quote information from the submissions in public reports prepared about the issue. The Public Advocate will not publish any information that may personally identify a person who may have impaired decision-making capacity for a matter.

You may lodge your submission to:

- Email: public.advocate@justice.qld.gov.au
- Phone: 07 3224 7424
- Fax: 07 3224 7364

Please contact us by email or phone if you would like to make a telephone appointment time.

SUBMISSION DEADLINE: FRIDAY 5 DECEMBER

Definitions

Adult	A person aged over 18 years who has been found by the Tribunal to have impaired decision-making capacity for a matter.
Convention	The United Nations *Convention on the Rights of Persons with Disabilities*[3].
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 by 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 is 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.[4] By way of an enduring power of attorney, a principal may authorise an attorney to make decisions regarding financial matters or personal matters (including health matters). By way of an advance health directive, a principal may give directions about their future health care and appoint an attorney to exercise power for a health matter (but not special health matters). An attorney appointed under either document may only exercise power while the principal has impaired capacity for that matter.
Guardianship system	Comprised of the agencies and entities that exercise powers, functions and roles under Queensland's guardianship legislation.
Informal decision-maker	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. This is commonly undertaken by a member of the person's support network.
Queensland guardianship legislation	Collectively the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*, as they apply to adults.
Substitute decision-maker	A person formally appointed as a guardian or administrator by the Tribunal; 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.

[3] *Convention on the Rights of Persons with Disabilities* opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008).
[4] *Powers of Attorney Act 1998* (Qld) s 28.

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.[5]
Tribunal	The Queensland Civil and Administrative Tribunal (QCAT).

[5] *Guardianship and Administration Act 2000* (Qld) sch 4, definition of 'support network'.

Part A. Principles and rights

The United Nations *Convention on the Rights of Persons with Disabilities* heralds a paradigm shift in moving away from a focus on what a person cannot do to instead direct attention to the supports that should be provided to enable people to make decisions and exercise their legal capacity.[6] Notwithstanding the broader cohort toward whom this paper is targeted[7] and other rights accorded to persons through various human rights and legislative instruments, article 12 of the Convention imposes an obligation on state parties to ensure that people with disability receive the support they need to exercise their legal capacity and make decisions.[8]

The principles that underpin Queensland's guardianship legislation (the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*) are broadly consistent with this paradigm shift. These principles (11 general principles and a health care principle) must be applied by any person or entity that performs a function or exercises a power under these Acts.[9]

For example, the legislation requires that all adults, regardless of capacity, are accorded the same basic human rights. It also requires that the importance of empowering an adult to exercise these rights must be recognised and taken into account.[10]

Furthermore, the principle relating to maximum participation, minimal limitations and substituted judgement builds on the above by preserving the right of adults to be involved in decisions about their own lives to the greatest extent possible, and specifies that 'any necessary support' must be provided to enable an adult to be involved in their own decision-making.[11]

The *Guardianship and Administration Act 2000* and *Powers of Attorney Act 1998* also impose obligations to act in a manner that is the least restrictive of an adult's autonomy; provide support to enable an adult's views and wishes to be sought and taken into account; and endeavour to involve members of an adult's existing support network in decision-making processes.[12]

While the general principles form a rights-based foundation for the guardianship legislation, not all substitute or informal decision-makers may be aware of the principles. Little practical guidance, education or training is 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.

One example of how the need for guidance might be addressed can be found in the United Kingdom, where there is a Code of Practice that supports the *Mental Capacity Act 2005* (UK). This Code of Practice[13] describes in plain language (with case studies and examples) how those who make decisions under the Act and/or those who provide care for persons with a lack of capacity should apply the Act, including how to apply the five key principles underpinning the Act.

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[6] The Queensland Law Reform Commission (QLRC) also concluded that the principles are broadly consistent with the Convention, although did recommend some redrafting to ensure they align more closely. This recommendation is being considered as part of the first stage of the Guardianship reforms being undertaken by the Department of Justice and Attorney-General. See: Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010).

[7] A person's capacity to make decisions may be impaired for a range of reasons including, but not limited to, dementia, intellectual disability, acquired brain injury or mental illness.

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

[9] *Guardianship and Administration Act 2000* (Qld) sch 1; *Powers of Attorney Act 1998* (Qld) sch 1.

[10] *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, s 2; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, s 2.

[11] *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, s 7; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, s 7.

[12] *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, ss 5, 7; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, ss 5, 7.

[13] *Mental Capacity Act 2005* (UK) ss 42-43; Department for Constitutional Affairs, *Mental Capacity Act 2005: Code of Practice* (Issued 23 April 2007) UK Government <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224660/Mental_Capacity_Act_code_of_practice.pdf>.

Guiding questions: Promoting the general principles

To what extent are relevant stakeholders (e.g. adults with impaired capacity, guardians, attorneys, service providers, health care providers, etc) aware of:

- guardianship legislation in Queensland; in particular, the existence of the general principles and the health care principle;

- the obligations they impose on substitute decision-makers and others making decisions under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*; and

- how the principles should be implemented?

What are the implications of this?

What extra guidance, training or education would be helpful and in what format should it be provided?

Part B. Promoting autonomy: Advance planning and informal support

The current guardianship system in Queensland provides for advance planning, as well as for informal and formal decision-makers. In other words, there are a range of options to explore and utilise for people who need support with decision-making before resorting to a formally appointed substitute decision-maker for all decisions.

Increased engagement in advance planning

The *Powers of Attorney Act 1998* provides for people to make decisions and/or set up arrangements that can be implemented in the future should their capacity become impaired, including provision for advance health directives and enduring powers of attorney (collectively known as 'enduring documents').

Engaging in advance planning, for example by making an advance health directive or an enduring power of attorney, can be an important way in which people can maintain some level of autonomy by:

- making binding choices about the nature of any health care that they may choose to receive in the future should they lose capacity to make decisions about such matters;
- appointing a person of their own choosing to make decisions for them;
- detailing how the power provided under the enduring document can be exercised; and/or
- expressing any wishes that they may have in relation to particular matters.

Not only is it likely that more advance planning would reduce the need for guardianship and administration, but it also provides people with the opportunity to designate the person or people that they would like to have make decisions on their behalf if and when they are not able to make decisions for themselves.

There are, however, low rates of advance planning in Queensland with only a minority of people actively planning their own decision-making arrangements for the future. According to research undertaken in 2012, approximately 14 percent of the Australian population had an advance directive in place. Queensland had the second highest take-up rate at 19 percent.[14]

Guiding question: Advance planning

What are the main factors that contribute to the low rates of advance planning in Queensland and how might these be addressed?

Informal decision-making

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.

The *Guardianship and Administration Act 2000* recognises that decisions for an adult can be made informally by the adult's existing support network,[15] which may include members of the adult's family, close friends of the adult, and other people recognised by the Tribunal as providers of support to the adult.[16] There is also provision for the Tribunal to ratify or approve a decision of an informal decision-maker, which 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.[17]

[14] B White et al, 'Prevalence and predictors of advance directives in Australia' (2014) 44 (10) *Internal Medicine Journal*, 975, 978.
[15] *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).
[16] *Guardianship and Administration Act 2000* (Qld) sch 4, definition of 'support network'.
[17] *Guardianship and Administration Act 2000* (Qld) s 154.

An issue that informal decision-makers often encounter when acting on behalf of a person with impaired capacity is difficulty in communicating with and obtaining information from organisations to inform the decision that they are making on the person's behalf or to give effect to such a decision.

In recognition of this issue, the Queensland Law Reform Committee recommended amending the *Guardianship and Administration Act 2000* 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.[18]

Guiding question: Informal decision-making

What are the benefits and/or challenges associated with informal decision-making?

Recognising the role of decision-making support

As described in the previous section, informal decision-making as referenced under the guardianship legislation involves decision-making on behalf of a person who has or may have impaired decision-making capacity by a member of the person's support network who is not a formally appointed guardian or administrator and is not an attorney appointed under an enduring document. While the informal decision-maker is not formally appointed, the informal decision-maker is still making decisions on the person's behalf.

However, this term, as it is used in the guardianship system, does not formally recognise that there exist many situations when members of a person's support network may provide support or assistance to the person to enable them to make decisions for themselves.

In many such instances, those providing decision-making support to a person may need to communicate with and obtain information on behalf of the person. This often requires some form of legislative authority to do so due to restrictions on sharing or disclosing people's personal information imposed by federal and state privacy laws.

Research participants have indicated that the reluctance of financial institutions such as banks and telephone companies to communicate with a person providing informal decision-making support to a person who may have impaired decision-making capacity for a matter can often be a prompt for an application for guardianship and/or administration.

In other countries formal recognition can be provided to people who assist people with their decision-making in this way. Under such an arrangement, the person retains the ultimate decision-making authority, but another person is appointed and/or registered as their decision-making supporter or assistant and has general legal authority to seek relevant information on behalf of the person.[19]

Consideration could be given to providing legal authority to a decision-making supporter to communicate with banks and other third parties on the person's behalf, but where the person remains as the decision-maker.

[18] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) recommendation 30.13.
[19] Assisted Decision-Making (Capacity) Bill 2013 (Ireland); Adult Guardianship and Co-decision-making Act SS 2000; Adult Guardianship and Trusteeship Act SA 2008.

Guiding questions: Decision-making support

What barriers are there to the provision of decision-making support, and how could they be addressed? What resources might be required to do so?

What might be the benefits and/or challenges associated with providing formal legal authority to a nominated person to communicate with third parties (such as financial institutions, telephone companies) at the request of people who can make decisions for themselves but who require such assistance?

How might some of the challenges in relation to authority in respect of legal and financial matters be attended to?

What safeguards should be in place for people who may have impaired decision-making capacity for a matter, and/or their decision-making supporters, under such arrangements?

Part C. Capacity and support

The importance of the concept of 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 an adult can no longer exercise their legal capacity for that matter; that is, the law will not recognise the decisions that the adult makes in relation to that matter. 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 the adult, or an enduring power of attorney may be activated. For example, in the decision of *Bergmann v DAW*, Justice Muir stated that "an administrator for all financial matters… assumes the powers in respect of financial matters of the adult…, to the exclusion of the adult, except to the extent that the Tribunal orders otherwise". [20]

The *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* uphold the common law presumption of capacity, meaning that all adults are presumed to have capacity.[21] The *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* define capacity as follows:

> **capacity,** for a person for a matter, means the person is capable of –
>
> a) understanding the nature and effect of decisions about the matter; and
>
> b) freely and voluntarily making decisions about the matter; and
>
> c) communicating the decisions in some way.[22]

Capacity is time and matter-specific. That is if an adult 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.[23] It does not, however, limit their capacity to make decisions in respect of other matters.

There are a range of people or entities that may need to consider a person's capacity. The failure to give adequate consideration to a person's capacity can have a significant impact on the person's life and circumstances and/or those of other people. Negative consequences could arise in areas including, but not limited to, accommodation, service provision, health and contractual or other legal agreements.

The role of support in determining capacity

Decision-making support may take many forms, such as assistance in understanding information provided; expert advice or advice from family and friends; assistance in seeking further information and advice; and/or communicating a decision to others. For some people, if they are provided with a degree of support, they may be able to make decisions for themselves, even though without support they may experience difficulty in doing so.

The relationship of support to the determination of capacity is recognised by the *Guardianship and Administration Act 2000*, which states that "the capacity of an adult with impaired capacity to make decisions may differ according to… the support available from members of the adult's support network".[24] The Act also states that "an adult with impaired capacity has a right to adequate and appropriate support for decision-making".[25]

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[20] [2010] QCA 143 (11 June 2010) [35].
[21] *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 1; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 1.
[22] *Guardianship and Administration Act 2000* (Qld) sch 4, definition of 'capacity'; *Powers of Attorney Act 1998* (Qld) sch 3, definition of 'capacity'.
[23] *Guardianship and Administration Act 2000* (Qld) sch 4, definition of 'impaired capacity'; *Powers of Attorney Act 1998* (Qld) sch 3, definition of 'impaired capacity'.
[24] *Guardianship and Administration Act 2000* (Qld) s 5(c)(iii).
[25] *Guardianship and Administration Act 2000* (Qld) s 5(e).

These statements relate specifically to an adult who *has* 'impaired capacity'. Whether and if the Tribunal can consider support available to a person when determining whether or not they have capacity is currently unclear. Some stakeholders in the guardianship system have expressed the view that the level of support available to a person may be more relevant to determining the need for the appointment of a guardian or administrator, rather than in deciding the capacity of the person to make decisions.

The ability to make decisions with support

Capacity has traditionally been viewed by the law as an absolute concept. A person either has capacity for a matter or they do not, and if they do not have capacity then this disqualifies them from making any decisions or even engaging in a range of activities.[26] This is how capacity for a person in respect of a matter is reflected in the *Guardianship and Administration Act 2000* and *Powers of Attorney Act 1998.*

In practice however, it may not always be that straightforward for all people. For example, a person with a mental illness may have fluctuating capacity; that is capacity that comes and goes depending on their wellness. If, as some commentators suggest, a person's capacity can be affected by the support they receive, then it is possible that a person may have capacity to make decisions when they are in a supportive environment.

There is a growing emphasis, promoted by the Convention, on strength-based assessments for capacity, where capacity is related not only to the level of a person's cognitive capacity or functional ability, but also to the level of support available to a person or that could be reasonably built around the person to make the decision. The focus is less on where someone lands on a continuum of capacity and more on the amount and type of support they have or could obtain to make their own choices, and how this impacts their capacity to make decisions for themselves.[27]

In some countries, where a tribunal or court identifies that a person may be able to make decisions with support, they can appoint a supporter or a 'co-decision-maker' to help them to make decisions. In this way the person retains their legal capacity but obtains the assistance he or she needs to continue to make decisions. For example in Alberta, Canada a person can authorise another person to be their supporter to help them make decisions or a co-decision-maker can be appointed if the court is satisfied that a person's capacity to make decisions is significantly impaired but they can still make decisions with support. The person and their co-decision-maker jointly make decisions, although the person has the final say.

The Guardianship and Administration Bill 2014 that is currently before the Victorian Parliament introduces the concept of a 'supportive guardian' to support a person with a disability to make and give effect to their decisions.

Commentators have highlighted however that an unintended consequence of formalising the provision of decision-making support could lead to 'net widening', that is, statutory orders may extend to a population broader than those who would have been subject to guardianship, and therefore may inadvertently expand the reach of guardianship.[28] This is an important consideration to keep in mind if and when legislating for supported decision-making.

[26] 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.

[27] 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.

[28] T Carney and F Beaupert, 'Public and Private Bricolage – Challenges Balancing Law, Services and Civil Society in Advancing CPRD Supported Decision-Making' (2013) 36(1) *University of New South Wales Law Journal* 175, 195; T Carney, *'Participation Rights, Family Decision-Making and Service Access: A Role for Law'* (2011) *Sixth Annual Roundtable on Intellectual Disability Policy*.

Guiding questions: Capacity and support

Should, and if so how should, the availability and effectiveness of decision-making support be taken into account by the Tribunal when determining a person's capacity?

To what extent might the appointment of a co-decision-maker meet the needs of people who can make decisions when provided with support, and what are the key issues, concerns and/or resourcing considerations relating to this type of arrangement?

How might the provision of decision-making support be more widely acknowledged and accepted without widening the net of guardianship?

Part D. Circumstances leading to an application for a guardian or administrator

Circumstances leading to applications

Interviews with stakeholders in the guardianship system have identified that certain life circumstances often underpin applications for guardianship and/or administration. These include:

- the need to enter the aged care system;
- a sudden illness or injury;
- transition of a child with disability from the care of the state to adulthood;
- family conflict or another change in personal circumstances or family dynamics;
- the desire of ageing parents of an adult child with disability to put support arrangements into place for their child;
- problematic substance/alcohol use; or
- questions around the validity of an enduring power of attorney or the legitimacy of the actions of an attorney or attorneys.

In some cases, applicants seek guardianship and/or administration for their family member out of a perceived need to ensure that there will be someone looking out for the person once their current carers are no longer able to do so; or to ensure that there will always be someone to advocate on their behalf. Alternatively, a guardianship and/or administration appointment may be sought to exclude the influence of other members of the family who are considered by the applicant to act in ways contrary to a person's best interests.

Stakeholders in the guardianship system have spoken about the existence of family conflict as being an impetus for applications to the Tribunal for the appointment of a guardian and/or administrator. It has also been suggested as the underpinning rationale behind many applications that seek to challenge the appropriateness of a person's attorney under an enduring power of attorney.

More specific to applications to appoint an administrator, are circumstances in which financial and other institutions, due to their fiduciary obligations, are unwilling to progress matters without some form of 'authority to act'. For example, they may raise concerns about a person's capacity to enter into contracts and/or provide consent or instructions in relation to a matter. In such circumstances, they may require a statement of capacity or the appointment of an administrator before proceeding.

Regardless of which of the above circumstances might predicate an application for appointment of a guardian and/or administrator, in some cases the person may actually be able to make decisions for themselves even though support may be required to enable them to do so, or there may not be a specific decision that needs to be made.

It is therefore possible that appointments for guardianship and administration are sometimes made where they are unnecessary (i.e. may not have been the least restrictive alternative or may not have been essential to dealing with the matter at hand).

Further to this, the circumstances of a person may lead to the appointment of the Public Guardian or the Public Trustee, despite there often being family members who are willing and able to take on the role of guardian and/or administrator.

Guiding questions: Circumstances surrounding applications for guardians and administrators

What could be done to avoid unnecessary applications? An unnecessary application might be an application that is made prematurely or is not essential to dealing with the matter at hand.

To what extent might an initial screening process or a compulsory conference process assist with identifying unnecessary applications, for example by highlighting circumstances in which a person might be able to make decisions for themselves with support, providing early mediation where there is family conflict, or identifying alternatives to guardianship and/or administration?

What might be the challenges in implementing such a process?

Pressures on Queensland's guardianship system

There are a number of systemic pressures on Queensland's guardianship system. One such pressure is the increasing number of applications sought by entities and organisations (such as hospitals and residential aged care facilities) to address policy or administrative requirements. For example, a hospital may require consent to move a person out of hospital, or an aged care facility may require that a person have a guardian or administrator appointed before they will be accepted into their facility.

Another pressure stems from the need for people with disability, older people and people with mental illness to negotiate access to a complex system of social services. Along with the increasing need "for brokers to negotiate access, advocates to demand services, and agents to provide legal approvals for decisions", this has been recognised as one of the drivers of guardianship systems and reforms in the later twentieth century[29].

Arguably, the lack of an integrated and coordinated social services system has continued to put increasing pressure on the guardianship system with many guardians performing a 'case-management' role in addition to their decision-making functions.

This issue is likely to become increasingly relevant under contemporary models of service delivery, which are increasingly based on self-directed funding and individual choice, for example the National Disability Insurance Scheme (NDIS) and the *My Aged Care* reforms. One of the challenges will be how to ensure people gain access to the services they need but do not unnecessarily lose their legal capacity for decision-making in the process of doing so.

Guiding questions: Pressures on Queensland's guardianship system

What types of organisations, and for what reasons do they, pursue the appointment of a guardian and/or administrator?

What could be done to reduce and/or prevent organisations seeking unnecessary appointments of guardians and/or administrators?

To what extent and in what ways do gaps in social service systems and/or the lack of a coordinated social service system contribute to the demand for guardianship and/or administration?

What alternatives to guardianship and/or administration are available to address this problem?

[29] T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 5.

Part E. Appointments of guardians and administrators

The least restrictive order

In order to appoint a guardian or administrator, the Tribunal must be satisfied that:

a) the adult has impaired capacity for the matter; and

b) there is a need for a decision in relation to the matter or the adult 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

c) without an appointment –

   i the adult's needs will not be adequately met; or

   ii the adult's interests will not be adequately protected.[30]

While it might be established that an adult has impaired capacity for a matter and that there is a need for the appointment of a guardian and/or administrator, before making an appointment the Tribunal must also consider the 'least restrictive alternative'.

The *Guardianship and Administration Act 2000* requires that "the right of an adult with impaired capacity to make decisions should be restricted and interfered with to the least possible extent".[31] Further, the general principles require that an adult's right to participate in decisions, and the need to preserve the adult'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".[32]

Queensland's guardianship legislation also provides for the appointment of guardians and/or administrators to be matter specific (rather than a general appointment for all matters).[33]

Some stakeholders in the guardianship system are of the view that the Tribunal has significant flexibility about the making of guardianship and/or administration orders. For example, the Tribunal can make self-limiting orders that expire once a specific decision has been made (for example, the sale of a house).

Theoretically the Tribunal may also limit appointments not only for certain matters (such as health care), but also to decisions of particular complexity. For example, an administrator could be appointed to manage the investment of a large sum of money, but the person could retain legal decision-making capacity for day-to-day financial decisions.

It should be noted, however, that some research participants indicated that separating complex and simple matters could be difficult and may lead to a guardianship or administration arrangement that is not workable. Several research participants cited particular difficulties in determining and differentiating between simple and complex financial matters. This often leads to administration orders being made for all financial matters, rather than limiting the order to particular types of financial matters.

[30] *Guardianship and Administration Act 2000* (Qld) s 12(1).
[31] *Guardianship and Administration Act 2000* (Qld) s 5(d).
[32] *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).
[33] *Guardianship and Administration Act 2000* (Qld) s 12(1).

Guiding questions: Least restrictive guardianship and administration orders

To what extent does the Tribunal demonstrate its flexibility to make a range of least restrictive orders in practice (such as through the making of self-limiting orders or appointments restricted to complex matters)?

What could assist with the practical separation of complex and simple matters, particularly in relation to ensuring that a person's needs will be met while still enabling sufficient safeguards?

Are administration orders typically made for ALL financial matters and if so, why do you believe this is the case?

Public versus private

If the Tribunal decides to appoint a guardian or administrator, they must then identify the most appropriate appointee. The appointee is most commonly an individual known to the adult, the Public Guardian or the Public Trustee. Consistent with the principle of the least restrictive option in respect of an adult's autonomy, the Public Guardian may be appointed only if there is no other appropriate person available for appointment for the matter (that is, as a last resort).[34]

The Public Guardian may offer specific safeguards for some adults, particularly those who are isolated and/or without family support; have family in significant conflict; have family and/or supporters in conflict with service providers; or have experienced abuse, neglect or exploitation. For example, the Public Guardian may be able to make decisions that limit the access that a particular person may have to the adult, or may be able to better advocate for access to services that are deemed necessary to reduce risk for a vulnerable adult.

Stakeholders in the guardianship system have also spoken to the benefits of the appointment of the Public Trustee even when there are supportive people around the adult. Suggested benefits include the ability of the Public Trustee to ensure adults receive all the government and other benefits to which they are entitled and access professional legal and specialist services at commercially agreed rates (thus reducing the cost of administration). They have also suggested that some people can find the task of administration to be complex, time-consuming and arduous.

More recently, a new type of potential appointee has emerged – a 'fee for service' guardian. The private organisations that are being developed in this space propose to charge a fee for the provision of 'case-management' type services to provide support to a person in the decision-making process. However, should such appointments be made, the organisation would effectively be *paid* to act as a person's 'private' guardian for matters for which the person is deemed to have impaired decision-making capacity. While an emerging concept that has yet to be fully explored, it is imperative that sufficient safeguards exist should appointments of such decision-making agents be made.

[34] *Guardianship and Administration Act 2000* (Qld) s 14.

Guiding questions: Appointment of the Public Guardian and the Public Trustee

What benefits or otherwise does the appointment of the Public Guardian or Public Trustee offer adults with impaired decision-making capacity?

In what circumstances might the Public Guardian be appointed other than as a true 'last resort' option?

What concerns and/or unintended consequences, if any, do you foresee in relation to 'fee for service' private guardians?

What safeguards should be in place to protect people with impaired decision-making capacity who might access a 'fee-for-service' arrangement in respect of decision-making support?

Recognition of cultural diversity

The general principles, particularly principles nine and ten, stipulate that any power exercised under Queensland's guardianship legislation must be undertaken in a way that maintains an adult's cultural and linguistic environment and is appropriate to their circumstances.[35]

In practice, some people, for example Aboriginal and Torres Strait Islanders, people who do not speak English, or those who have particular cultural needs, may experience difficulty accessing the guardianship system and/or the system may not adequately respond to their needs.

Guiding question: Recognition of cultural diversity

To what extent does Queensland's guardianship system recognise and cater for the needs of all Queenslanders, including people of Indigenous background and those from different cultures?

[35] *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1.

Part F. Substitute decision-making and taking into account an adult's views and wishes

When appointed as a substitute decision-maker (a guardian, administrator or an attorney), an appointee has a responsibility to support the adult for whom they are making decisions.

The *Guardianship and Administration Act 2000* acknowledges that "an adult with impaired capacity has a right to adequate and appropriate support for decision-making".[36] Further, the general principles note that an appointee must recognise and take into account the adult's right to participate in decisions that affect them, and must take into account the importance of preserving the adult's right to make decisions.[37] As such, the adult must be given any necessary support and access to information that is required to enable their participation, and the adult's views and wishes must be sought and taken into account.[38]

Even when subject to substituted decision-making, an adult can, and should be, supported to participate in any decision-making that impacts their life. As part of upholding the general principles, substitute decision-makers should seek, and support an adult to express, their views and wishes.

Family members, carers and others who are appointed as guardians, administrators or attorneys for an adult do not receive training on their obligations in relation to providing support for decision-making and how, in practical terms, they should do this.

The extent to which public guardians and administrators may be able to provide the kind of support necessary to ensure adults can participate in decision-making may be impacted by a number of factors including, but not limited to, the level of contact that they are able to have with their client, the size of their case load and the geographic location of their client.

Arguably, it may be the case that decision-makers who are well informed about their obligations to provide decision-making support, and also about how to carry out their functions generally, may be more likely to undertake their role in a manner that is more respectful of the person's rights. This may particularly be the case in circumstances where any infringements they may have otherwise made are unintentional or due to a lack of knowledge generally.

Guiding questions: Substitute decision-making and an adult's views and wishes

To what extent do the Public Guardian and the Public Trustee support adults to participate in decision-making?

What type of guidance, education and training would assist guardians, administrators, attorneys or any other decision-maker in relation to the obligation to fulfil their responsibilities including their obligation to provide support to adults to participate in decision-making?

[36] *Guardianship and Administration Act 2000* (Qld) s 5(e).
[37] *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7(1)-(2); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(1)-(2).
[38] *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).

Part G. Monitoring and safeguards

Duties of substitute decision-makers

Guardians, administrators and attorneys are subject to a number of obligations under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*.

An administrator, for example, is required to apply the general principles; act honestly; keep detailed records about transactions and dealings made on behalf of the adult; submit accounts according to decisions made by QCAT; avoid conflict transactions; keep their own property separate to that of the adult; 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.[39]

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.[40]

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.[41]

Many stakeholders in the guardianship system have confirmed that while some people may deliberately set out to exploit or abuse an adult for whom they are acting as a guardian, administrator or attorney, most substitute decision-makers want to do the right thing but may be unaware of their responsibilities and obligations. In particular, administrators and attorneys may be unaware of the requirement to keep their assets separate to those of the adult and to avoid conflict transactions.

Guiding question: Duties of substitute decision-makers

What more can be done to reduce the risk of abuse, neglect and exploitation, whether deliberate or inadvertent, by substitute decision-makers?

Adults subject to guardianship: Exercising their rights

The Tribunal must review the appointment of the guardian or administrator within specified time periods in the *Guardianship and Administration Act 2000* or in accordance with the order. At each review, the presumption of capacity must again be rebutted and the Tribunal must again consider whether the person has impaired capacity in respect of the matter at hand.

In addition, according to an internal policy, the Office of the Public Guardian regularly undertakes reviews of their clients and the continuing need for guardianship.

These are the key mechanisms by which oversight is provided in relation to adults who are subject to guardianship and administration.

Currently (with the exception of people subject to restrictive practices) there is no obligation that people subject to guardianship or administration are provided with information about their rights, including their right to be included in decision-making and their right to request a review or a declaration of capacity from the Tribunal.

[39] *Guardianship and Administration Act 2000* chapter 4, part 1 set out further functions, duties and powers of an administrator.
[40] *Powers of Attorney Act 1998* chapter 5 sets out further functions, duties and powers of an attorney.
[41] *Guardianship and Administration Act 2000* chapter 4, part 2 sets out further functions, duties and powers of a guardian.

A person with impaired capacity has a right to representation should they choose to utilise it.[42] While there are representation and advice services available, most people who are the subject of an application for guardianship or administration do not have their own representation and many do not appear at the Tribunal nor 'have a voice' in the hearing or when decisions are made on-the-papers.

Further, while an adult subject to guardianship and/or administration may request a review from the Tribunal at any time, pursuing this often depends on the adult knowing about and exercising that right independently, which would be extremely difficult for many people with impaired capacity without advocacy or support.

Guiding questions: Exercising the rights of adults subject to guardianship

To what extent do Tribunal reviews of the appointments of guardians and administrators offer sufficient oversight for adults subject to guardianship and administration, and why?

To what degree are the voices of people who are subject to guardianship proceedings typically heard in Tribunal proceedings? Why or why not?

Is the advocacy, support and information available to people who are subject to guardianship proceedings sufficient, and how might any identified gaps be addressed?

[42] *Queensland Civil and Administrative Tribunal Act 2009* s 43.

Summary of guiding questions

Promoting the general principles

- To what extent are relevant stakeholders (e.g. adults with impaired capacity, guardians, attorneys, service providers, health care providers, etc) aware of guardianship legislation in Queensland; in particular, the existence of the general principles and the health care principle; the obligations they impose on substitute decision-makers and others making decisions under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*; and how the principles should be implemented?
- What are the implications of this?
- What extra guidance, training or education would be helpful and in what format should it be provided?

Advance planning

- What are the main factors that contribute to the low rates of advance planning in Queensland and how might these be addressed?

Informal decision-making

- What are the benefits and/or challenges associated with informal decision-making?

Decision-making support

- What barriers are there to the provision of decision-making support, and how could they be addressed? What resources might be required to do so?
- What might be the benefits and/or challenges associated with providing formal legal authority to a nominated person to communicate with third parties (such as financial institutions, telephone companies) at the request of people who can make decisions for themselves but who require such assistance?
- How might some of the challenges in relation to authority in respect of legal and financial matters be attended to?
- What safeguards should be in place for people who may have impaired decision-making capacity for a matter, and/or their decision-making supporters, under such arrangements?

Capacity and support

- Should, and if so how should, the availability and effectiveness of decision-making support be taken into account by the Tribunal when determining a person's capacity?
- To what extent might the appointment of a co-decision-maker meet the needs of people who can make decisions when provided with support, and what are key issues, concerns and/or resourcing considerations relating to this type of arrangement?
- How might the provision of decision-making support be more widely acknowledged and accepted without widening the net of guardianship?

Circumstances surrounding applications for guardians and administrators

- What could be done to avoid unnecessary applications? An unnecessary application might be an application that is made prematurely or is not essential to dealing with the matter at hand.
- To what extent might an initial screening process or a compulsory conference process assist with identifying unnecessary applications, for example by highlighting circumstances in which a person might be able to make decisions for themselves with support, providing early mediation where there is family conflict or identifying alternatives to guardianship and/or administration?
- What might be the challenges in implementing such a process?

Pressures on Queensland's guardianship system

- What types of organisations, and for what reasons do they, pursue the appointment of a guardian and/or administrator?
- What could be done to reduce and/or prevent organisations seeking unnecessary appointments of guardians and/or administrators?
- To what extent and in what ways do gaps in social service systems and/or the lack of a coordinated social service system contribute to the demand for guardianship and/or administration?
- What alternatives to guardianship and/or administration are available to address this problem?

Least restrictive guardianship and administration orders

- To what extent does the Tribunal demonstrate its flexibility to make a range of least restrictive orders in practice (such as through the making of self-limiting orders or appointments restricted to complex matters)?
- What could assist with the practical separation of complex and simple matters, particularly in relation to ensuring that a person's needs will be met while still enabling sufficient safeguards?
- Are administration orders typically made for ALL financial matters and if so, why do you believe this is the case?

Appointment of the Public Guardian and the Public Trustee

- What benefits or otherwise does the appointment of the Public Guardian or Public Trustee offer adults with impaired decision-making capacity?
- In what circumstances might the Public Guardian be appointed other than as a true 'last resort' option?
- What concerns and/or unintended consequences, if any, do you foresee in relation to 'fee for service' private guardians?
- What safeguards should be in place to protect people with impaired decision-making capacity who might access a 'fee-for-service' arrangement in respect of decision-making support?

Recognition of cultural diversity

- To what extent does Queensland's guardianship system recognise and cater for the needs of all Queenslanders, including people of Indigenous background and those from different cultures?

Substitute decision-making and taking into account an adult's views and wishes

- To what extent do the Public Guardian and the Public Trustee support adults to participate in decision-making?
- What type of guidance, education and training would assist guardians, administrators, attorneys or any other decision-maker in relation to the obligation to fulfil their responsibilities including their obligation to provide support to adults to participate in decision-making?

Duties of substitute decision-makers

- What more can be done to reduce the risk of abuse, neglect and exploitation, whether deliberate or inadvertent, by substitute decision-makers?

Exercising the rights of adults subject to guardianship

- To what extent do Tribunal reviews of the appointments of guardians and administrators offer sufficient oversight for adults subject to guardianship and administration, and why?
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