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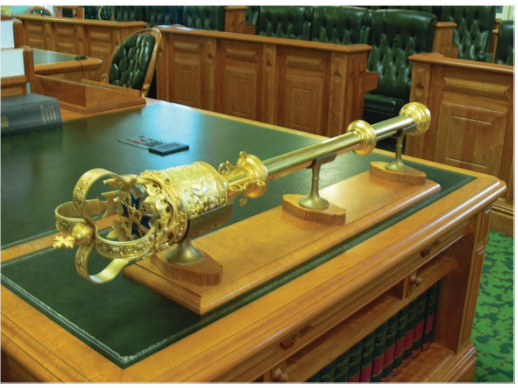
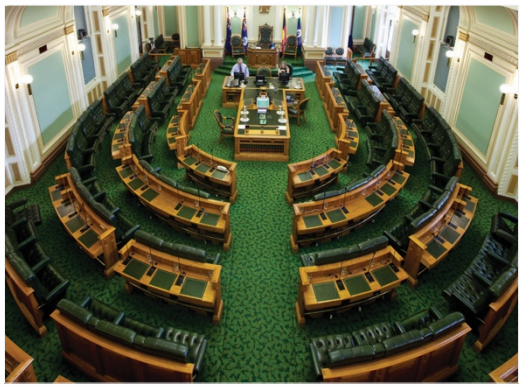
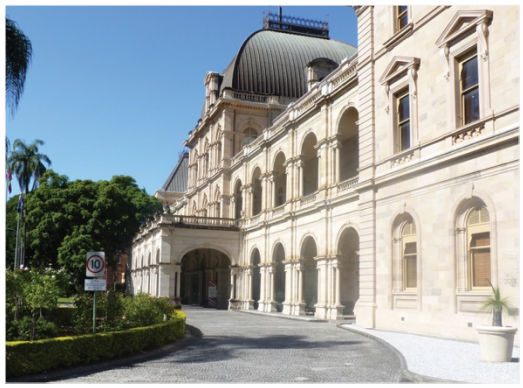

Guardianship and Administration and Other Legislation Amendment Bill 2018

Report No. 7, 56th Parliament
Legal Affairs and Community Safety Committee
March 2018

Legal Affairs and Community Safety Committee

Chair	Mr Peter Russo MP, Member for Toohey
Deputy Chair	Mr James Lister MP, Member for Southern Downs
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Acknowledgements

The committee acknowledges the assistance provided by the Department of Justice and Attorney-General.

Contents

Abbreviations

2017 Bill	Guardianship and Administration and Other Legislation Amendment Bill 2017
Acts Interpretation Act	*Acts Interpretation Act 1954*
ADAA	Aged and Disability Advocacy Australia
AHD	advance health directive
ATSILS	Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd
Bill	Guardianship and Administration and Other Legislation Amendment Bill 2017
committee	Legal Affairs and Community Safety Committee
Department / DJAG	Department of Justice and Attorney-General
EPA	enduring power of attorney
FAC	former Finance and Administration Committee
FAC Report	Finance and Administration Committee Report No. 19, *Inquiry into the Report on the Strategic Review of the functions of the Integrity Commissioner*
FLP	fundamental legislative principle
GAA	*Guardianship and Administration Act 2000*
GOC	government owned corporation
GOC Act	*Government Owned Corporations Act 1993*
Integrity Act	*Integrity Act 2009*
legal services	Townsville Community Legal Service Inc and Caxton Legal Centre Inc
MIGA	Medical Insurance Group Australia
LSA	*Legislative Standards Act 1992*
OBPR	Office of Best Practice Regulation
OPG	Office of the Public Guardian
PCCC	Parliamentary Crime and Corruption Committee

PCCC Report	Parliamentary Crime and Corruption Committee Report No. 97, *Review of the Crime and Corruption Commission*
PGA	*Public Guardian Act 2014*
PID Act	*Public Interest Disclosure Act 2010*
POA Act / POA	*Powers of Attorney Act 1998*
previous committee	Legal Affairs and Community Safety Committee of the 55th Parliament
PTQ	Public Trustee of Queensland
QAI	Queensland Advocacy Incorporated
QCAT	Queensland Civil and Administrative Tribunal
QLRC	Queensland Law Reform Commission
QLRC Report	Queensland Law Reform Commission, Report No. 67 - *A review of Queensland's guardianship laws*, September 2010, tabled 12 November 2010.
QLS	Queensland Law Society
QNMU	Queensland Nurses and Midwives' Union
RANZCP	The Royal Australian and New Zealand College of Psychiatrists, Queensland Branch
TASC	TASC National Limited
UNCRPD/CRPD	United Nations' *Convention on the Rights of Persons with Disabilities*

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Guardianship and Administration and Other Legislation Amendment Bill 2018.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

The committee has recommended that the Bill be passed.

On behalf of the committee, I thank the Legal Affairs and Community Safety Committee of the previous Parliament for their work on the Guardianship and Administration and Other Legislation Amendment Bill 2017. I also thank those individuals and organisations who lodged written submissions on the 2017 Bill and those who gave evidence at the previous committee's public hearing. This evidence helped inform the committee's deliberations regarding the Guardianship and Administration and Other Legislation Amendment Bill 2018. I also want to thank the committee's secretariat, Hansard staff and the department.

I commend this report to the House.

Peter Russo MP
Chair

Recommendation

The committee recommends that the Guardianship and Administration and Other Legislation Amendment Bill 2018 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility are:

- Justice and Attorney-General
- Police and Corrective Services
- Fire and Emergency Services.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

1.2 Inquiry process

On 15 February 2018, the Guardianship and Administration and Other Legislation Amendment Bill 2018 (the Bill) was introduced into the Queensland Parliament and referred to the committee. The committee is required to report to the Legislative Assembly by 9 April 2018.[2]

The Bill 'is substantially the same'[3] as the Guardianship and Administration and Other Legislation Amendment Bill 2017 (2017 Bill) which was introduced into the Legislative Assembly on 5 September 2017 and referred to the Legal Affairs and Community Safety Committee of the previous Parliament (previous committee). The previous committee conducted an inquiry into the 2017 Bill but did not report to the Legislative Assembly because the Parliament was dissolved four days prior to its reporting date.

Given the similarity between the Bill and the 2017 Bill, and because the previous committee conducted its full inquiry into the 2017 Bill so recently (September – October 2017), the committee resolved to base its inquiry into the Bill on the evidence gathered by the previous committee and not to seek further evidence by way of submissions or hearings.

The committee sought a written briefing from the Department of Justice and Attorney-General (department) on the 'minor changes'[4] between the Bill and the 2017 Bill.

The briefing is available on the committee's webpage - http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/GAOLAB2018.

During its examination of the 2017 Bill, the previous committee:

- invited stakeholders, subscribers and the general public to lodge written submissions

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1 *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

2 Queensland Parliament, Record of Proceedings, 15 February 2018, p 105.

3 Hon Yvette D'Ath, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 15 February 2018, p 102.

4 Hon Yvette D'Ath, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 15 February 2018, p 103.

- wrote to the department seeking advice on the Bill; and received a written briefing on the Bill from the department on 20 September 2017
- received 18 submissions (see Appendix A)
- received written advice from the department on 3 October 2017 on issues raised in submissions
- received a public briefing from the department and held a public hearing on 11 October 2017 (see Appendix B for a list of witnesses).

The submissions, correspondence from the department and other parties, and transcripts of the briefing and hearing on the 2017 Bill are available on the committee's webpage - http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/GAOLAB2017.

1.3 Queensland's guardianship system

The *Guardianship and Administration Act 2000* (GAA), the *Powers of Attorney Act 1998* (POA Act) and the *Public Guardian Act 2014* (PGA) form the legislative basis for the guardianship system in Queensland.

In particular:

- the GAA provides for the Queensland Civil and Administrative Tribunal (QCAT) to formally appoint guardians and administrators to manage the personal and financial matters, respectively, of adults with impaired capacity, provides a scheme for substituted consent for health care matters and special health care matters, and establishes the Public Advocate, who has a systemic advocacy function for adults with impaired capacity[5]
- the POA Act provides a scheme where an adult may authorise other persons (attorneys) to make personal and/or financial decisions on their behalf, or give directions about their future health care, and provides legislative authority for an advance health directive (AHD) and a statutory health attorney[6]
- the PGA establishes the role and functions of the Public Guardian for adults with impaired capacity and children, including its power to act as a person's substitute decision–maker (if appointed by QCAT), or as an attorney (for a personal matter under an enduring power of attorney (EPA) or health matter under an AHD), or as a person's statutory health attorney of last resort.[7]

This system provides a scheme 'for individuals to be appointed to make personal, health and financial decisions on behalf of adults who do not have capacity to make decisions about certain matters themselves' and 'where adults can plan ahead and appoint individuals of their choice to make personal, health and financial decisions and give directions about their future health care'.[8]

1.4 Policy objectives of the Bill

The explanatory notes advise that the objectives of the Bill are to:

- amend Queensland's guardianship legislation (the GAA, POA Act and PGA) to:
  - provide a focus on contemporary practice and human rights for adults with impaired capacity

5 Explanatory notes, pp 1-2.

6 Explanatory notes, p 2.

7 Explanatory notes, p 2.

8 Explanatory notes, p 1.

- enhance safeguards for adults with impaired capacity in the guardianship system
- improve the efficiency of Queensland's guardianship system or improve the clarity of Queensland's guardianship legislation

- amend the *Integrity Act 2009* (Integrity Act) to implement recommendations 1 and 2 of the Finance and Administration Committee (FAC) Report No. 19, *Inquiry into the Report on the Strategic Review of the functions of the Integrity Commissioner* (FAC Report)
- amend the *Government Owned Corporations Act 1993* (GOC Act) and the *Public Interest Disclosure Act 2010* (PID Act) to implement recommendation 13 of the Parliamentary Crime and Corruption Committee (PCCC) Report No. 97, *Review of the Crime and Corruption Commission* (PCCC Report).[9]

1.5 Government consultation on the Bill

A number of the Bill's legislative reforms address recommendations from the final report of the Queensland Law Reform Commission (QLRC) following its five year review of guardianship law – *A Review of Queensland's Guardianship Laws* (QLRC Report), tabled in Parliament in 2010.[10] Accordingly, with respect to the reforms to Queensland's guardianship legislation contained in the Bill, the explanatory notes state:

> *The QLRC consulted widely and extensively, including conducting state-wide community forums and focus groups, and an informal reference group. Over 500 written submissions were also received as part of the QLRC's general review.*[11]

And:

> *The following stakeholders were consulted on a consultation draft of the Bill: the Chief Justice of Queensland; the Chief Judge of Queensland; the President of the QCAT; the Public Guardian; the Public Advocate; the Public Trustee; the Bar Association of Queensland (BAQ); the Queensland Law Society (QLS); Legal Aid (Qld); the Australian Medical Association (Queensland); the Royal Australian and New Zealand College of Psychiatrists; Aged Care and Disability Advocacy; Queensland Advocacy Incorporated; the Australian Centre for Health Law Research, the Queensland University of Technology; the National Seniors Association; the Elder Abuse Prevention Unit, Uniting Care Community; the Anti-Discrimination Commission Queensland; the Social Work Department, the University of Queensland; the Queensland Health Care at the End of Life State Wide Reference Group; and the Caxton Legal Centre Inc.*
>
> *Stakeholders were invited to provide their comments on the consultation draft of the Bill. Overall, the stakeholders who did provide comments, were supportive of the Bill and their specific feedback was taken into account in further drafting of the Bill.*[12]

With respect to the amendments to implement recommendation 13 of the PCCC Report, the explanatory notes state:

> *The provisions to amend the GOC Act and PID Act were contained in a consultation draft of the Crime and Corruption and Other Legislation Bill 2017, which was circulated to key stakeholders, including: the Commission, the Queensland Ombudsman, the Office of the Director of Public Prosecutions, QLS, BAQ, the Aboriginal and Torres Strait Islander Legal Service (Qld), the Queensland Police Union of Employees, the Queensland Police Commissioned Officer's Union of*

9 Explanatory notes, p 1.

10 Explanatory notes, p 2.

11 Explanatory notes, p 19.

12 Explanatory notes, p 19.

Employees, the Together Union, and the Local Government Association Queensland. Stakeholders did not provide any comment on these provisions.[13]

The Queensland Law Society (QLS) and the Aboriginal and Torres Strait Islander Legal Service (ATSILS) commended the department on its consultation during the development of the Bill prior to its introduction into Parliament.[14]

1.6 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend the Bill be passed.

After examination of the Bill, including the policy objectives which it would achieve and consideration of the information provided by the department and from submitters, the committee recommends that the Bill be passed.

Recommendation

The committee recommends that the Guardianship and Administration and Other Legislation Amendment Bill 2018 be passed.

[13] Explanatory notes, p 19.

[14] Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, submission 5, p 2; Queensland Law Society, submission 17, p. 2.

2 Examination of the Guardianship and Administration and Other Legislation Amendment Bill 2018

In summary, the objectives of the Bill are to:

- amend Queensland's guardianship legislation to make it more contemporary, clear and efficient, and to improve safeguards for adults with impaired capacity
- amend the Integrity Act to implement recommendations of the Finance and Administration Committee
- amend the GOC Act and the PID Act to implement recommendations of the PCCC.[15]

This section discusses issues raised during the committee's examination of the Bill.

2.1 Differences between the Bill and the 2017 Bill

The department advised that the Bill:

> *… is substantially the same as the 2017 Bill, with only minor changes to:*
>
> 1. *address drafting issues relating to the health care principles; and*
> 2. *ensure a consistent approach to the authorisation of conflict transactions for administrators and attorneys (that addresses a recommendation made by the Queensland Law Society, in its public briefing to the Legal Affairs and Community Safety Committee on the 2017 Bill last year).*[16]

The amendments to the Health Care Principles are discussed below in 2.2.2 and conflict transactions are discussed in 2.3.5.

2.2 Contemporary practice and human rights for adults with impaired capacity

The Bill proposes to amend the guardianship legislation to reflect current thinking regarding people with disabilities, particularly as expressed in the United Nations' *Convention on the Rights of Persons with Disabilities* (CRPD).[17]

2.2.1 Supported and substituted decision-making

The CRPD, which was ratified by Australia in 2008, gives preference to supported decision-making over substituted decision-making. Substituted decision-making means a person is permitted by law to make decisions on behalf of another person.[18] Supported decision-making 'embraces a wide range of models, theories and practices but essentially involves the participation of the adult in the decision that needs to be made, rather than the decision being made for them by another person without their involvement.'[19]

The department explained that while the proposed amendments to the guardianship legislation were particularly influenced by the CRPD, the CRPD's emphasis on supported decision-making rather than

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15 Explanatory notes, p 1.

16 Department of Justice and Attorney-General, correspondence dated 28 February 2018, attachment, p 1 (bolding removed).

17 Explanatory notes, p 7.

18 Queensland Government, *Substitute decision-makers,* https://www.qld.gov.au/health/support/end-of-life/advance-care-planning/legal/decision-makers.

19 Department of Justice and Attorney-General, correspondence dated 20 September 2017, p 1.

substituted decision-making was not introduced.[20] As a result, the proposed amendments to the guardianship legislation 'do not represent a fundamental change'.[21]

Stakeholder views

Certain stakeholders considered that the Bill should incorporate a supported decision-making approach.[22] Ms Simone Lea was adamant that supported decision-making should be introduced:

> *We should have in Australia supported decision over substitute decision-making. … the bill must be thrown out to give full recognition in Queensland law to all international law as is Australia's responsibility.*[23]

Aged and Disability Advocacy Australia (ADAA), on the other hand, submitted that the Bill is a positive move towards supported decision-making:

> *If passed through Parliament, it is believed that these amendments will provide adults with impaired capacity with more choice and less restrictive options whilst safeguarding their rights. The proposed amendments will also bring Queensland a step closer to achieving our obligations under the UN Conventions on the Rights of Persons with Disabilities.*[24]

2.2.2 General Principles and Health Care Principles

The General Principles and the Health Care Principle in the GAA and the POA would be amended by the Bill to be more consistent with the CRPD by such means as amending the terminology.[25]

> *Contemporary language such as 'safeguards' is used rather than 'proper care and protection.' Further, it is the adult's 'rights, interests and opportunities' that are promoted and safeguarded, rather than their 'best interests.'*[26]

New General Principle 10 would provide a structured approach to decision-making. The approach involves supporting the adult to make a decision, if possible, and taking into account any of the adult's views, wishes and preferences.[27]

The wording of Health Care Principle 3 in cl 56 of the Bill is different to that in the 2017 Bill. In the Bill, Health Care Principle 3 includes the phrases 'or under an enduring document' and 'within a reasonable time'. The department explained why the phrases were included in the Bill:

> *The additional words* ['] *or under an enduring document* ['] *reflect the fact that the power to perform a function or exercise a power for a health matter may be conferred on an attorney either under an EPA or AHD (i.e. an enduring document) or under the POA (that is, for a statutory health attorney).*
>
> *The equivalent provision in the GAA (clause 8, section 11C) does not include a reference to 'an enduring document' because the power to perform a function or exercise a power for health*

---

20 Department of Justice and Attorney-General, public briefing transcript, Brisbane, 11 October 2017, p 1. See also, Department of Justice and Attorney-General, public briefing transcript, Brisbane, 11 October 2017, p 5; Department of Justice and Attorney-General, correspondence dated 20 September 2017, pp 1-2.

21 Department of Justice and Attorney-General, public briefing transcript, Brisbane, 11 October 2017, p 1.

22 See for example, Queensland Advocacy Incorporated, submission 16, p 12; Queensland Advocacy Incorporated, public hearing transcript, Brisbane, 11 October 2017, pp 19-20; Simone Lea, Public hearing transcript, Brisbane, 11 October 2017, p 16.

23 Public hearing transcript, Brisbane, 11 October 2017, p 16.

24 Aged and Disability Advocacy Australia, submission 7, p 1.

25 Explanatory notes, p 7.

26 Department of Justice and Attorney-General, correspondence dated 20 September 2017, appendix, p 2.

27 Department of Justice and Attorney-General, public briefing transcript, Brisbane, 11 October 2017, p 2.

> *matters under the GAA may only be conferred on a guardian for personal matters or exercised by QCAT.*
>
> *…*
>
> *The words 'within a reasonable time' were inserted in Health Care Principle 3(e) as a result of stakeholder feedback that there should be some limitation on the timeframe by which health decisions could be postponed until a better health care option becomes available.*
>
> *However, due to an oversight, the words 'within a reasonable time' were not included in the equivalent health care principle 3(e) in the POA (clause 56, section 6D).*[28]

Stakeholder views

TASC National Limited (TASC), the Public Advocate and ADAA were generally in favour of the alignment of the legislation with the CRPD.[29] Queensland Advocacy Incorporated (QAI), however, was concerned that some principles may be weighted over others. It recommended that:

> *… safeguards also be introduced to ensure that entities do not give selective weighting to the General Principles in a way that skews the decision-making process to the statutory body's objectives. For instance, some decision-makers weigh* Principle 10 – Appropriate to the circumstances *more heavily than* Principle 2 – Same human rights*. As a result, the decision-making process is skewed to the statutory body's objective, rather than the individual's.*[30]

The Public Advocate was concerned that the redrafting of the principles has the effect of 'making them far less readable and accessible than the current version.'[31] The Public Advocate elaborated:

> *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.*[32]

The Public Advocate submitted that the preamble of General Principle 3 lacks clarity and 'the language has the effect of diluting the power of the principles.'[33] The Public Advocate considered that the General Principles should comprise 'complete sentences and statements of principle that stand alone, rather than being drafted like the provisions of an Act.'[34] Her view was that they should be accessible by the people to whom they have relevance.[35]

MIGA[36] supported the proposed principles for health care decision-making but had some concerns about applying the principles. It considered that some of the terms in Health Care Principle 3 could

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28 Department of Justice and Attorney-General, correspondence dated 28 February 2018, attachment, pp 2-3 (bolding removed).

29 TASC National Limited, submission 8, p 2; Office of the Public Advocate, submission 9, p 2; Office of the Public Advocate, public hearing, 11 October, p 18; Aged and Disability Advocacy Australia, submission 7, p 1.

30 Queensland Advocacy Incorporated, submission 16, p 6. See also Queensland Advocacy Incorporated, public hearing transcript, Brisbane, 11 October 2017, p 23.

31 Office of the Public Advocate, submission 9, p 2. See also Officer of the Public Advocate, public hearing transcript, Brisbane, 11 October 2017, pp 18-19.

32 Office of the Public Advocate, submission 9, p 2.

33 Office of the Public Advocate, submission 9, p 3.

34 Office of the Public Advocate, submission 9, p 3.

35 Office of the Public Advocate, submission 9, p 4.

36 Medical Insurance Group Australia

cause confusion because of their breadth and should be confined.[37] MIGA also submitted that Health Care Principle 4 may cause confusion about the primacy of an AHD.[38]

Department response

As to concerns about weighting being given to one General Principle over another, the department stated:

> *QCAT (like other entities and persons performing a function or exercising a power under the GAA) must take into account all the general principles, including general principle 9, where there is an overall obligation to act in a way that:*
>
> - *promotes and safeguards the adult's rights, interests and opportunities; and*
> - *is least restrictive of the adult's rights, interests and opportunities.*
>
> *The redrafted general principles* [strengthen] *the focus on recognising and taking into account the adult's views, wishes and preferences when making a decision on behalf of an adult with impaired capacity.*
>
> *While a person should make decisions and perform functions, as far as is practicable, in a way that is aligned with the adult's views, wishes and preferences (or that give priority to the adult's views, wishes and preferences), they must also take into account the other general principles including general principle 9.*[39]

With respect to the redrafted principles, the department advised:

> *The General Principles and Health Care Principles in the Bill reflect recommendations of the QLRC and feedback from stakeholders and have been updated to align with principles in the UNCRPD. Stakeholders consulted on the consultation version of the Bill generally supported the redrafted principles.*[40]

Noting the concerns expressed by MIGA, the department was of the view that, when read with the General Principles and other Health Care Principles, the references to alternative and better health care options in Health Care Principle 3 do not need qualifying.[41] Further, that Health Care Principle 4 'does not impact on the primacy of an AHD in determining how a health matter is dealt with for an adult with impaired capacity.'[42]

2.2.3 Location of General Principles and Health Care Principles

It is proposed that the General Principles and the Health Care Principles would be relocated from the schedules in the GAA and in the POA to the beginning of the Acts. The intent of the change is 'to highlight the new principled approach and encourage the exercise of functions and powers under the Acts in a way that is more consistent with human rights and contemporary practice'.[43] The explanatory notes acknowledge, however, that this amendment is not consistent with QLRC recommendations 4.9 and 5.7 which recommended the principles continue to be located in the schedules.[44]

Stakeholder views

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37 Clause 8; MIGA, submission 13, attachment, pp 2-3.

38 Clause 8; MIGA, submission 13, attachment, p 3.

39 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 34-35.

40 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 20.

41 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 27-28.

42 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 28.

43 Explanatory notes, p 7.

44 Explanatory notes, p 7.

The Queensland Nurses and Midwives' Union (QNMU) was supportive of the redrafting of the General Principles and the Health Care Principles and of their repositioning in the GAA. The QNMU held the view that the changes 'will assist both principals and attorneys in the creation and enlivening of enduring documents.'[45]

The Public Advocate submitted that her preference was for the General Principles and the Health Care Principles to remain in the schedules:

> *In my view, the principles were better located in a separate schedule, because I think there is significant value in having them sitting alone and separate from the remainder of the act so that people who are not familiar with legislation can easily identify them and distinguish them from the other provisions. I am aware that you have had different views on that and that someone has suggested that placing the principles closer to the front of the bill to give them more prominence will assist. I recognise that, expressing them early in the bill, sets the tone in terms of the way the act is to be interpreted and applied. The principles themselves state that they want the community to apply them. I do not think that many ordinary people go to a piece of legislation to find this kind of stuff. If you want to make it accessible, you need to put it in a clear place for people to find them.*[46]

The Public Advocate recommended that the department 'print and promote a version of the General and Health Care Principles separately for use by members of the public' to encourage awareness of them.[47]

Department response

In response to the comments of the Public Advocate, the department advised:

> *The principles have been relocated to the beginning of both the GAA and POA to provide them with more prominence, and to encourage the exercise of functions and powers under these Act in a way that accords with the principles.*[48]

Further:

> *Generally stakeholders were pretty happy with how we had crafted the general principles and gave us lots of good advice and feedback on how to improve that drafting. There will also be a raft of non-legislative reforms to accompany the bill. That will be an opportunity—in the redesign of the forms, explanatory guidelines, guidelines to assist in determining someone's capacity—to make it even clearer, in plain English, in the accompanying education material how to apply the general principles.*[49]

2.2.4 Acknowledgements under the GAA

The Bill would extend the scope of s 5 of the GAA to provide that the capacity of any adult, not just an adult with impaired capacity, to make decisions may differ according to:

- the type of decision to be made, including, for example the complexity of the decision to be made
- the support available from members of the adult's existing support network.[50]

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45 Queensland Nurses and Midwives' Union, submission 10, p 2.

46 Office of the Public Advocate, public hearing transcript, Brisbane, 11 October 2017, p 18. See also Office of the Public Advocate, submission 9, p 1.

47 Office of the Public Advocate, submission 9, p 2. See also Office of the Public Advocate, public hearing transcript, 11 October 2017, p 18.

48 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 20.

49 Department of Justice and Attorney-General, public briefing transcript, Brisbane, 11 October 2017, p 5.

50 Clause 6; *Guardianship and Administration Act 2000*, s 5; explanatory notes, p 21.

Stakeholder views

QAI supported the removal of the restriction in s 5, as well as 'the continuing recognition that an adult's capacity to make decisions can vary depending on the type and complexity of the decision and the availability of support.'[51] QAI noted that the Queensland Handbook for Practitioners on Legal Capacity emphasised that capacity is time-specific, domain-specific, decision-specific and can be increased with appropriate support.[52] In this respect QAI noted that currently s 5 of the GAA only recognises the third point and the fourth point to a limited extent, stating '… the right to appropriate support is recognised in s 5(e), but the connection is limited to associating capacity with support, not with appropriate support …'[53]

Department response

The department advised that it noted 'the way that the *Queensland Handbook for Practitioners on Legal Capacity* discusses the concept of capacity which is broadly consistent with the concept of capacity in the GAA.'[54]

2.2.5 Guidelines for assessing capacity

The Bill would require the Minister to prepare guidelines to assist in assessments about the capacity of adults to make decisions.[55]

Stakeholder views

MIGA supported the development of the guidelines and made suggestions about their content and accessibility.[56] Other submitters also made suggestions and recommendations about the guidelines.[57] In addition, the Public Advocate raised concerns that the publication of the guidelines may not comply with Information Standard 26[58] because the department's website does not currently comply with the minimum requirements.[59]

Department response

The department advised that it will consider submitters' comments in the development of the guidelines.[60] The department also stated that the publication of the guidelines on its website will comply with Information Standard 26.[61]

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51 Queensland Advocacy Incorporated, submission 16, p 4.

52 The Queensland Handbook for Practitioners on Legal Capacity is jointly published by Queensland Advocacy Incorporated and Allens Linklaters.

53 Queensland Advocacy Incorporated, submission 16, p 4.

54 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 33-34.

55 Clause 41; proposed new s 250, *Guardianship and Administration Act 2000*; explanatory notes, p 19.

56 MIGA, submission 13, attachment, pp 3-4.

57 Aged and Disability Advocacy Australia, submission 7, p 4; Royal Australian and New Zealand College of Psychiatrists, Queensland Branch, submission 11, pp 1-2; Queensland Advocacy Incorporated, submission 16, pp 10-11; Queensland Law Society, submission 17, pp 4-5. Aged and Disability Advocacy Australia also provided information during the public hearing into the Bill on 11 October 2017 (Aged and Disability Advocacy Australia, public hearing transcript, Brisbane, 11 October 2017, p 20).

58 The standard outlines the minimum standards for government agencies to create, implement and manage agency internet sites for delivering information and services.

59 Public Advocate, submission 9, p 4.

60 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 18, 24, 28, 37, 42.

61 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 21.

2.2.6 Reviewing an appointment of a guardian or administrator

The Bill proposes to amend s 31 of the GAA to clarify that when QCAT is reviewing an appointment of a guardian, and the Public Guardian is the current appointee, QCAT may remove the Public Guardian as appointee if there is an appropriate person available for appointment.[62]

Stakeholder views

The Public Advocate supported the proposed amendment because it '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.'[63]

The Public Advocate queried why the Bill does not implement QLRC Report recommendations 14.13 (Appointment of the Public Trustee as administrator) and 14.15 (Continuance of Public Trustee as administrator only if no other suitable person available). Amongst other things, the Public Advocate submitted that the fees charged by the Public Trustee can result in significant amounts and therefore '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.'[64]

The Public Advocate also advised:

> *… it does concern us that the appointment of the trustee is not really consistent with the general principles anyway. What we really want to do is appoint people as much as possible who know the person they are being appointed to care for, or make decisions for, and understand their views and wishes. Then we expect them along the road to be actively seeking their views and wishes and their participation in these decisions.*
>
> *… I am not suggesting we should be making appointments of people who are not responsible or who might have improper motives in terms of handling someone's money; in those cases we always want to appoint the Public Trustee or an appropriate trustee company—it seems to me that the possibility should always be explored at the time of any appointment. Certainly the QLRC thought the same thing. I think it is more consistent with the general principles to be always looking at someone closer to the person to make the appointment.*[65]

With respect to the review of an appointment under the GAA, ADAA recommended that all aspects of s 12, which sets out the considerations for appointment, also be applied during a review. This includes 'establishing capacity or impaired capacity, need for a decision maker and appropriateness of decision maker' as well as the adequacy of informal supports.[66]

Department response

With respect to the role of the Public Trustee, the department advised:

> *QLRC recommendation 14.15 is not implemented by the Bill because the role of an administrator is becoming increasingly complex due to the nature and extent of the adult's financial or property affairs and which necessarily entails significant accountability and risk factors. Further, the GAA imposes additional obligations on administrators, such as the requirement to keep records, to submit a financial plan for approval or to file, on request by QCAT, a summary of receipts and expenditure on accounts. For these reasons, it is considered that QCAT should not be restricted in considerations of appropriate persons, including the Public Trustee, who may be appointed as an administrator. The Department notes that QCAT must have regard to a range of factors*

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62 Clause 17; explanatory notes, p 25. See also, Guardianship and Administration and Other Legislation Amendment Bill 2017, s 14.

63 Office of the Public Advocate, submission 9, p 5.

64 Office of the Public Advocate, submission 9, p 6.

65 Public Advocate, public hearing transcript, Brisbane, 11 October 2017, p 21.

66 Aged and Disability Advocacy Australia, submission 7, p 2.

prescribed in s15 of the GAA when appointing or reviewing the appointment of an administrator.[67]

The department advised that as part of the review process QCAT must be satisfied on matters that it would consider in making an original appointment because it is required to revoke an appointment under s 31 unless satisfied that it would make an appointment if a new application was made.[68]

In terms of consideration of informal supports the department stated:

Section 12 of the GAA would enable QCAT to consider the adequacy of informal supports, as it is required to consider whether without an appointment, the adult's needs will not be adequately met or the adult's interests will not be adequately protected. It is noted that QCAT must apply the general principles in undertaking appointments and reviews of appointments. General Principle 4 as amended by the Bill requires the role of families, carers and other significant persons in an adult's life to support the adult to make decisions to be acknowledged and respected.[69]

2.3 Safeguards for adults with impaired capacity in the guardianship system

The Bill seeks to enhance safeguards for adults with impaired capacity in the guardianship system through amendments to the POA Act, the GAA and the PGA. Some of the proposed amendments are discussed below.

2.3.1 Eligible attorneys and statutory health attorneys

At present, a person who is a paid carer for the person who makes an EPA (the principal) cannot be an 'eligible attorney' under the POA Act.[70] The Bill proposes to further limit those who may be an eligible attorney for an EPA by requiring that an eligible attorney must have capacity for the matter, and by excluding persons who have been a paid carer for the principal within the previous three years. The Public Trustee or a trustee company would also be restricted to being an eligible attorney for a matter under an EPA with respect to financial matters, and the Public Guardian for a personal matter.[71]

Currently, to be eligible to be an attorney under an AHD, a person must have capacity for a matter, be at least 18 years of age, and not a paid carer, or health provider, for the principal. The Public Trustee and the Adult Guardian may be an eligible attorney.[72]

The Bill proposes to exclude service providers for a residential service where the adult is a resident from being an eligible attorney for a matter under an AHD. In addition, the Public Trustee would no longer be eligible.[73]

The Bill also proposes to place further restrictions on who may be the statutory health attorney for an adult under the POA Act.[74] Currently, a paid carer for the adult may not be an adult's statutory health attorney.[75] The Bill proposes to maintain this prohibition and extend it to include a spouse who is not 18 years or more, a health provider for the adult, and a service provider for a residential service where

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67 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 22-23.

68 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 16.

69 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 16-17.

70 *Powers of Attorney Act 1998*, s 29(1).

71 Clause 57; explanatory notes, p 34.

72 *Powers of Attorney Act 1998*, s 29(2). Note, the insertion of the requirement that a spouse be 18 years or older to be an eligible attorney implements recommendation 10.5 of the QLRC review; Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 22.

73 Clause 57.

74 Clause 57; explanatory notes, p 35.

75 Clause 67; explanatory notes, pp 37-38; *Powers of Attorney Act 1998*, s 63(1)(b), (c).

the adult is a resident.[76] The amendment also includes a definition of 'relation' for the purposes of existing s 63(1)(c) relating to the appointment of a statutory health attorney.

The explanatory notes acknowledge that the amendments restrict who an adult may choose as their attorney and the availability of statutory health attorneys but the objective of the amendments is 'to ensure unsuitable people cannot act as attorneys and to reduce the risk of abuse or exploitation to an adult by a person appointed under an enduring document.'[77]

A related amendment to s 13 of the POA Act is proposed, with respect to the meaning of an 'eligible witness' for a document under the POA Act, omitting the reference to a beneficiary under the principal's will from being ineligible to be a witness for an AHD.[78]

Stakeholder views

While support for the amendments was expressed by some stakeholders, others raised concerns around the restrictions placed on the eligibility of persons to be an eligible attorney or statutory health attorney.

Eligible attorney under an advance health directive

The QNMU was satisfied with the amendments proposed to the position of an attorney for a matter under an advance health directive:

> *We are of the view that the clauses amending sections of the Act relevant to who can assume the role of an attorney under an Advance Health Directive (AHD) are appropriate and provide consistent safeguards for the principal in the event that the AHD is enlivened.*[79]

Aboriginal and Torres Strait Islander remote communities

ATSILS appreciated the rationale for the amendments relating to eligible attorneys and statutory health attorneys but contended that the amendments do not cater for those in Aboriginal and Torres Strait Islander remote communities:

> *… consideration should be given to Aboriginal and Torres Strait Islander remote communities in Queensland where the above amendments can be limiting due to population numbers and availability of job positions, such that the appointment of an attorney(s) can be far more problematical. Discretion for a determination by the Public Guardian is recommended to overcome this limitation.*[80]

Definition of 'eligible witness'

The QLS, in supporting the proposed amendment to s 31 of the POA Act relating to eligible witnesses, proposed a further amendment requiring an EPA be signed off by an independent medical practitioner. In this respect the QLS noted:

> *This is particularly relevant given that Australia's population of elderly people is increasing, and with it, the potential for elder abuse. Medical practitioners are usually located in communities and are therefore relatively accessible. Further, medical practitioners have completed some level of formal training in evaluating cognitive ability, and in that respect have a more structured knowledge of the subject than legal practitioners, justices of the peace or commissioners for declarations.*[81]

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76 Clause 67.

77 Explanatory notes, p 14.

78 Clause 58.

79 Queensland Nurses and Midwives' Union, submission 10, p 2.

80 Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, submission 5, p 3 (bolding removed).

81 Queensland Law Society, submission 17, p 5.

Eligibility to be an attorney – 'Capacity'

The Royal Australian and New Zealand College of Psychiatrists, Queensland Branch (RANZCP) and QAI identified possible problems with the requirement that an eligible attorney has capacity under amended s 29(1)(a)(i) of the POA Act. QAI stated that this 'may be difficult to enforce unless the matter ends up before QCAT'.[82] RANZCP, while being in favour of the additional eligibility requirements generally, was concerned about what criteria would be used to assess a potential attorney's capacity.[83]

Eligibility to be an attorney and/or a statutory health attorney – 'Paid carer'

QAI raised concerns with the terminology around, and restrictions placed on, paid carers' eligibility to be an attorney or statutory health attorney under the POA Act.[84] QAI noted that carers are not support workers and that the term 'support worker' or 'waged employee' should be used as opposed to 'paid carer' because support workers draw a wage for services rendered whereas a carer may receive an allowance or pension (and sometimes both) from Centrelink as financial support.[85] With respect to the restrictions applied to paid carers, and sharing the concerns raised by ATSILS generally, QAI also noted that excluding from eligibility persons who are or were paid carers for the principal in the preceding three years 'could limit a person's ability to appoint an attorney, particularly if their network is limited.'[86]

Eligibility to be a statutory health attorney – 'Relation'

ATSILS was concerned that the standard Australian definition of family does not mirror the more extensive Aboriginal concept of family. The organisation held the view that the proposed definition of 'relation' in cl 67 needs to be clearer.[87]

> *ATSILS agrees the definition of relation of an Aboriginal and/or Torres Strait Islander adult to who under custom is regarded as a relative of the adult is wide ranging allowing for custom, however with this broadening of the definition support around this provision needs further clarity*.[88]

Recognising the need for a broad definition to encompass the kinship system, ATSILS proposed that s 42 of the GAA be amended to support the new definition, so that if there was disagreement among two or more eligible statutory health attorneys for an adult about certain matters, the Public Guardian would consult with the elders or Community Justice Group of the kinship group before exercising power for the health matter.[89]

Eligibility to be a statutory health attorney – Spouse

With respect to the introduction of the requirement that a spouse be 18 years or over to be an eligible statutory health attorney under an amended s 63(1)(a) of the POA Act, the Public Advocate was of the view that marriage laws allow people to marry if one person is between the ages of 16 and 18 and 'such situations should be recognised in the circumstances in which decisions are required of a statutory health attorney.'[90]

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82 Queensland Advocacy Incorporated, submission 16, p 12.

83 The Royal Australian & New Zealand College of Psychiatrists, submission 11, p 2.

84 Note: Queensland Advocacy Incorporated raised similar concerns about other amendments in the Bill (clauses 11 and 12) requiring that consideration be given to whether a person is or had been a paid carer for an adult in determining appropriateness for appointment as a guardian or administrator under the GAA.

85 Queensland Advocacy Incorporated, submission 16, p 7.

86 Queensland Advocacy Incorporated, submission 16, p 12.

87 Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, submission 5, p 4.

88 Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, submission 5, p 4.

89 Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, submission 5, p 5.

90 Public Advocate, submission 9, p 5.

Application of criteria where multiple persons may be eligible

MIGA supported the proposed amendment to s 63 of the POA Act addressing who is a statutory health attorney, but was concerned that the provision does not provide for the resolution of a situation in which two or more persons fall within one category and there is disagreement over who would be the statutory health attorney. MIGA suggested:

> *Clarification of who should be the principal or prevailing attorney, or alternatively how to resolve disputes between potential attorneys if there is no primacy, would be helpful for practitioners…*
>
> *… it would be helpful for further guidance to be developed for practitioners and the community around this issue, including the use of case studies.*[91]

Transitional provisions – Eligible attorney

Under proposed new s 169 of the POA Act, an existing AHD would be revoked to the extent it gives power to an attorney who is no longer eligible to be appointed in that role.[92] As such, MIGA stated, '[T]here needs to be a focus on ensuring that medical and other health practitioners, and the community, are made aware of this change before the new regime commences'.[93]

Department response

The department advised that the changes to eligibility requirements for attorneys and statutory health attorneys 'seek to strike a balance between providing stronger and consistent safeguards to protect adults with impaired capacity from abuse or exploitation, while ensuring the requirements are not overly restrictive such that an adult would not have anyone in their life eligible to perform the role of an attorney.'[94]

In this respect, and with the objective of enhancing safeguards, the department also advised:

> *… a number of recent inquiries have highlighted the vulnerability of older adults with impaired capacity to abuse, in particular financial abuse. The bill addresses these concerns in a number of ways, including, for example, strengthening eligibility requirements for attorneys and requiring QCAT, when considering the appropriateness of a person to be appointed as a guardian or administrator, to take into account whether the person has ever been a paid carer for the adult.*[95]

With respect to the definition of 'eligible witness', the department advised:

> *The Bill seeks to strike a balance between strengthening safeguards for the making of enduring documents, and ensuring that requirements are not so onerous as to discourage people in the community from undertaking advance care planning. Currently, in making an EPA, an eligible witness, i.e. a justice, commissioner for declarations, notary public or lawyer, must sign a certificate stating that the EPA was signed by the principal in the witness's presence and at the time, the principal appeared to have the capacity necessary to make the EPA (see sections 31 and 44 of the POA).*[96]

The department advised that to determine whether a person has 'capacity' to be an eligible attorney under an EPA at proposed amended s 29(1) of the POA Act, the general test for capacity would apply as per the criteria set out in the definition of capacity in schedule 3 of the POA Act.[97]

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91 Clause 67; MIGA, submission 13, attachment, p 4.

92 Clause 79.

93 MIGA, submission 13, p 5.

94 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 13.

95 Department of Justice and Attorney-General, public briefing transcript, Brisbane, 11 October 2017, p 2. See also p 4.

96 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 43.

97 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 25.

Eligibility to be an attorney and/or a statutory health attorney – 'Paid carer'

With respect to the terminology around, and the further restriction on, the eligibility to be an attorney for persons who were paid carers in the preceding three years, the department cited the QLRC Report:

> *… the appointment of an adult's former paid carer as the adult's attorney may raise concerns about the potential for financial or other abuse of the adult. The risk of abuse by a person who previously was the adult's paid carer may be reduced if the person is eligible for appointment only once a specified period of time has elapsed since the person has ceased to act as the adult's paid carer.*[98]

Further, the department advised, '[U]nder the POA, a paid carer does not include a person who only received a carer's payment or other benefit from the Commonwealth or state for providing home care for the principal.'[99]

Eligibility to be a statutory health attorney – 'Relation'

In response to ATSILS' concerns about the proposed definition of 'relation' at cl 67, the department advised that it was intended that the definition of 'relation' would encompass relationships under the kinship system. Also, that the term Aboriginal tradition (and Island custom) is used in other Queensland legislation and defined in schedule 1 of the *Acts Interpretation Act 1954* to mean:

> *… the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships. Island custom is similarly defined.*[100]

With respect to ATSILS' suggestion to amend s 42 of the GAA, the department advised:

> *… the Public Guardian may do all things necessary or convenient to be done to perform the Public Guardian's functions. This could include undertaking any necessary consultation to assist the Public Guardian to exercise the power.*[101]

Eligibility to be a statutory health attorney – Spouse

The department advised that the purpose of requiring that a spouse be 18 years or older in order to be a statutory health attorney is to provide consistency with 'who can be an eligible attorney for enduring documents.'[102]

Application of criteria where multiple persons may be eligible

In relation to the concerns around the resolution of disagreements where more than one person falls into a category to be a statutory health attorney, the department advised that s 41 of the GAA would apply. This provision addresses disagreements about matters other than a health matter, and it 'provides the Public Guardian with a dispute resolution role via mediation, and final decision making role where there is disagreement about a health matter for an adult'.[103]

Transitional provisions – eligible attorney

In terms of managing the transition to a more restricted approach to eligibility, including to being a statutory health attorney, the department advised it intends to develop 'a communication strategy to

98 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 12.

99 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 12.

100 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 14.

101 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 14-15.

102 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 22.

103 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 28.

communicate the amendments in the Bill to the public, including representative bodies for the medical and health professions, prior to their commencement.'[104]

Appointment of guardians and administrators

In relation to whether a person's criminal history is taken into account when determining suitability for appointment, the department advised:

> *When QCAT is thinking about appointing a guardian or an administrator it would take into account in its consideration the history of the person in terms of their appropriateness. The QLRC had a recommendation that we introduce an amendment so that people with certain types of criminal history involving personal dishonesty, or violence, would not be eligible to be a substitute decision-maker. We are not introducing that amendment at this time. Since the tabling of the QLRC report, although stakeholders generally agreed with the policy intent of that amendment, there was a lot of disagreement about what type of scheme to introduce, how we would introduce that, who would enforce it and what type of offences should be included as well as some concerns, such as those raised by the Aboriginal and Torres Strait Islander Legal Service that, once you start precluding huge rafts of people from being attorneys or administrators, you really start to cut down on the autonomy of principals and adults to have the person who they want as a substitute decision-maker.*[105]

2.3.2 Successive appointees

The Bill would amend s 14 of the GAA, which allows QCAT to appoint a guardian or administrator for a matter for an adult where an adult's parent makes an application, such that the tribunal may only make the appointment if the tribunal has informed the parent of the tribunal's power to appoint successive appointees for the matter. However, a failure to comply with the requirement would not affect an appointment.[106] This amendment implements recommendation 18.2 of the QLRC Review.[107]

Stakeholder views

The QLS sought clarification as to the intention of cl 10 that would amend s 14. In particular, whether it would mean that a notice provided to parents would extend to additional appointments made at a later date, or to an appointment at the outset. The QLS noted that if it were the latter, it would 'potentially allow the parent to be involved in who would succeed them as appointee once they can no longer act.'[108]

Department response

With respect to the operation of proposed amended s 14, the department stated:

> *In practice, where a parent has made an application for the appointment of a guardian or administrator for their child, QCAT would be required to notify the parent of its power to make successive appointments, prior to making any appointment. This would allow the parent to determine whether to seek an additional successive appointment that would come into effect if the parent's appointment ends due to their death or other incapacity.*[109]

2.3.3 Decisions about special health care

The Bill proposes to insert new s 68A in the GAA. The new provision would set out whose views QCAT must seek, and take into account, in making a decision about special health care. This includes a

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104 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 29.

105 Department of Justice and Attorney-General, public briefing transcript, Brisbane, 11 October 2017, p 5.

106 Clause 10; explanatory notes, pp 23-24.

107 Explanatory notes, p 8.

108 Queensland Law Society, submission 17, pp 3-4.

109 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 40.

guardian appointed by QCAT, or where there is no guardian, an attorney for a health matter appointed by an adult, or where there is no guardian or attorney for a health matter, the statutory health attorney for the adult.[110]

The department noted that new s 68A would replace an equivalent provision in the Health Care Principles in Schedule 1 of the GAA. It was not included in the Principles in proposed section 11C of the Act because it only relates to special health care.[111]

Stakeholder views

QAI stated that new s 68A required clarification to the extent it is not clear what the obligation to consult encompasses. In this respect, QAI also stated that the consultation should be broader than that proposed. This includes that QCAT should be required to consult – where appointed – with the guardian, attorney, statutory health attorney and qualified medical practitioners, including the adult's treating team. QAI noted:

> *Although it is clear that the tribunal must consult with medical professionals and the person's informal support network as well as the guardian or attorney, in our view this should be explicitly stated.*
>
> *We note that it must be made clear that, by specifically designating these people/entities, this does not restrict the scope of the Tribunal's considerations.*[112]

Department response

The department advised:

> *… any expansion to current mandatory consultation requirements would require further consideration and consultation with QCAT and other key stakeholders. In practice, as acknowledged by QAI, it is expected QCAT would liaise with medical professionals and the adult's support network in making special health care decisions.*[113]

2.3.4 Interim orders

The Bill would amend s 129 of the GAA relating to the issuing of interim orders and the setting out of the grounds upon which QCAT could issue an interim order.[114] Section 129 requires QCAT to be satisfied that an adult is at immediate risk of harm with regard to their health, welfare or property, including where they are at risk of abuse, exploitation, neglect or self-neglect.[115] The amendment clarifies that QCAT must be satisfied that the adult has, or may have, impaired capacity for a matter.

Stakeholder views

Concerns were raised by ADAA that an adult is 'often not included in or notified of hearings regarding interim orders.'[116] ADAA asserted:

> *… it is key for procedural fairness in relation to interim orders that the views and wishes of the person themselves must be gained by QCAT prior to placing someone under an interim order. I know that this occurs in other jurisdictions in other states. What often happens is that the adult has no prior notice of an interim order. Not only do they not have notice in a technical sense;*

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110 Clause 28; proposed new s 68A, *Guardianship and Administration Act 2000.*

111 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 36. See also, cl 8.

112 Queensland Advocacy Incorporated, submission 16, p 8.

113 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 36.

114 Clause 34.

115 Explanatory notes, p 29.

116 Aged and Disability Advocacy Australia, submission 7, p 3.

they have no idea in any practical sense either. Their views and wishes should be gained prior to the interim order.[117]

QAI raised similar concerns, noting that the current provision and the proposed amendment are silent on QCAT consulting with the adult and their family when making an interim order. QAI noted:

We know of cases where interim orders have been made without speaking to either of these parties, or even notifying the adult or their family, who may not even be aware of the proceedings until after the order has been made. … QAI submits that the GAA must oblige the Tribunal to consult, and that this requirement should be mandated in an enforceable way.[118]

Further:

We are aware that the human rights of a person facing a guardianship order are often given scant attention when an interim order is proposed, which is concerning given the tendency of interim orders to be confirmed and made into more permanent orders.[119]

Department response

The department advised:

Section 129 of the GAA provides that QCAT may make an interim order without complying with the requirements of the GAA.

As the purpose of interim orders is to address an immediate risk of harm to an adult, any mandatory requirements around the exercise of this power may limit the extent that QCAT could act quickly to respond when an adult is at immediate risk.[120]

2.3.5 Conflict transactions

The Bill proposes to amend ss 37 and 152 of the GAA and ss 73 and 118 of the POA to clarify that:

- an administrator for an adult or an attorney for a financial matter may enter into a conflict transaction only if QCAT (or the principal or the Supreme Court (under the POA)) has prospectively authorised the transaction, conflict transactions of that type, or conflict transactions generally.
- QCAT (or the Supreme Court (under the POA)) would be able to retrospectively authorise a conflict transaction.[121]

Clarification of the jurisdiction of the Supreme Court or QCAT to retrospectively authorise a conflict transaction undertaken by an attorney under s 118(2) of the POA was not included in the 2017 Bill.[122]

Stakeholder views

TASC praised the strengthened provisions regarding fiduciary obligations of an administrator to avoid conflict transactions on the basis that they would help prevent financial exploitation of the elderly or those with a disability.[123]

The QLS generally welcomed the amendments as they apply to the GAA, noting that they provide:

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117 Aged and Disability Advocacy Australia, public hearing transcript, Brisbane, 11 October 2017, p 21.

118 Queensland Advocacy Incorporated, submission 16, p 9.

119 Queensland Advocacy Incorporated, public hearing transcript, Brisbane, 11 October 2017, p 20.

120 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 17.

121 Clauses 20, 35, 68, 76; explanatory notes, pp 25, 29, 38, 40; Department of Justice and Attorney-General, correspondence dated 28 February 2018, attachment, p 3.

122 Department of Justice and Attorney-General, correspondence dated 28 February 2018, attachment, p 4.

123 TASC National Limited, submission 8, p 3.

… for prospective authorisation of conflict transactions, as well as additional examples of conflict transactions and clarification on when they may arise as a result of a relationship status, or gifts (s 54 of the Guardianship Act).[124]

However, the QLS also suggested that consideration be given to a stronger deterrent to an appointee that enters a conflict transaction and then requests forgiveness later, stating that QCAT should be satisfied that 'reasonable action has been taken to avoid a conflict and should only provide approval if it is demonstrably in the interests of the principal.'[125] The QLS advised that no guidance has been provided as to how QCAT may approve a transaction retrospectively, and as such the QLS proposed:

… that the tribunal be given some guidance and principles to act upon in determining whether something should be retrospectively authorised or not. They can be expressed as principles, not necessarily as requirements, or as inclusive, not necessarily exclusive, considerations for the tribunal for the purposes of creating some uniformity in the way they address these issues. I know that every situation is different, but the reality is if you have some objective principles or guidelines for the tribunal, that can assist both them in making appropriate decisions and ensuring consistency of decisions in certain cases.[126]

QLS also raised a concern that the amendment creates an anomaly between 'the status of an administrator and the status of an enduring power of attorney',[127] noting:

Under the legislation an administrator can seek and obtain a retrospective authorisation for a conflict transaction. Under the legislation, an enduring power of attorney cannot. You need to ask yourself the question why that is given that they both have the same legal duties but one is given a right that another one is not. The consequence of that is there could be inadvertent and innocent unintended consequences when it comes to not giving to an enduring power of attorney the ability to seek retrospective authorisation.

… The reality is we see little reason why there should be a discrepancy between the law as it applies to administrators and enduring powers of attorney when it comes to retrospective authorisation, bearing in mind it is not giving them the power to do whatever they want. It still requires the tribunal's approval for that authorisation to be obtained, which can be obtained by the administrator under this legislation but not by an enduring power of attorney.[128]

Department response

The department explained the reason for the amendments to clarify the power of QCAT and the Supreme Court to retrospectively authorise conflict transactions by attorneys as well as those of administrators:

In its public briefing to the Committee, the Queensland Law Society (QLS) recommended that the Bill be amended to clarify that QCAT could retrospectively authorise a conflict transaction entered into by an attorney … The QLS submitted that there were no reasonable grounds to treat conflict transactions carried out by attorneys and administrators differently in terms of retrospective approval by the tribunal.

While it was never the policy intention to distinguish between attorneys and administrators in this way, the Department notes that a QCAT decision, subsequent to the QLRC Report has thrown doubt on the matter. In SMJ [2014] QCAT 272, which followed obiter comment in the Supreme Court decision of Public Trustee of Queensland v Ban (2011) QSC 380), it was held that the

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124 Queensland Law Society, submission 17, p 4.

125 Queensland Law Society, submission 17, p 4.

126 Public hearing transcript, Brisbane, 11 October 2017, p 9.

127 Public hearing transcript, Brisbane, 11 October 2017, p 7.

128 Public hearing transcript, Brisbane, 11 October 2017, p 7.

language in section 118(2) of the POA does not confer jurisdiction on QCAT to retrospectively authorise a conflict transaction of an attorney.

Therefore the 2018 Bill makes the following further amendments to section 118 of the POA (clause 76) to clarify the power 'of both QCAT and the Supreme Court to retrospectively authorise conflict transactions by attorneys:

- *a new subsection 118(3) is inserted which provides that if an attorney undertakes a transaction mentioned in subsection 118(2) that has not been authorised by the Supreme Court (or QCAT by virtue of section 109A of the POA), the Supreme Court (or QCAT) may retrospectively authorise the transaction; and*
- *a new subsection 118(4) is inserted to provide that where the Supreme Court (or QCAT) retrospectively authorises a transaction, the transaction is taken to be valid as if it had been entered into by prospective authorisation of the court.*

Clause 68 of the 2018 Bill is also amended to insert new subsections 73(1C) and 73(1D) (renumbered by the Bill as subsections 73(4) and 73(5)) to provide that that if an attorney for financial matters enters into a conflict transaction without obtaining a prospective authorisation of the principal or the Supreme Court (or QCAT), the attorney has acted contrary to their duty not to enter into a conflict transaction, until such time as the transaction is authorised retrospectively by the principal, Supreme Court (or QCAT). Other amendments to section 73 are made to make it clear that a conflict transaction for an attorney may be authorised by both a principal, and the Supreme Court (or QCAT) under section 118.

Collectively, these amendments will align with the amendments made to section 152 of the GAA (in clause 35) to clarify that QCAT may retrospectively authorise conflict transactions entered into by an attorney.[129]

2.3.6 Access to compensation

The Bill proposes to amend s 59 of the GAA and s 106 of the POA Act respectively with regard to the power of a court or QCAT to order a guardian, administrator or attorney to pay an adult (or their estate where deceased) compensation for a loss caused by an appointee, or any profits accrued by an appointee as a result of their failure to comply with the Act in exercising a power.[130] The department advised that the amendments clarify that QCAT can exercise the same jurisdiction as the court to order compensation as well as inserting the power to order that any profits be accounted for.[131]

Stakeholder views

TASC supported the amendments to the provisions relating to compensation, stating:

TASC praises the Bill's strengthened provisions regarding fiduciary obligations of an administrator to avoid conflict transactions … Importantly this provision is augmented by amending section 59 GAA to clarify that a court or QCAT can order a guardian or administrator to compensate the adult or the adult's estate, for a loss caused by their failure to comply with the Act. Additionally this provision provides an alternative remedy to compensation through an account of profits … Such amendments and clarification lend themselves as being preventative measures against financial exploitation of the elderly or those with a disability.[132]

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129 Department of Justice and Attorney-General, correspondence dated 28 February 2018, attachment, p 4.

130 Clauses 25, 74.

131 Public briefing transcript, Brisbane, 11 October 2017, p 2.

132 TASC National Limited, submission 8, p 3.

The QLS supported the proposed amendment to the POA Act, specifically the proposed inclusion of the principal's estate. However, the QLS also considered 'that the section should go further to include an express retrospective effect.[133]

Concern was also raised by stakeholders with respect to whether the compensation provisions sufficiently covered circumstances where an adult regained capacity. ADAA proposed that amended s 59(2A) be changed, to provide that compensation and accounting for profits for a failure to comply can be ordered by QCAT or a court where a 'person has regained or retained capacity' (in addition to where an appointee's appointment has ended). ADAA proposed that these words be included because 'the loss of capacity is not required to enliven the compensation jurisdiction'.[134]

The QLS considered the reforms could go further, in particular 'to ensure that the tribunal has jurisdiction to deal with a former administrator where a person seeking compensation has regained capacity.'[135]

Related to the power to order compensation, ADAA proposed that the amendment to s 81 of the GAA about QCAT's functions for the GAA also be changed.[136] The proposed amendment in the Bill states that when QCAT performs its functions or exercises its powers in relation to an adult, it must to the greatest extent possible take into account the views, wishes and preferences expressed or demonstrated by the adult and the views of any member of the adult's support network. ADAA proposed that 'the best interests of any represented person, or of a person in respect of whom an application is made' also be taken into account. ADAA noted that this insertion, which is included in the Western Australian analogous legislation at s 4, draws on 'the safeguarding rights and interests of adults principles' and that it would allow QCAT to 'consider compensation order applications irrespective of the capacity of the principal.' [137]

Mr Chris Jenkinson raised concerns about whether the proposed amendments would address practical problems in obtaining compensation and concerns with the presentation of false records.[138]

Department response

In response to the concerns raised by ADAA (and the QLS) the department advised:

> *The Bill clarifies that QCAT may exercise the same jurisdiction as a court in relation to ordering former attorneys and administrators (not just current appointees) to pay compensation for a loss to the principal or the principal's estate due to the attorney's, administrator's or guardian's failure to comply with the legislation.*
>
> *Clauses 25 and 74 clarify the position following BH [2012] QCAT 179 and other similar cases where QCAT held that it did not have jurisdiction to award compensation against former attorneys, that compensation orders may be made even where an administrator or attorney's appointment has ended. The provisions clarify QCAT's jurisdiction to award compensation against former administrators and attorneys.*
>
> *As such, an adult for whom an administrator or attorney was previously appointed, who then regained capacity and had the administrator or attorney appointments revoked, could subsequently seek compensation from QCAT to compensate for a failure by the former administrator/attorney to comply with the legislation during their appointment.*

133 Queensland Law Society, submission 17, p 7.

134 Aged and Disability Advocacy Australia, submission 7, p 2.

135 Queensland Law Society submission 17, p 8. With reference to the amendments to the *Public Guardian Act 2014* (Qld).

136 See cl 30.

137 Aged and Disability Advocacy Australia, submission 7, p 3.

138 Chris Jenkinson, submission 4, pp 4, 13.

The Department considers that the proposed amendments to the compensation provisions are clear and address ADA's concerns.[139]

The department also noted:

To complement the amendments made in relation to clarifying QCAT's power to order compensation in relation to former administrators and attorneys, and the new accounting for profits remedy, the Bill also clarifies (clause 36 and 77) that QCAT may order a former attorney or former administrator (in addition to current attorneys and administrators) to file in QCAT records and audited accounts of the administrator's or attorney's dealings and transactions conducted on behalf of the adult. These clauses amend existing provisions which enable QCAT to order these records and audited accounts for current attorneys and administrators.[140]

2.3.7 Power for Public Guardian to continue to investigate a complaint after the death of the adult

The PGA enables the Public Guardian to investigate any complaint or allegation that an adult is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements under s 19. The Bill proposes to extend the scope of the provision so that the Public Guardian would be able to investigate a complaint or allegation after an adult's death.[141]

Additionally, proposed new s 31 of the PGA requires the Public Guardian to report to certain people after carrying out an investigation or audit in relation to an adult.[142]

Stakeholder views

The QLS advised it supported the proposed amendment to s 31 of the PGA, stating it:

… will give the Public Guardian the ability to inform a person who has requested an investigation and other parties about the result of an investigation or audit (in such a way that the Public Guardian considers appropriate).[143]

Mr Richard Worley also supported the establishment of a governing body with 'the power to investigate financial abuse of an adult if it is discovered following their death.'[144]

The Caxton Legal Centre and Townsville Community Legal Service, while broadly supportive of the new power, were concerned that s 19 (and amended s 19) lacks clarity, in particular in relation to which adults it applies to, and may overlap with the Coroner's role to investigate a reportable death.[145] In addition, the legal services noted that the Public Guardian would not be required to provide a report to the State Coroner even though there could be overlap in the information obtained by the Public Guardian and the Coroner.

In this respect, the Caxton Legal Centre advised the committee:

Our concern is that Coroner has jurisdiction to investigate a death which is reportable to the Coroner under the Coroners Act. We were concerned that the Public Guardian may collect information after a person has died where they discover that a death is reportable and has not been reported to the Coroner in which case they would have an obligation to report the death to

139 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 15-16.

140 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 9.

141 Clause 87.

142 Clause 90.

143 Queensland Law Society, p 8.

144 Richard Worley, submission 15, p 2.

145 Townsville Community Legal Service Inc and Caxton Legal Centre Inc, submission 12, pp 2-3; Caxton Legal Centre, public hearing, 11 October 2017, p 8.

> *the Coroner. Additionally, the Public Guardian may uncover information which is not passed onto the Coroner in the Coroner's investigation of that person's death.*[146]

Noting that memorandums of understanding exist between other organisations, such as the Office of the Health Ombudsman, the legal services recommended that a similar memorandum of understanding be implemented between the Coroner and the Public Guardian 'to ensure appropriate information sharing and timely notification of reportable deaths to the Coroner.'[147]

Department response

The department advised that the Public Guardian's functions are limited to adults with impaired capacity for a matter, and that the power that would be provided to the Public Guardian 'is distinct from any powers exercisable by the Coroner under the *Coroners Act 2003*.'[148] The department further advised that it will raise with the State Coroner and the Public Guardian the legal services' comments regarding a possible memorandum of understanding between the entities.[149]

2.4 Improving efficiency and clarity of guardianship system and legislation

2.4.1 Presumption of capacity

A number of stakeholders expressed concern about the Bill's proposal to replace s 11 (Principles for adults with impaired capacity) of the GAA.[150]

New s 11 would state that where QCAT or the court has appointed a guardian or administrator for an adult, the guardian or administrator is not required to presume the adult has capacity for the matter.[151] Further, a declaration that an adult has an impaired capacity can be relied upon to presume that adult does not have capacity where a person or other entity performs a function or exercises a power under the GAA.[152]

The explanatory notes state:

> *The application of the presumption of capacity was considered by the Supreme Court in* Bucknall v Guardianship and Administration Tribunal (No 1) [2009] 2 Qd R 402 (Bucknall) *where the Court examined questions of whether the presumption is required to be applied each time a person or entity exercises a power or performs a function under the Act, and the ensuing difficulties with this approach.*
>
> *The proposed provisions address concerns raised by the Supreme Court in* Bucknall *about the wording of existing section 11 GAA and sets out (as recommended by the QLRC) how the QCAT and Supreme Court are to apply the presumption of capacity once a formal determination has been made that the adult has impaired capacity for a matter.*[153]

Stakeholder views

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146 Caxton Legal Centre, public hearing transcript, Brisbane, 11 October 2017, p 11.

147 Townsville Community Legal Service Inc and Caxton Legal Centre Inc, submission 12, p 3; Caxton Legal Centre, public hearing, 11 October 2017, p 11.

148 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 27. See also the response to Mr Worley at pp 31-32.

149 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 27.

150 Clause 7; see for example, Doug Young, supplementary submission 2, pp 1-2; Simone and Robert Lea, supplementary submission 3, pp 1-2; John Tracey, submission 6, pp 1-4; TASC National Limited, submission 8, pp 2-3; Queensland Advocacy Incorporated, submission 16, p 5. Note, clause 75 includes an analogous amendment, s 111A, for the POA Act.

151 See proposed s 11(2).

152 See proposed s 11(3).

153 Explanatory notes, p 13.

MIGA supported the proposed redrafting of the presumption of capacity, describing it as a 'clearer reiteration'.[154] The organisation considered it appropriate that those involved in an adult's health care 'are entitled to rely on a court or tribunal decision or appointment to indicate that an adult lacks capacity.'[155]

Conversely, Mr John Tracey submitted that the GAA is currently consistent with Articles 12 and 13 of the CRPD, which provide for equal recognition before the law for persons with disabilities and effective access to justice for persons with disabilities on an equal basis with others respectively.[156] According to Mr Tracey, the proposed amendment to s 11 would change this, as well as undermine the General Principles set out in the GAA, including General Principles 1, 2 and 7.[157] Mr Tracey stated:

> *If this amendment is passed a person with impaired capacity can legally be stripped of all statutory and common law rights and legal capacity, which are transferred to a substituted decision maker. This is not equal legal capacity.*
>
> *These issues are particularly important when a person with impaired capacity has a complaint and wants to initiate legal action against their substituted decision maker. If the amendment were passed, a person would have no legal agency to complain or initiate legal proceedings as that power would lie exclusively with the accused party which is of course a conflict of interest.*[158]

QAI raised similar concerns, noting the:

> *… blanket reversal of the presumption of capacity is not consistent with the appropriately nuanced understanding that capacity is time, domain and decision-specific, and could subject a person to an order that is not required, particularly in circumstances where they have limited support networks to assist them to advocate for themselves. Recognition of the fluctuating nature of capacity is critical given that guardianship orders can run for substantial periods of time, within which a person's capacity can significantly vary.*[159]

TASC argued that the amendments:

> *… are discriminatory in nature as they treat one class of people, those who lack capacity, differently to other societal members. Further, these provisions protect a guardian or administrator as opposed to enhancing safeguards of those subject to guardianship legislation, thereby potentially breaching an objective of the Bill …*
>
> *Whilst the aim of these provisions is to address the concerns raised in* Bucknell v Guardianship and Administration Tribunal (No 1) [2009] 2 Qd 402 *around the presumption of capacity, they fail to satisfy obligations under the CRPD to ensure that people with disability 'enjoy legal capacity on an equal basis with others in all aspects of life'.*[160]

TASC noted that under the amendments, once an order of declaration has been made that an adult has impaired capacity, an appointee is not required to presume the adult has capacity for a matter at a later time. In this respect, TASC argued that the Bill does not recognise capacity that fluctuates, breaching the CRPD and undermining the objectives and principles of the Bill, although this could be ameliorated if recommendation 15.1 from the QLRC Review were adopted.[161]

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154 MIGA, submission 13, attachment, p 2.

155 MIGA, submission 13, attachment, p 2.

156 John Tracey, submission 6, p 1.

157 John Tracey, submission 6, p 1, 2.

158 John Tracey, submission 6, p 1.

159 Queensland Advocacy Incorporated, submission 16, p 5.

160 TASC National Limited, submission 8, p 2.

161 TASC National Limited, submission 8, pp 2-3. Queensland Advocacy Incorporated also noted that the issue of fluctuating capacity must also be addressed in the Act (Queensland Advocacy Incorporated, public

Department response

In response, the department referred to the finding of the Supreme Court in Bucknell and noted that the Bill implements recommendations 7.1 to 7.2 in the QLRC Report.[162] Additionally that:

> *The amendment does not: remove the requirement for QCAT to apply the presumption of capacity when making a decision about an adult's capacity; prevent a further application to QCAT or the Supreme Court for a declaration that the adult has capacity for a matter; or prevent an application to QCAT for a review of the appointment.*
>
> *Further the guardian or administrator in acting on behalf of the adult must apply the general principles, which have been revised by the Bill to better align with principles in the United Nations Convention of the Rights of Persons with Disabilities (UNCRPD). For example, new general principle 10 provides for a structured approach to decision-making that emphasises recognition of the adult's (expressed or demonstrated) current views, wishes and preferences and supporting the adult to make a decision, if possible. The Department refers to its briefing note to the Committee which provides further details of a range of amendments in the Bill that seek to provide consistency with the UNCRPD.*[163]

The department also advised the committee:

> *At common law, in the guardianship legislation an adult is presumed to have capacity. However, this is a rebuttable presumption. In some cases where the presumption has been rebutted—where, for example, QCAT has appointed a guardian or administrator for a matter—both the Supreme Court in the decision of* Bucknall v Guardianship and Administration Tribunal 2009 2 Qd R *and the QLRC itself considered that it did not make sense to ask guardians and administrators to continue to apply the presumption.*
>
> *If guardians and administrators could not rely on QCAT's finding that an adult did not have the capacity for a matter, then it would be very difficult to carry out their duties with certainty. Therefore, clauses 7 and 75 of the bill clarify the existing presumption of capacity by requiring QCAT or the Supreme Court to presume that an adult has the capacity for a matter until the contrary is proven and to provide certainty to substitute decision-makers by not requiring the guardian for the administrator to apply the presumption after QCAT or the court has made a finding that the adult does not have capacity for a matter and has appointed the guardian or administrator to make decisions for that matter.*[164]

The department noted that recommendation 15.1 of the QLRC review provides that when an order is made with respect to an adult with fluctuating capacity, QCAT may limit the exercise of an appointee's powers to periods when an adult's capacity is impaired. Further, that implementation of this recommendation was considered in consultation on the Bill. However, concerns were raised by stakeholders about the practical operation of appointments in these circumstances. As a result of the

hearing, 11 October 2017, p 19). Recommendation 15.1 – that the Act be amended to provide that, when making an order to appoint a guardian or administrator (an 'appointee') for an adult who has fluctuating capacity, the Tribunal may limit the exercise of the appointee's powers to periods when the adult has impaired capacity: Queensland Law Reform Commission, *A review of Queensland's guardianship laws*, Report No. 67, September 2010, p 118.

162 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 5.

163 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 6.

164 Public briefing transcript, Brisbane, 11 October 2017, pp 2-3.

issues raised requiring further consideration, the decision was made not to include an amendment in the Bill reflecting the recommendation.[165]

2.4.2 Definition of capacity

Schedule 3 of the POA Act includes a definition of 'capacity', stating that capacity for a person in 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.[166]

Section 41 of the POA Act provides an additional definition of capacity to apply to a principal, specifically relating to a principal making an EPA. Section 41 provides that a principal is deemed to have capacity to make an EPA only if the principal understands the nature and effect of the EPA. The Bill proposes to amend s 41 to add a requirement that the principal also be capable of making the power of attorney freely and voluntarily in order to be considered to have capacity.[167] The Bill would also insert the statement that the definition of capacity in schedule 3 does not apply to this section.[168]

Additionally, the Bill proposes to insert a note to the definition of 'capacity' in schedule 3 of the POA Act and schedule 4 of the GAA.[169] The explanatory notes provide that the amendment emphasises that 'all reasonable means should be used to facilitate communication before a person is treated as unable to communicate'.[170]

Stakeholder views

The QLS supported inserting a separate test for an EPA, however, stated that it 'does not go far enough to ensure that a witnessing party is aware of the requirements of capacity and appropriately employs their discretion.'[171]

The Public Advocate was concerned about having two different definitions of capacity, one applying to a principal executing an EPA and another for impaired capacity, suggesting that it creates uncertainty and could undermine public confidence.[172] In this respect the Public Advocate noted:

> *Guardianship is one of these really difficult areas of law where it impacts on people's lives in such a personal way. It is really important that in the way you approach the law and the application of the law you make it as accessible as possible for ordinary people. It seems to me that, if you have different definitions for different but very similar purposes in the legislation, there is the potential to create confusion and to have a bit of a loss of confidence for a definition that is for that and that for this, but why?*

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165 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 21-20. See also Department of Justice and Attorney-General, public briefing transcript, Brisbane, 11 October 2017, p 3.

166 Definition of 'capacity', Schedule 3, Dictionary, *Power of Attorney Act 1998*. Note, the definition of 'capacity' in schedule 4 of the GAA mirrors that in Schedule 3 of the POA Act.

167 Clause 62.

168 Clause 62.

169 Clauses 84, 47.

170 Explanatory notes, pp 32 and 42.

171 Queensland Law Society, submission 17, p 6.

172 Office of the Public Advocate, submission 9, p 5.

> *… It just seems to me that you do not want anything too convoluted in this space if you can make it simpler, but you do not make it simpler at the risk of things not working very well. I do not think it is impossible to have a single test for capacity and for executing enduring documents.*[173]

The Public Advocate suggested standardising the tests or providing a definition of 'impaired capacity' rather than 'capacity' in schedule 3 of the POA Act.[174]

The RANZCP provided in principle support for the proposed expansion of the definition of capacity in the GAA and the POA Act to 'investigate the use of all reasonable ways of facilitating communication, before a person is treated as unable to communicate'.[175] It was, however, concerned about matters including the application of the test in urgent situations. The RANZCP also stated that consideration must be given to whether a principal has sufficient comprehension of English, and that information should be communicated using clear, plain language and should be repeated as required.[176]

QAI advised that it supported the 'attempt to balance accessibility and user-friendliness of the orders whilst safeguarding abuse' and the differentiation of the test of capacity.[177] However, it was concerned the definition did not include appropriate safeguards, recommending that before an application is approved a person must be assured 'adequate and appropriate support to understand the consequences of the application.'[178]

Department response

In response to the Public Advocate's concerns, the department advised:

> *The Bill implements the recommendations of the QLRC in relation to both clarifying the capacity tests for making enduring documents (EPAs and AHDs) and clarifying that these capacity tests are different from the general test of capacity in the guardianship legislation (QLRC recommendations 8.1-8.7).*
>
> *The QLRC noted that the current guardianship legislation has two tests of capacity: a general test of capacity and a test for making enduring documents. The QLRC noted that a specific test of capacity for executing enduring documents reflects the common law. Because enduring documents pass decision making power to third parties it is important not only that a principal has capacity, but also that a principal has achieved a certain level of understanding as to the legal effect of such a document. Related to this it is also important that a person who witnesses an enduring document can attest to the principal having a certain level of understanding. The proposed amendments in relation to the tests for capacity for making an enduring document are clarifying in purpose and designed to make the existing law clearer.*[179]

Further:

> *… the bill does not introduce a new test of capacity. These two different tests have always been there. Because enduring documents pass decision-making power to third parties, it is important not only that a principal has capacity but also that the principal has achieved a certain level of understanding as to the legal effect of such a document.*[180]

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173 Public Advocate, public hearing transcript, Brisbane, 11 October 2017, p 24.

174 Office of the Public Advocate, submission 9, p 5.

175 The Royal Australian & New Zealand College of Psychiatrists, submission 11, p 1. See clauses 47 and 84. See also Queensland Advocacy Incorporated, public hearing, 11 October 2017, p 19.

176 The Royal Australian & New Zealand College of Psychiatrists, submission 11, pp 1-2.

177 Queensland Advocacy Incorporated, submission 17, pp 12-13.

178 Queensland Advocacy Incorporated, submission 17, p 12.

179 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 21-22.

180 Department of Justice and Attorney-General, public briefing transcript, Brisbane, 11 October 2017, p 2.

The department advised that it will consider the matters raised by the QLS and the RANZCP during the development of the guidelines to assist in assessing capacity.[181]

2.4.3 AHDs

The Bill proposes a number of amendments to the POA Act with respect to AHDs, including:

- clarifying that an AHD may be made by an adult principal who is outside the State[182]
- establishing a principal's capacity to make an AHD[183]
- amending the definition of 'invalidity' in relation to an AHD,[184] and
- clarifying the protections afforded to persons and health providers where they are unaware of an invalid AHD.[185]

Stakeholder views

The RANZCP supported the amendment to s 35 but noted that in some instances the directives may not be able to be followed absolutely because the particular service or care is not available in Queensland.[186]

The QNMU supported the amendment to s 42 relating to the principal's capacity to make an AHD, stating:

> *… the clauses creating better and consistent clarity regarding the legal capacity required by a principal in making an AHD are appropriate and will ensure the AHD (or other enduring documents) truly reflects the principal's intentions.*[187]

MIGA supported the protections for medical and other health practitioners who rely on an AHD, or who act unaware of an AHD, in good faith. Nevertheless it is concerned that the amended protections are not sufficiently broad.[188] MIGA was concerned that the term 'liability' in s 100 is not defined, stating that it should:

> *… be extended to clarify that the protections from 'liability' under amended ss 100 and 102 of the PAA includes offences, civil liability, adverse disciplinary findings and / or determinations of a breach of professional standards or etiquette.*[189]

MIGA stated further:

> *… the protections contemplate protection only for practitioners in relation to AHDs invalidly made in another state, which have been revoked or where there are issues about whether they could have been made at all. They do not extend to all issues around of validity of an AHD made in Queensland, such as scope or form.*[190]

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181 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 24, 43, 44. Note, clause 41 inserts section 250 relating to the Minister preparing guidelines to assist in assessment of the capacity of an adult.

182 Clause 61; amended s 35.

183 Clause 63; amended s 42.

184 Clause 71; amended s 96.

185 Clauses 72, 73; amended ss 100, 102. Note that section 100 (amended at clause 72) also applies to a power for a health matter under an enduring document.

186 The Royal Australian & New Zealand College of Psychiatrists, submission 11, p 2.

187 Queensland Nurses and Midwives' Union, submission 10, p 2.

188 MIGA, submission 13, attachment, pp 4-5.

189 MIGA, submission 13, p 5.

190 MIGA, submission 13, p 5. See also MIGA, public hearing, 11 October 2017, p 10.

MIGA elaborated:

> *The concern that we have—particularly relating to protections for doctors who are trying to interpret this—is that they are dealing with a regime in Queensland that has particular requirements around form and sometimes what matters you can make a directive for, which can be different to the powers and forms that must be followed in other states. You may have a Queensland patient presenting who falls under one regime: you have a patient from New South Wales, for instance, who presents who falls under another regime that might be able to do a directive in a different way about different things. The concern we have is that a doctor is placed almost in the position of a lawyer of having to know how to interpret those things and what is valid. Moving on from that, we were concerned about whether there is sufficient protection for doctors and nurses—and whoever else is interpreting it—who are trying to do the right thing, but at the same time not being able to have that detailed knowledge or understanding of a variety of form and substance requirements they may encounter.*[191]

MIGA proposed that the protections be extended to cover practitioners, where they act in good faith, who are unaware of a potential invalidity generally of an AHD in Queensland.[192]

More broadly, MIGA argued for recognition of common law AHDs in Queensland. In this respect, while acknowledging the potential benefits of statutory AHDs, MIGA stated its concern that this can place 'unnecessary emphasis on form over substance, and unduly impede the provision of health care.'[193]

MIGA argued that deficiencies in the form of a directive should not prevent it from being followed if it meets 'common law requirements, as set out clearly in *Hunter New England Area Health Service v A* [2009] NSWSC 761. This,' MIGA contended, 'is a regime which has been in place for a long time, is both workable and practical.'[194] MIGA noted that this position is particularly important in circumstances where a patient normally resides outside of Queensland, or has an AHD or equivalent document outside of Queensland, given the problem that could potentially arise requiring 'medical and other health practitioners to make an assessment of validity against a regime which is unfamiliar to them.'[195]

The QLS suggested that s 102 should go further, 'placing an express onus on health professionals and health services to make a reasonable attempt to check whether a person has an enduring document in place.'[196]

The QLS also raised a concern that the forms used for an AHD include the option of also entering into an EPA, a structure which it stated causes confusion at both the practitioner and layperson level, particularly where an EPA is already entered into which 'could easily bring about two conflicting documents'.[197] In this respect, the QLS advised the committee:

> *If a person wants to do an enduring power of attorney and an advance health directive—which most people are inclined to do—having the ability to do an enduring power of attorney in the advance health directive often results, from my own professional experience, in clients completing an enduring power of attorney, completing the first part of the advance health directive with me as the witnessing lawyer, then taking the advance health directive away to see a doctor and completing that part, and then also completing the enduring power of attorney part of the advance health directive. The consequence is they have done two enduring powers of attorney within a short space of time in two different documents without realising it. When that*

191 MIGA, public hearing, 11 October 2017, p 10.

192 MIGA, submission 13, p 5.

193 MIGA, submission 13, p 6.

194 MIGA, submission 13, p 6.

195 MIGA, submission 13, p 6.

196 Queensland Law Society, submission 17, p 7.

197 Queensland Law Society, submission 17, p 6.

happens you get adverse legal consequences, unintended consequences. They never meant to do another enduring power of attorney, not realising they had already done one to cover the same subject matter, which is personal health care. In my view and in my experience, it is very confusing for most people to see that in an enduring power of attorney, particularly where they have already done an enduring power of attorney in the advance health directive.[198]

The QLS also noted the possibility of different attorneys being appointed across documents within days of each other.[199]

Department response

The department advised with respect to liability and protections:

Clause 72 of the Bill amends section 100 of the POA to provide a person who acts in good faith and without knowing that an advance health directive or a power for a health matter under an enduring document is invalid or a direction in an advance health directive does not operate, acts in reliance on the advance health directive, power or direction does not incur any liability, either to the adult or anyone else.

Clause 73 of the Bill amends section 102 to clarify that a health provider is protected from liability to the extent the person does not know of an adult's AHD, as long as the health provider acts in 'good faith.'

The scope of the protection from liability which section 100 of the POA currently provides is unchanged by the Bill. The department notes that the definition of liability in Schedule 1 to the Acts Interpretation Act 1954 *is an inclusive one. That is, liability means any liability or obligation (whether liquidated or unliquidated, certain or contingent, or accrued or accruing).*[200]

Further, the department advised that the amendment to s 102 implements recommendation 9.17 of the QLRC and is 'intended to limit protection from liability for health providers to those circumstances where a health provider has made reasonable inquiries to determine if an adult has an AHD.'[201] This would include checking medical files and asking the adult's next of kin for information, and could be considered to be acting in good faith.

On the validity of common law AHDs, the department stated: 'Section 39 of the POA provides that the POA does not affect common law recognition of instructions about health care given by an adult that are not given in an advance health directive.'[202]

With respect to the option available to enter into an EPA when also completing an AHD, the department advised:

The Department is reviewing the AHD and EPA forms to increase useability and accessibility for the wider community, and to better support an adult to reflect the values and beliefs that guide an adult's health care preferences. Appointing an attorney as part of an AHD can be useful, as a principal may not be able to foresee all circumstances that may arise, and a principal may derive comfort from the fact that an attorney can make decisions in the event that the directions in an AHD prove inadequate.

Further … Section 50 of the POA also provides that a principal's EPA is revoked, to the extent of an inconsistency, by a later enduring document of the principal.

198 Public hearing transcript, Brisbane, 11 October 2017, p 9.

199 Public hearing transcript, Brisbane, 11 October 2017, p 9.

200 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 29.

201 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 46.

202 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 30.

The Department will take into account the concerns raised by QLS in the redesign of the forms and the explanatory guideline.[203]

2.4.4 Missing persons

The Bill proposes to insert new s 12A and new s 12B into the GAA.[204] Section 12A would empower QCAT to appoint an administrator for a financial matter for an adult if the adult is a missing person and certain other criteria are satisfied. Proposed s 12B would establish how the powers relating to missing persons interact with the *Public Trustee Act 1978* (Qld).

More broadly, amendments are also proposed for s 26, relating to the automatic revocation of an appointment as an administrator, to include when an adult dies.[205]

The Bill also proposes to insert a new division with provisions about appointment for an adult who is a missing person. The new division includes provisions relating to changes of circumstances an administrator must advise QCAT about, such as when an administrator becomes aware an adult is alive or dead, and when QCAT must revoke an order.[206] With respect to the division, the department advised that it:

… enables QCAT to appoint an administrator for a missing person if QCAT is satisfied that the person is a missing person and that without an appointment the person's financial interest will be significantly adversely affected. The Australian Capital Territory, New South Wales and Victoria have similar provisions. These amendments will ensure that pressing issues in relation to a missing person's estate may be dealt with.[207]

Stakeholder views

The QLS supported the insertion of the provisions into the GAA relating to missing persons.[208]

Townsville Community Legal Service and Caxton Legal Centre (legal services) also supported new ss 12A and 12B because they 'will allow families to more expeditiously deal with the estate of their missing family member.'[209] The legal services noted that the Bill is silent on the duration of an order under this provision, but that s 28 of the GAA requires that an order be reviewed every five years. In this respect, the Caxton Legal Centre advised the committee that 'it would allow greater certainty for those being appointed if the appointment was for a fixed period.'[210]

The legal services also noted that the Bill is not clear as to how 'revocation in section 26 might be communicated to the administrator as a matter of practicality.' The legal services considered that this may be a matter to include in the State Coroner's Guidelines.[211]

Department response

With respect to questions raised by the legal services about the term of appointment for an administrator, the department advised:

It is noted that the GAA does not set out maximum terms for orders appointing administrators generally. While there is not a specific duration for the appointment of an administrator for a

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203 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 44.

204 Clause 9.

205 Clause 14.

206 Clause 16; new division 1A, chapter 3, part 3.

207 Public briefing transcript, Brisbane, 11 October 2017, p 3.

208 Queensland Law Society, submission 17, p 3.

209 Townsville Community Legal Service Inc and Caxton Legal Centre Inc, submission 12, p 2.

210 Caxton Legal Centre, public hearing transcript, Brisbane, 11 October 2017, p 8.

211 Townsville Community Legal Service Inc and Caxton Legal Centre Inc, submission 12, p 2.

missing person (aside from the general provisions), QCAT will have discretion to determine the appropriate length of an appointment according to the circumstances of the case.[212]

In addition to s 28, the department noted that s 29 of the GAA states that QCAT, on its own initiative or on application by certain persons, can review at any time the appointment of a guardian or administrator.[213]

The department undertook to raise with the State Coroner the legal services' comments regarding possible amendments to the State Coroner's Guidelines.[214]

The department elaborated:

There are a number of circumstances where administrators' appointments are automatically revoked. It is usually around eligibility. There are no specific mechanisms in place for that. The particular issue raised in that submission was in relation to an administrator appointed for an adult who is a missing person. In those circumstances the automatic revocation would occur if the adult was found alive or if it was found that the adult was dead. Certainly we will work with the coroner's office, for example, and QCAT to look at information sharing that may have to occur. It is likely the administrator will have a fairly good idea if either of those two events happen.[215]

2.4.5 Delegation of powers by Public Trustee

Proposed new s 250A of the GAA and proposed new s 160 of the POA Act provide for the delegation of the Public Trustee's powers.[216] The powers may, for example, be delegated to an appropriately qualified member of the Public Trustee's staff or, for day-to-day decisions about a matter, to stated persons. The Public Trustee would not, however, be empowered to delegate stated day-to-day decisions to the Public Guardian or a paid carer for the adult.

Stakeholder views

The Public Advocate supported the amendments to allow the Public Trustee to delegate its powers to appropriately qualified members of the Public Trustee's staff but was concerned about delegating powers for day-to-day matters to an appropriately qualified carer or other person. The Public Advocate was of the view that the delegation process should be specified.[217]

ADAA recommended that proposed s 250A(1)(b)(iv) relating to day-to-day decisions be changed, removing the reference to 'appropriately qualified' and inserting 'appropriate', so that 'the public trustee can delegate the power to the person themselves. In ADA Australia's experience, this practice already occurs, but is not necessarily supported by the legislation.'[218]

Department response

The department advised that the proposed delegation powers implement QLRC Report recommendation 25.3 and that the purpose of the amendment is:

… to enable expedited decision making for low-risk, uncontroversial decisions. This delegation power reflects a similar delegation power for the Public Guardian under section 146 of the Public

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212 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 25.

213 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 26.

214 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 26.

215 Public briefing transcript, Brisbane, 11 October 2017, p 5.

216 Clauses 41, 78.

217 Office of the Public Advocate, submission 9, p 6.

218 Aged and Disability Advocacy Australia, submission 7, p 3. See also Aged and Disability Advocacy Australia, public hearing transcript, Brisbane, 11 October 2017, p 21.

> Guardian Act 2014 *to delegate day-to-day decisions in relation to a personal matter for an adult to a range of people including an appropriately qualified person who is caring for the adult.*[219]

With respect to the use of the term 'appropriately qualified', the department stated the term is commonly used across statutes, and is a defined term under the Acts Interpretation Act that means a person has the qualifications, experience or standing to exercise a power. As such the department considered the term to be appropriate.[220]

2.4.6 Appointment of a representative in a QCAT proceeding

The Bill proposes to amend s 125 of the GAA which provides for the appointment of a representative for an adult by QCAT in proceedings before QCAT.[221] The amendment expands on who may appoint a representative for an adult from the president or presiding member to the tribunal, and sets out that an appointed representative must:

(a) have regard to any expressed or demonstrated views, wishes and preferences of the adult; and

(b) to the greatest extent practicable, present the adult's views, wishes and preferences to the tribunal; and

(c) promote and safeguard the adult's rights, interests and opportunities.[222]

Stakeholder views

With respect to legal representation QAI advised the committee:

> *Legal representation has a vitally important role to play in this jurisdiction, especially for vulnerable people who do not have the capacity to self-advocate, who do not have a support network and who are isolated, or whose fundamental human rights are at stake, particularly in relation to special health care, restrictive practices, seclusion and containment, which are complex areas of the law. In practice, we know that the appointment of lawyers is extremely limited. We suspect that that is mainly due to the lack of free legal services to refer people to.*[223]

QAI supported the proposed amendment noting:

> *At present, if a person does not have a support person or advocate or if they cannot attend the hearing, the Tribunal often only hears the version presented by the applicant for the order and will not consider the person's rights.*[224]

However, QAI was concerned that the amendment to s 125 implies to some degree that a person will not have capacity to give instructions, because it emphasises 'promoting and safeguarding the person's rights, interests and opportunities' and suggested that this provision is not sufficiently defined. QAI noted the amendment is not 'consistent with the recognised role of a legal representative to represent a client's views, wishes and preferences whether they have capacity to give instructions.'[225] QAI suggested that s 125 be amended to reflect the new *Mental Health Act 2016* provision relating to the role of an appointed representative which requires a representative be present at a proceeding to represent the person's views, wishes and preferences, and where they cannot be expressed, the person's best interests.[226]

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219 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 23.

220 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 18.

221 Clause 33.

222 Clause 33.

223 Queensland Advocacy Incorporated, public hearing transcript, Brisbane, 11 October 2017, p 20.

224 Queensland Advocacy Incorporated, submission 16, p 9.

225 Queensland Advocacy Incorporated, submission 16, p 9.

226 Queensland Advocacy Incorporated, submission 16, p 9.

Mr Jenkinson also noted concerns with regard to the approach to representation at QCAT referring to personal experiences, including one instance involving his mother, stating 'no defence was afforded her in a case that proved not in her best interests ... the Adult was not afforded any form of representation at its hearings.'[227] Mr Jenkinson argued that if QCAT is to be given more powers it should be required to 'fully abide by normal Court Rules also, including mandating equal legal representation to a Protected Person, even those silent or incapacitated'.[228]

Related to the amendment, QAI was also concerned that, where an adult's support person, advocate or legal representative cannot attend, a hearing should be adjourned as opposed to 'on the papers' decisions and/or orders being extended or interim orders being made. QAI asserted the overriding consideration should be to ensure all measures are taken to enable an adult and their support to prepare for and attend a matter before the tribunal (including by video-link).[229]

Department response

Noting the matters raised by Mr Jenkinson, the department advised that the position in amended s 125:

> *… reflects the broader position about representation before QCAT, as reflected in section 43 of the QCAT Act. Section 43 of the QCAT Act provides that parties are to represent themselves unless the interests of justice require otherwise, and also states that a party may be represented by someone else if the party is a person with impaired capacity. The general position of not mandating representation aims to ensure that QCAT remains a low cost, accessible and informal mechanism for resolving matters.*[230]

In response to the QAI submission, the department stated that amended s 125 provides QCAT with a discretion to appoint a representative where an adult is either not represented or is represented by an agent QCAT considers inappropriate to represent the adult's interest. Further:

> *The purpose of this discretion is to ensure that an unrepresented adult has a person appointed to represent their interests where they are not able to do this for themselves or appoint someone (either a lawyer or another person) to do this on their behalf.*[231]

The department also advised that s 125 does not apply where an adult has capacity to provide instructions to a lawyer and had been given leave by QCAT to be represented by a lawyer in a proceeding.[232]

2.4.7 Public Advocate to keep all rights accrued as a public service officer

The Public Advocate was pleased that the Bill provides that the person appointed as Public Advocate is able to keep all rights accrued or accruing as a public service officer.[233] The provision is consistent with the Public Guardian's rights.[234]

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227 Chris Jenkinson, submission 4, p 9.

228 Chris Jenkinson, submission 4, p 9.

229 Queensland Advocacy Incorporated, submission 16, p 9.

230 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 11-12. See also Department of Justice and Attorney-General, public briefing transcript, Brisbane, 11 October 2017, p 6.

231 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 37.

232 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 36-37.

233 Clause 38; Office of the Public Advocate, submission 9, p 6.

234 Office of the Public Advocate, submission 9, p 6; explanatory notes, p 29; *Public Guardian Act 2014*, s 100.

2.5 Integrity Act, GOC Act and PID Act

The Crime and Corruption Commission (CCC) submitted that the amendments proposed to be made to the Integrity Act, GOC Act and the PID Act 'will promote integrity across the public sector'.[235]

The CCC considered that the amendments to the Integrity Act 'have potential to minimise corruption risks that could arise through interactions between current and former public sector employees and office holders.'[236]

The CCC advised it had been proposing the amendments to the GOC Act and the PID Act since 2012.[237] It noted that the changes may result in 'a slight increase in complaints to the CCC relating to GOCs [government owned corporations]'[238] but that it will report to the PCCC in regard to this.[239]

2.6 Matters outside the scope of the Bill

Some submitters raised issues relevant to guardianship generally, but which fell outside the scope of the Bill. These included interjurisdictional issues, concerns about QCAT and the Public Trustee, informal substitute decision makers, and recommendations regarding enduring powers of attorney, wills, and the Public Trustee.

2.6.1 Enduring powers of attorney and wills

Mr Worley proposed a number of matters to be included in the Bill regarding enduring powers of attorney and wills. Amongst other things, Mr Worley recommended:

- a minimum of two attorneys be required for an EPA
- a national register of EPAs be established
- an attorney or any other party proven to have financially abused another person should be charged with a criminal offence.[240]

The department addressed Mr Worley's suggestions:

> *Number of attorneys under an EPA*
>
> *Imposing a minimum number of attorneys may reduce flexibility, particularly for persons who only wish to appoint one attorney, either by choice or necessity, and may result in inappropriate attorneys being appointed under EPAs.*
>
> *National register of EPAs*
>
> *The QLRC considered whether the POA should be amended to require that all EPAs be registered. While the QLRC considered that registration has a number of benefits, on balance, the QLRC found that the burdens of mandatory registration would likely outweigh its benefits. Ultimately the QLRC did not recommend the registration of all EPAs.*
>
> *The Australian Law Reform Commission has recommended in its report* Elder Abuse – A National Response *that a national online register of enduring documents and court and tribunal appointments of guardians and financial administrators should be established. This recommendation was made on the basis that jurisdictions agree on nationally consistent laws governing guardianship and* [enduring] *powers of attorney, and the development of a national model enduring document.*

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235 Crime and Corruption Commission, submission 14, p 2.

236 Crime and Corruption Commission, submission 14, p 2.

237 Crime and Corruption Commission, public hearing transcript, Brisbane, 11 October 2017, p 21.

238 Crime and Corruption Commission, submission 14, p 2.

239 Crime and Corruption Commission, submission 14, p 2.

240 Submission 15; public hearing transcript, Brisbane, 11 October 2017, p 3.

Queensland is working with the Commonwealth and other states and territories as part of the Law, Crime and Community Safety Council's Working Group on Protecting the Rights of Older Australians, which will promote cross-jurisdictional collaboration to address elder abuse.

Criminal offence for financial abuse against an impaired adult

The Department notes that various inquiries have taken different and contrasting views on whether a specific criminal offence of elder abuse is required.

The QLRC recommended the development of a new offence dealing with financial abuse and exploitation of vulnerable persons (including older people, people with impaired capacity and people with disabilities) (recommendation 17.19). In contrast, the Australian Law Reform Commission in its 2014 report: Equality, Capacity and Disability in Commonwealth Laws *concluded that existing criminal laws adequately cover conduct which constitutes elder abuse and did not recommend the enactment of new offences for elder abuse.*

The Parliamentary Committee 'Inquiry into adequacy of existing financial protections for Queensland's seniors' (Inquiry) noted that fraud committed against seniors by electronic means is largely federally regulated. The Inquiry also noted that the Queensland Criminal Code contains a range of offence provisions for fraudulent acts which criminalise dishonestly obtaining advantage or benefit, pecuniary or otherwise from another person. The Inquiry did not recommend a specific offence for financial abuse against an adult with impaired capacity.

QLRC recommendation 17.19 is not being implemented by this Bill. The Queensland Government is working with the Commonwealth and other state and territory governments as part of the Law, Crime and Community Safety Council's Working Group on Protecting the Rights of Older Australians, which will promote cross-jurisdictional collaboration to address elder abuse.[241]

2.6.2 Informal substitute decision makers

Mr and Mrs Semple sought amendment of the Bill to give legal status to informal substitute decision makers for persons with impaired capacity, in particular for dealings with financial institutions and energy, telecommunications and health insurance companies.[242]

Department response

The department noted the issue and advised that any possible responses would require further consultation and consideration.[243]

2.6.3 Interjurisdictional matters

Mr Jenkinson highlighted difficulties that can arise in situations in which one or more key participants in a guardianship matter are resident outside Queensland, such as problems with accessing documents.

Department response

The department was unable to comment on the particular case referred to by Mr Jenkinson but explained that the GAA provides a process for orders of other jurisdictions that are similar to orders made under the GAA or POA Act to be registered by QCAT, with the effect of registration being generally that the order is treated as if it were an order made by QCAT. Similarly, an EPA or AHD that complies with legislation in another State may be treated as if it were an EPA or AHD under the POA Act to the extent the powers it gives could validly have been given by an EPA or AHD made under the

241 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 30-33.

242 WJ and AJ Semple, submission 1, pp 1-2. See also, Carolyn Lyell, submission 18, p 1.

243 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 3.

POA Act. The Bill would amend the POA Act to enable recognition of EPAs made in New Zealand, in addition to Australian states and territories.[244] The Bill also clarifies that QCAT may:

- order compensation in relation to former administrators and attorneys
- order a former, or current, attorney or administrator to file in QCAT records and audited accounts of the dealings and transactions conducted on behalf of the adult.[245]

With respect to QCAT liaising with interstate agencies including tribunals, QCAT advised that the tribunal 'considers and responds to general and other enquiries as need arises.'[246] Regarding QCAT's interactions with other tribunals concerning an adult who resides in Queensland:

- if the guardian or other appointee was appointed by Queensland but resided interstate, QCAT would make any necessary inquiries directly with the appointee, not the other jurisdiction's tribunal
- if the guardian or other appointee was appointed by another jurisdiction's tribunal, it would be the responsibility of the other jurisdiction's tribunal to take any actions specific to the appointment.[247]

2.6.4 Public Trustee

At the public hearing, the Public Advocate acknowledged the difficult role the Public Trustee has in ensuring that adults lacking capacity retain sufficient money for their needs, but commented that sometimes it means it is difficult for a client of the Public Trustee to make basic purchases. The Public Advocate gave the example of a client who was required to get three quotes for a bed.[248] ADAA added that tracksuit pants was another example.[249]

The Public Advocate recommended:

- the Public Trustee have a panel of financial advisors through which it rotates, and the composition of the panel be reviewed around every three years.[250] According to the Public Advocate, this would appear to be 'a much more defensible, accountable system.'[251]
- the Public Trustee not seek specialist financial advice for a client unless the client wants it, due to the fees involved.[252]

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244 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, pp 8-9; Department of Justice and Attorney-General, correspondence dated 13 October 2017, attachment, p 1. See also, cls 60, 84; *Powers of Attorney Act 1998*, s 34; *Acts Interpretation Act 1954*, s 33A. The Queensland Law Society expressed support for the amendment: submission 17, attachment, p 6.

245 Department of Justice and Attorney-General, correspondence dated 3 October 2017, attachment, p 9. See also, cls 36, 77.

246 Department of Justice and Attorney-General, correspondence dated 13 October 2017, attachment, p 2.

247 Department of Justice and Attorney-General, correspondence dated 13 October 2017, attachment, pp 1-2.

248 Public hearing transcript, Brisbane, 11 October 2017, p 22.

249 Public hearing transcript, Brisbane, 11 October 2017, p 22.

250 Public Advocate, public hearing transcript, Brisbane, 11 October 2017, p 22.

251 Public hearing transcript, Brisbane, 11 October 2017, p 22.

252 Public hearing transcript, Brisbane, 11 October 2017, p 23.

2.6.5 Stakeholder dissatisfaction with QCAT and Public Trustee

Some stakeholders expressed dissatisfaction with QCAT and the Public Trustee. Amongst other matters, these stakeholders were concerned with QCAT's jurisdiction over guardianship matters and the Public Trustee's handling of client finances and investments.[253]

Department response

The department advised that the matters raised in the submissions from Mr Young, Mr Jenkinson and Mr and Ms Lea about the performance of functions by QCAT and the Public Trustee are outside the scope of the Bill.

2.7 Committee comment

The committee wishes to thank the previous committee for its work in relation to the 2017 Bill. We note that, amongst other things, the previous committee received 18 submissions and held a public hearing at which more than a dozen individuals and organisations were represented.

The committee is pleased that the department considered the evidence given by witnesses at the previous committee's public hearing on the 2017 Bill and amended the Bill to resolve an issue identified by the QLS.

In its deliberations on the Bill, the committee took into account the evidence received by the previous committee in relation to the 2017 Bill as well as the additional information received about the 2018 Bill.

The committee notes that the Bill proposes to implement a number of the recommendations relating to guardianship made by the QLRC in *A review of Queensland's guardianship laws*, and to implement certain actions arising from the Queensland Government response to the report by the Communities, Disability Services and Domestic and Family Violence Prevention Committee titled *Inquiry into the adequacy of existing financial protections for Queensland seniors*. The Bill also proposes to implement recommendations made by the former FAC and the PCCC. The committee supports these proposed amendments.

The committee considers that other amendments proposed to be made by the Bill, such as enabling the appointment of an administrator for a missing person and providing a legislative exception to ademption in certain circumstances, would also be beneficial.

[253] Simone Lea, public hearing transcript, Brisbane, 11 October 2017, p 16; Simone and Robert Lea, submission 3, p 1 and submission 3a, p 1; Doug Young submission 2, p 1 and submission 2a, p 1; Public Advocate, public hearing transcript, Brisbane, 11 October 2017, p 22.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' (FLPs) are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the FLPs to the Bill. The committee brings the following to the attention of the House.

3.1.1 Rights and liberties of individuals – delegation of administrative power

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons.

Summary of provisions

Clause 41 inserts new s 250A into the GAA. Clause 78 also inserts the exact same provisions as contained in new s 250A, into the POA Act.

New s 250A(1) provides that if the Public Trustee has the power for a financial matter for an adult, the Public Trustee may delegate the power to:

(a) an appropriately qualified member of the Public Trustee's staff, or

(b) for day-to-day decisions about the matter:

(i) an appropriately qualified carer of the adult

(ii) an attorney under an enduring document

(iii) a person who would be eligible to be the adult's statutory health attorney

(iv) another person the public trustee considers appropriately qualified to exercise the power.

Clause 94 amends s 146 of the PGA.

Section 146(1A) provides that the Public Guardian may delegate the Public Guardian's powers under ss 29 (Cost of investigations and audits) and 106 (Engaging external contractor) to a senior executive or a senior officer.

Pursuant to s 146(1B), the Public Guardian may delegate the Public Guardian's powers under s 25(1) (Witnesses) to a senior executive. Section 25(1) of the PGA allows the Public Guardian to call witnesses to answer questions and produce documents.

Potential FLP issues

Clauses 41 and 78 allow the Public Trustee to delegate significant matters to certain persons and 'another person' the Public Trustee considers appropriately qualified to exercise the power. Clause 94 also provides the Public Guardian with a delegation power by way of section 146(1B) to call witnesses and request documents. The clauses may potentially breach s 4(3)(c) of the LSA which provides that the delegation of administrative power should only occur in appropriate cases and to appropriate persons.

Powers should only be delegated to appropriately qualified officers or employees. The OQPC Notebook provides that the appropriateness of a delegation depends on all the circumstances including the

nature of the power, its consequences and whether its use appears to require particular expertise or experience.[254]

The explanatory notes acknowledge the potential FLP in relation to cls 41 and 78, and provide the following justification:

> *The proposed amendments potentially depart from the principle that legislation should only allow the delegation of administrative power in appropriate cases and to appropriate persons.*
>
> *The proposed amendments are considered appropriate given the continued growth in the appointments of the Public Trustee as administrator for Queenslanders with impaired capacity for decision-making. The delegation is also limited to appropriately qualified officers/persons. Further the enhanced flexibility to delegate a power to make day-to-day decisions in certain circumstances where appropriate will ensure that decisions are made as efficiently as possible.*[255]

In relation to cl 94 the explanatory notes advise:

> *It is proposed to allow the Public Guardian to delegate the power (section 25) to require a person to attend before the Public Guardian and give information and answer questions, or produce requested documents/things in the context of an ongoing investigation. Given the quasi-judicial nature of the power, this power may only be delegated to another senior executive officer. As such the delegation of this power will be limited to an appropriately qualified senior executive officer within the meaning of the Acts Interpretation Act 1954. Further, any sub-delegation of this power is prohibited.*
>
> *The ability to recover costs of an investigation under certain circumstances (section 29) and to engage an external contractor (section 106) is commensurate with other powers that senior officers exercise in the Public Service. As such it is considered appropriate to also allow the Public Guardian to delegate these powers, but to limit any delegation to an appropriately qualified senior officer within the Public Guardian's office. Further, any further sub-delegation of these powers is prohibited.*[256]

Committee comment

The committee notes that the Public Trustee currently has a delegation power to transfer property and execute documents pursuant to s 11A of the *Public Trustee Act 1978*. In extending the Public Trustee's powers under cls 41 and 78, the committee has considered the justification provided - that the clauses seek to address the continued growth in circumstances where the Public Trustee is appointed as administrator, by allowing for the appointment of a wider range of appropriately qualified persons. Section 250A(1)(b)(iv) will provide the Public Trustee with a wide discretion to delegate a function to another person that the Public Trustee considers appropriately qualified to exercise the particular power.

In relation to cl 94 and the power to delegate under s 25 of the PGA, the committee notes that given the importance of the function the delegation will be limited to senior officers only. Similarly, in relation to cls 29 and 106, the delegation power will be limited to a senior executive or a senior officer.

3.1.2 Immunity from proceedings

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

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254 Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 33.

255 Explanatory notes, p 18.

256 Explanatory notes, p 18.

Summary of provisions

Current s 247 of the GAA provides protection for whistle-blowers in circumstances where an actual breach of guardianship laws has occurred.

New s 247(1)(a) provides that a person is not liable, civilly, criminally or under an administrative process, for disclosing information to an official if the person honestly believes, on reasonable grounds, that the information tends to show:

(i) another person has contravened the Act, the POA Act or the PGA, or

(ii) an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse.

A person is also not civilly or criminally liable under s 247(1)(b) if the information would help in the assessment or investigation of a complaint that another person has contravened the Act, the POA Act or the PGA; or an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse.

The committee notes that the amendment to s 247 was recommended in the QLRC Report.[257]

Potential FLP issues

It may be argued that the greater protections afforded by the amended provision will allow more scope for individuals to make ill-informed and/or baseless allegations against persons in relation to the use of an EPA or the administration of a person's affairs in circumstances where the person is ultimately found to have acted appropriately. This potentially breaches s 4(3)(h) of the LSA which provides that legislation should not confer immunity from proceeding or prosecution without adequate justification.

The OQPC Notebook states that a person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence … and if liability is removed it is usually shifted to the State.

The explanatory notes acknowledge the potential FLP and provide the following justification:

> *Currently, the whistle-blowers' protection in existing section 247GAA is applicable only in instances where an actual breach of the guardianship legislation is revealed. Whether an allegation amounts to an actual breach is usually not known until the completion of an investigation. This could act as a potential disincentive for a person disclosing information and does not align with disclosure provisions under the PID Act which enables the lawful disclosure of broader information than the GAA does currently. The amendment is considered justified as the departure will align the GAA with the PID Act and help ensure that infringements on the rights of people with impaired capacity are identified and appropriate action is taken.*

Committee comment

Although cl 39 would allow individuals more scope to report untested allegations, the committee notes that the rationale behind the provision is to provide a greater incentive to persons to disclose information more readily in order that guardianship agencies can respond as soon as possible to cases where a person with impaired capacity is being abused, exploited or neglected. The provision provides immunity only to those persons who have acted honesty and on reasonable grounds, in keeping with the view of the OQPC Notebook.

[257] Recommendation 27.1.

The committee also notes that the amended provision is designed to align with the PID Act in order to provide a more consistent approach to disclosures with respect to guardianship matters.

3.1.3 Delegation of legislative power

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

Summary of provisions

Clause 41 inserts new section 250 into the GAA.

Section 250(1) provides that the Minister is to prepare guidelines in order to assist required persons to make assessments about the capacity of adults to make decisions. Pursuant to s 250(2), the guidelines are to include:

(a) principles to be applied in making assessments about the capacity of adults to make decisions about matters

(b) information and advice that will give practicable guidance for making the assessments.

Section 250(3) provides that in preparing the guidelines the Minister must consult with persons who have qualifications relevant to, or experience in, making assessments about the capacity of adults to make decisions about matters.

The guidelines are to be published on the department's website by way of s 250(4), with s 250(5) providing that the Minister is to review the guidelines at least every 5 years.

Potential FLP issues

The making of guidelines in relation to capacity was a recommendation in the QLRC Report. The QLRC recommended that the guidelines should be made in subordinate legislation. However, the explanatory notes advise that it is not proposed that the guidelines will be provided in subordinate legislation. Given the significance of the information contained in the guidelines and the fact they will not be subject to parliamentary scrutiny, cl 41 potentially breaches s 4(4)(a) of the LSA which provides that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons. As noted in the OQPC Notebook, this matter is concerned with the level at which delegated legislative power is used.

In their submission to the committee, the Office of the Public Advocate while supporting the guidelines, raised concerns as to their publication on the department's website:

> *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.qov.au/ which is consistent with the government's one-stop shop approach for people's interactions with government services and policies.[258]

The explanatory notes acknowledge the potential FLP breach and provide the following justification:

It is not proposed that the guidelines be provided for in subordinate legislation. It is intended that they act as a complementary educative tool for individuals or entities that have to make a determination about an adult's capacity, e.g. an attorney or administrator or a witness to an enduring document. As noted they are required to be prepared in consultation with relevant experts.

The consequence of a finding of impaired capacity is that the adult will no longer be able to exercise decision-making autonomy for a matter. Consequently, the QLRC considered it important that guidelines be developed to assist individuals, such as substituted decision-makers, in assessing whether an adult has capacity to make a decision for a matter. The majority of stakeholders in their submission to the QLRC supported the proposal. It is argued that the departure is justified on the basis that it will provide practical assistance to individuals or entities required to assess an adult's capacity.

Committee comment

The committee notes that in relation to the making of the guidelines, new s 250 provides that the Minister must consult with persons who have an expertise in making assessments about the capacity of adults to make decisions. There is also a review process whereby the Minister must conduct an assessment of the guidelines at least every five years.

Although the guidelines will not appear in subordinate legislation it is intended that they will be publically available for interested parties on the department's website. The committee notes the concerns raised by the Office of the Public Advocate in this regard and their suggestion that the guidelines be published on the Queensland government website.

3.2 Proposed amended offence provision

Clause	Offence	Proposed maximum penalty
40	**Amendment of *Guardianship and Administration Act 2000*** **Insertion of new 247B Offence of taking reprisal** (1) A person must not take a reprisal. (2) An offence against subsection (1) is an indictable offence that is a misdemeanour.	167 penalty units or 2 years imprisonment

3.3 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

[258] Office of the Public Advocate, submission 9, p 4.

Appendix A – List of submissions

Sub #	Submitter
001	Bill and Alison Semple
002	Doug Young
002a	Doug Young
003	Simone and Robert Lea
003a	Simone and Robert Lea
004	Chris Jenkinson
005	Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd
006	John Tracey
007	Aged and Disability Advocacy Australia
008	TASC National Limited
009	Office of the Public Advocate
010	Queensland Nurses and Midwives' Union
011	Royal Australian & New Zealand College of Psychiatrists
012	Townsville Community Legal Service and Caxton Legal Centre, Inc.
013	Medical Insurance Group Australia ("MIGA")
014	Crime and Corruption Commission
015	Richard Worley
016	Queensland Advocacy Incorporated
017	Queensland Law Society

Appendix B – List of witnesses at public briefing and hearing

Public briefing

11 October 2017

Department of Justice and Attorney-General

- Mrs Leanne Robertson, Acting Assistant Director-General, Strategic Policy and Legal Services
- Mrs Kim Chandler, Acting Director, Strategic Policy and Legal Services

Public hearing

11 October 2017

- Ms Roslyn Murray, on behalf of Alison and Bill Semple
- Mr Chris and Mrs Debbie Jenkinson
- Mr John Tracey
- Mr Richard Worley
- Ms Michele Sheehan, Deputy Chair, QLS Succession Law Committee, Queensland Law Society
- Mr Brian Herd, Deputy Chair, QLS Elder Law Committee, Queensland Law Society
- Ms Vanessa Krulin, Senior Policy Solicitor, Queensland Law Society
- Ms Klaire Coles, Senior Lawyer, General Practice, Caxton Legal Centre Inc
- Mr Timothy Bowen, Senior Solicitor, Advocacy, Claims and Education, MIGA
- Ms Simone Lea
- Mr Doug Young
- Ms Carolyn Lyell
- Ms Mary Burgess, Public Advocate, Office of the Public Advocate
- Ms Michelle O'Flynn, Director, Queensland Advocacy Incorporated
- Ms Emma Phillips, Systems Advocate, Queensland Advocacy Incorporated
- Ms Karen Williams, Manager, Guardianship Team, Aged and Disability Advocacy Australia
- Mr Rob Hutchings, Director Legal Services, Crime and Corruption Commission

Statement of reservation

Mr Peter Russo MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Russo,

Re: Statement of Reservations - Guardianship and Administration and Other Legislation Amendment Bill 2018

We note the Legal Affairs and Community Safety's Committee's examination of the Guardianship and Administration and Other Legislation Amendment Bill 2018.

We wish to place on the record our reservations about certain aspects of the Guardianship and Administration and Other Legislation Amendment Bill 2018.

The Queensland Opposition will detail these reservations and the reasons for the reservations during the Parliamentary debate on the Guardianship and Administration and Other Legislation Amendment Bill 2018.

Yours Sincerely,

James Lister MP
MEMBER FOR SOUTHERN DOWNS
22 March 2018

Jim McDonald MP
MEMBER FOR LOCKYER
22/3/18