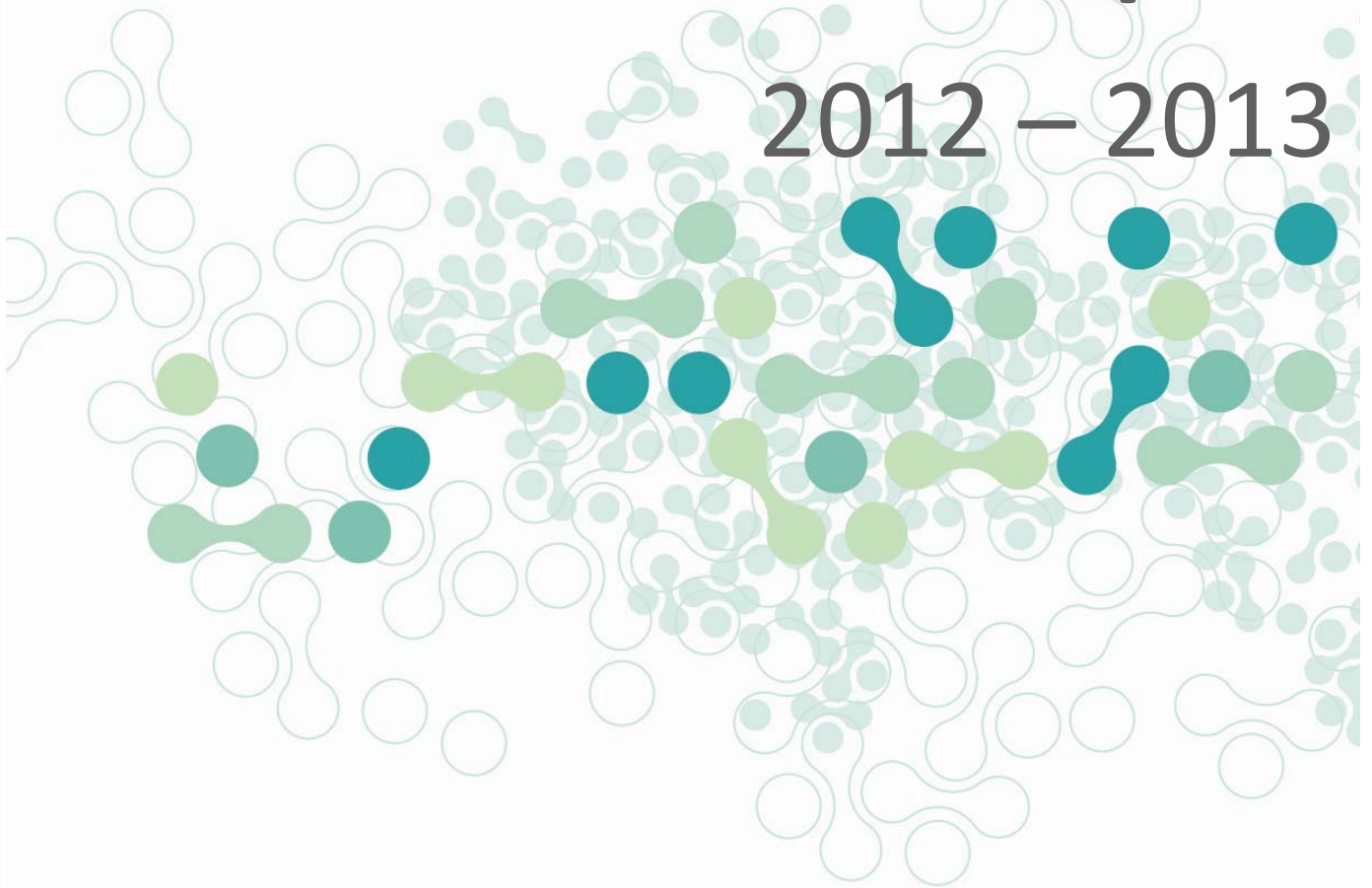


- HUMAN RIGHTS 
- JUSTICE 
- INCLUSION 
- EVERYONE 
- ALWAYS 

# Annual Report

2012 – 2013



adult guardian

The Honourable Jarrod Bleijie MP  
Attorney-General and Minister for Justice  
State Law Building  
Brisbane Qld 4000

31 October 2013

Dear Attorney,

It is my pleasure to present to you the Adult Guardian's fourteenth annual report for the financial year ended 30 June 2013.

The report is made in accordance with the requirements of section 206 of the *Guardianship and Administration Act 2000*.

The report details the work of the office during the year and gives a statistical and descriptive overview of the discharge of the Adult Guardians' statutory responsibilities in protecting the rights and interests of adults with impaired capacity.

Yours sincerely,



Kevin Martin  
Adult Guardian

## Table of Contents

Adult Guardian – review	4
Our role	8
Community Visitors	9
Investigating allegations of abuse, neglect and exploitation	13
Substitute decision-making	20
Making health care decisions	29
Protecting the legal rights of clients	32
Other activities: 2012-13	35
Appendix 1 Performance	36
Appendix 2 Organisational chart	37
Appendix 3 Statutory roles and functions	38
Appendix 4 General Principles	40
Appendix 5 Health Care Principle	42
Contacting the OAG and CVP	43

## Adult Guardian's review: 2012-13

I was appointed to the role of Adult Guardian of Queensland on 13 August 2012 which was a time of change in the Queensland Public Sector following the election of the Newman government.

The Adult Guardian is an institution dedicated to protecting the human rights of adults with impaired capacity. It operates through offices situated in Brisbane, Ipswich and Townsville but exercises responsibility for adults for whom it is appointed throughout the whole of Queensland.

### Fundamental role

The Office of the Adult Guardian is very conscious of the fundamental principle of Queensland law that all adults are presumed to possess the legal capacity to make decisions for and about themselves and that this capacity is only able to be rebutted following the production of cogent evidence that, on the balance of probabilities, enables an independent tribunal, the Queensland Civil and Administrative Tribunal [QCAT] to make a decision that a person lacks sufficient capacity so as to justify the appointment of an administrator and/or guardian for general or limited purposes.

The OAG is always conscious that, when appointed, the OAG must always operate in accordance with the General and Health Care Principles as set out in the *Guardianship and Administration Act 2000*. These principles are based on the fundamental principles reflected in International Instruments such as the *Universal Declaration on Human Rights* and the *United Nations Convention on the Rights of Persons with Disabilities*.

### Continuous review of justification for appointment

Whilst it is acknowledged that all appointments of OAG by QCAT are subject to regular review by QCAT at times specified in the appointment, the OAG has adopted an active policy of continually reviewing the need for the continuation of the involvement of OAG in a person's life.

Where the OAG forms the view that there is no longer a need for the appointment of a guardian in a person's life or where it forms the view that another person [relative/friend, etc] would be better able to perform the duties of OAG then appropriate applications are brought to QCAT for a variation or termination in the appointments previously made.

The OAG acts only as a guardian of last resort when there is no other person more suitable to be appointed. Strong emphasis is continually placed by the OAG on recognizing and maximising the personal freedom and capacity of the individual for whom they are appointed.

### Reform of the laws affecting guardianship in Queensland

In September 2010 the Queensland Law Reform Commission [QLRC] delivered to the then Queensland government a 4 Volume Report containing 317 Recommendations seeking to further reform the laws regulating Guardianship in

Queensland. The then government in October 2011 tabled an initial response to that Report that addressed certain of the Recommendations but left others for further consideration. No legislation of substance resulted from that consideration.

Following my appointment as Adult Guardian a small committee, comprising the Adult Guardian, the Public Advocate and a Ministerial Policy Adviser, was appointed to review the QLRC Recommendations and make recommendations to the Attorney General and Minister for Justice about advancing these Recommendations by the Newman government. After considerable work and consultation a comprehensive Committee Report on the QLRC Recommendations was submitted in June 2013 to the Attorney General and Minister for Justice to await his policy direction as to future action.

### **Restrictive practices**

Pursuant to the *Disability Services Act 2006* and the *Guardianship and Administration Act 2000* the OAG plays an important role in regulating and monitoring the application of Restrictive Practices to persons with impaired capacity.

Restrictive Practices, unless delivered by Service Providers in accordance with an approved Personal Behaviour Support Plan [PBSP], prima facie would constitute a criminal offence or provide a basis for a civil action. It is therefore important in protecting the human rights of individuals who might be subject to Restrictive Practices to ensure that the Restrictive Practice is only applied strictly within the terms of the plan that is approved.

Given the complexity of the behaviours to which PBSP's are directed this means that a significant administrative burden must be discharged not only by the Service Providers who prepare the plan but also by the OAG staff who are delegated with the responsibility of approving the plan. Considerable attention has been directed by the OAG as well as the primary Department, the Department of Communities, Disability Support and Child Safety [DCDSCS], in attempting to devise mechanisms that will improve administrative efficiency and reduce red tape whilst at the same time ensuring the proper protection of the human rights of individuals subject to restrictive practices.

It is hoped that in 2014 Government consideration of the results of consultation on a Discussion Paper on Restrictive Practices issued in mid 2013 will lead to significant improvement in current practices.

### **National Disability Insurance Scheme (NDIS)**

In 2012-13 the creation of a NDIS (or DisabilityCare Australia) became the policy accepted by both the Commonwealth and Queensland Governments. Whilst Queensland is not hosting a trial site for NDIS, as is occurring in some other States, the Queensland Department of Disability Services is currently implementing an individually directed funding mechanism for persons with disability under the Your Life Your Choice program.

Whilst both approaches represent a significant advance in providing those individuals with a disability with the opportunity for a more satisfying and fulfilling life, the fundamental principle underlying both schemes (that of individual choice and

decision making) poses particular problems for individuals who may have impaired capacity and for whom it is necessary to have someone formally or informally make decisions on their behalf.

The OAG, operating through the national body the Australian Guardianship and Administration Conference (AGAC), has sought to enter into active dialogue with the authorities charged with the responsibility of creating DisabilityCare Australia to ensure that the rights of individuals with impaired capacity are properly recognised and protected in the mechanisms that are in the process of being developed. In Queensland active consultation has taken place with the Your Life Your Choice program seeking to achieve a similar outcome. By addressing issues at the developmental stage it is hoped to ensure that all individuals, whether with impaired capacity or not, can maximise the benefits achievable under these new schemes.

### **Community Outreach**

As Adult Guardian it is clear that there is a necessity to engage in active dialogue with all elements of the community in order to be aware of the various views and arguments advanced about the best approach to be adopted to address the issues confronting those persons who form the office's client base.

It is also clear that there is a community wide need for enhanced community education in relation to the use of the Enduring Instrument's that empower an individual to make preparation in advance for the vicissitudes of life. Through the use of Enduring Powers of Attorney and Advance Health Directives the Queensland Parliament empowers individual Queenslanders to make provision to make decisions about themselves and their future health care should they suffer a future loss of capacity.

Individual Empowerment avoids the necessity for any form of community intervention in a person's life thus protecting the individual person's self worth as well as saving the community having to provide the resources necessary to establish and operate bodies such as the OAG.

Discussions are continuing with other bodies such as the Public Trustee and QCAT with the objective of enhancing community education during 2014 with the objective of enabling an individual to maximise control over their own life decisions

### **Community Visitors**

Community Visitors play a vital role in protecting the human rights of persons who are housed in a variety of funded service provision facilities. Through a program of regular and unannounced visits they provide an opportunity for individuals to raise issues with an independent and impartial person outside their service providers as well as being able, through their observations, to identify issues with facilities and practices that have the potential to impact on the rights of individuals with limited capacity to protect themselves.

A program to recruit new Community Visitors and spread their operations to a greater range of facilities has been successfully implemented and has led to demonstrated improvements in a number of areas.

## **Research**

The OAG is actively participating with the Public Advocate in conducting research into issues affecting our client base. Through the Community Visitors program extensive research has been undertaken in relation to the use of Electronic Monitoring at sites that are visited. Whilst Electronic Monitoring can be justified on the grounds of providing enhanced security and improved identification of problems for clients of institutions, its use does raise significant issues involving the protection of the personal privacy of clients with impaired capacity who may not be able to protect themselves in the same manner as citizens generally. Results of the research conducted to date are being analysed to identify if there are problems that need further consideration.

## **Staff**

No organization can operate effectively without highly skilled and motivated staff that is dedicated to achieving the best possible outcome for their clients.

Since assuming office I have been impressed by the dedication shown by the staff of the OAG to achieve the best possible outcomes for our clients in circumstances where options can be limited because of factors both external to, and arising from, the behaviour of clients.

Not all decisions made necessarily accord with the views of all individuals with an interest of a client. Officers of the OAG, however, are always ready to be held accountable for the often difficult decisions that they make, often in very trying circumstances.

During the year we have finally commenced the process of achieving permanency in appointment for staff who, over the last 2 years, due to a variety of external factors, have been employed on temporary rolling 3 month contracts. The use of an open merit selection process to fill these appointments does impose a significant administrative burden on the organization but it is gradually providing an increased level of security in employment for staff thus leading to better outcomes for our clients.

The types of clients and families that the officers of the OAG inter-relate with pose many challenges. In particular I want to commend those officers from the Townsville Office who through their dedicated work have over the years assisted well over 100 “Park People” to move from a transient life where the provision of services is difficult into a more settled pattern of accommodation through which they can obtain the services to which they are entitled. It is to be hoped that this successful approach might be able to be replicated in other areas of Queensland where people living such a life style pose a challenge to the community.

Kevin Martin  
Adult Guardian

## Our role

The role of the Adult Guardian is to protect the rights and interests of adults who have impaired capacity for a matter. The Adult Guardian does this by:

- ⇒ *Protecting from neglect, exploitation or abuse*
- ⇒ *Investigating abuse, neglect and exploitation*
- ⇒ *Substitute decision-making (as attorney, guardian or statutory health attorney)*
- ⇒ *Approving the use of restrictive practices*
- ⇒ *Consenting to a forensic examination*
- ⇒ *Seeking help and making representations*
- ⇒ *Educating, advising and conducting research*
- ⇒ *Mediating and conciliating*

The Adult Guardian also oversees the Community Visitor Program

- ⇒ *Safeguarding the interests of vulnerable adults*



## Community Visitors

### Overview

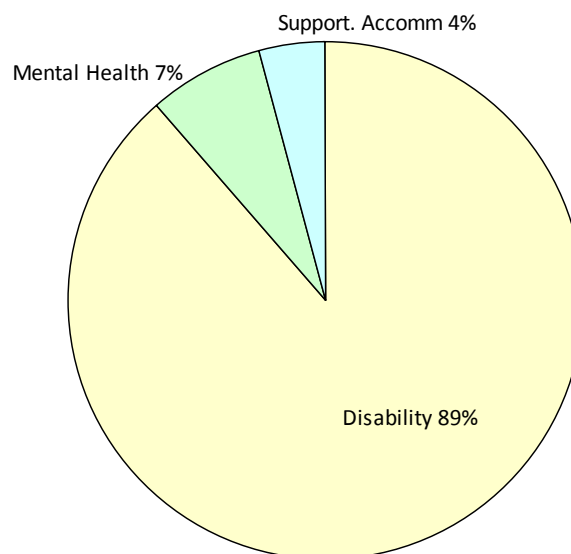
During 2012-13, Community Visitors helped to protect the rights and interests of up to **6,000 vulnerable people**<sup>1</sup> who were living in residential facilities. Community Visitors did this by making **4,700 visits** to just over **1,000** government-funded disability services, authorised Mental Health Services (both public and private), and privately-operated supported accommodation services regulated under the *Residential Services (Accreditation) Act 2002*.

As at 30 June 2013, there were a total of **21** Community Visitors, and further recruitment is planned for early in 2013-14.

In 2012-13 there was a net growth of **72 visitable sites**. Most of these were existing disability sites, brought within scope as a result of notifications by the Department of Communities, Child Safety and Disability Services. Two privately-operated supported accommodation hostels closed during the year.

### Site characteristics

*Type of facilities (as at 30 June 2013)*



Although disability facilities make up 89 per cent of all sites, they house only **50 per cent** of all consumers. Authorised Mental Health facilities account for some **28 per cent** of all consumers, and supported accommodation for the remaining **22 per cent**.

<sup>1</sup> This figure refers to the total capacity of all sites attended by Community Visitors.

## Operating agencies

Operating agency	Proportion of all sites	Proportion of all consumers
Queensland Health *	7 %	26 %
Department of Communities **	18 %	10 %
Non-government agencies ***	75 %	64 %

\* *mostly Authorised Mental Health Services*

\*\* *accommodation & support services for people with significant disabilities*

\*\*\* *private supported accommodation, for-profit mental health services and funded disability support providers (both non-profit and for-profit).*

**One-quarter** of all sites are government-operated, and house **36 per cent** of all residents who are visited by Community Visitors.<sup>2</sup>

On average, there are **6 residents** per visitable site. Disability sites are generally smaller (ave. 3 residents) and supported accommodation sites are larger (ave. 31).

### No. of residents living in CVP sites

<b>1-2</b> people	37% of all CVP sites
<b>3-4</b>	39%
<b>5-10</b>	12%
<b>11+</b>	12%

The above figures highlight two issues:

*Resource implications:* 76 per cent of all sites are very small (i.e. they house fewer than 5 people)

*Ongoing institutionalisation:* 14 sites are very large (i.e. 50 or more people). Up to 1,050 people live in these facilities in total.

### Geographic distribution of CVP sites

Brisbane North	168	Wide Bay	68
Brisbane South	237	Rockhampton	45
Gold Coast	93	Mackay	21
Ipswich	164	Townsville	54
Toowoomba	41	Cairns	49
Sunshine Coast	78		

<sup>2</sup> At 30 June 2013, there were 196 CVP sites (housing 639 residents) operated by the Department of Communities, Child Safety and Disability Services (Accommodation Support & Respite Services). AS&RS has been earmarked by Government for transition to the non-government sector.

## Visits undertaken

Community visitors conducted some **4,700 visits** to these sites, an increase of **9 per cent** over the previous year. Of these visits:

Visit types	
83 %	Un-announced visits
13 %	Announced visits
4 %	Third party-requested visits

### Unannounced visits

Most visits undertaken by Community Visitors are “unannounced”. Just under 10 per cent of all visits were “incomplete” for various reasons (e.g. residents not at home at time of visit), and required a follow-up visit.

### Announced visits

Just over 600 visits were pre-arranged (“announced visits”). Eighty per cent of these were initial visits by the Community Visitor to the site. The remainder were pre-arranged so that the visitor could discuss ongoing issues of concern with site management. Announced visits play an important part of escalating and resolving ongoing issues of concern.

### Requested visits

Under s.226 GAA a consumer at a visitable site, or a person acting for them, may request a visit by a Community Visitor. Where this occurs, the Community Visitor has an obligation to visit. In 2012-13 there were **175** requested visits (3.7 per cent of the total).

- **97** visits requested by a range of third parties including government agencies, consumers, families, service providers and members of the community.
- **60** visits requested by the Queensland Civil and Administrative Tribunal for the purpose of restrictive-practices tribunal hearings.
- **18** visits requested by staff of the Office of the Adult Guardian, in response to identified risk to OAG guardianship clients.

## Other CVP activities for 2012-13

### *Notification of consumer deaths*

Under the *Coroners Act 2003*, a “death in care” must be reported to the State Coroner. This includes people with a disability living in supported accommodation hostels, funded disability services or residential health services, or people under the *Forensic Disability Act 2011* or the *Mental Health Act 2000*. During 2012-13, Community Visitors made **54 notifications** of consumer deaths in visitable sites to the State Coroner.

### ***Monitoring the use of restrictive practices***

In 2012-13, the Community Visitor Program recommenced the provision of reports to the Queensland Civil and Administrative Tribunal (QCAT) for the purposes of hearings on restrictive practices matters.<sup>3</sup> An abridged report template was created, and **60 visits** were conducted by Community Visitors in the last quarter of 2012-13 at the request of QCAT, for the purposes of gathering information on the use of restrictive practices in certain visitable sites.

These reports were provided to the Tribunal to assist its decision-making about the approval of containment/seclusion and the appointment of guardians for restrictive practices matters. They represent an important part of the protection of rights for vulnerable adults who are subject to the use of restrictive practices, as Community Visitors will frequently have access to *on-the-ground* information and views which may not otherwise be available to the Tribunal.

### ***Electronic monitoring of consumers in visitable sites***

In 2013 the Adult Guardian and Public Advocate jointly initiated a targeted inquiry into the use of electronic monitoring at disability accommodation sites, as a result of concerns identified by Community Visitors that consumers' rights were being compromised by the use of electronic monitoring by service providers.

From March - June 2013 Community Visitors completed almost 900 surveys at disability sites while conducting their regular visits. Preliminary figures indicate that **12 per cent** of all disability accommodation sites (total 103) use electronic monitoring of consumers in their homes, and that audio monitors are most commonly used (75%). Services most frequently reported that electronic monitoring is used due to their concerns about consumers' health matters, or fears that consumers may experience harm (either accidentally or by third parties). In some cases, it was reported that some consumers were being unintentionally monitored by electronic devices.

An analysis of the survey data will be undertaken in early 2013-14, and a joint Adult Guardian-Public Advocate report will subsequently be released. It is intended that the report will highlight concerns about the potential breaches of privacy involved in the electronic monitoring of consumers in their own homes, and make recommendations to government about the need for robust safeguards to be in place where its use is deemed essential.

### ***Referral of high-risk concerns***

During 2012-13, the Community Visitor Program continued to refer high-risk consumer concerns to external agencies with the appropriate powers to investigate and protect.

A referral was made to the Health Quality and Complaints Commission when a Community Visitor found that a hospital had reportedly performed major surgery – the full extraction of all teeth – on a consumer with an intellectual disability *without* advising or seeking consent from his statutory health attorney. This represents a fundamental breach of the man's human rights and is contrary to both the provisions of Queensland's guardianship legislation and the Australian Charter of HealthCare Rights. The CVP is awaiting the outcome of the Commission's investigation.

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<sup>3</sup> *These reports had previously been undertaken, but had been ceased due to budgetary pressures.*

## Investigating allegations of abuse, neglect or exploitation<sup>4</sup>

	2012-13	2011-12
Active investigations at start of year	118	101
New investigations commenced	184	224
Investigations concluded	203	263
Active investigations at end of year	116	118

### The Adult Guardian's investigatory role

The OAG's investigatory framework is characterised by the following:

- The Adult Guardian's statutory function is to investigate complaints or allegations about attorneys, guardians/administrators or a person acting under an enduring document or an order of the Tribunal (s.174(2)(b) GAA).
- The primary focus is on the protection of the vulnerable person, rather than the pursuit of an alleged perpetrator.
- Although the Adult Guardian is provided with a limited range of (formal) protective powers, there is a commitment to resolving issues in the least intrusive manner, where possible and appropriate. Of those matters in 2012-13 where protective action was taken following an investigation, almost one-third were resolved informally (i.e. provision of advice/direction or mediation).
- The presumption of capacity must be rebutted before an investigation can proceed, as the Adult Guardian's jurisdiction only commences if the evidence indicates that a person lacks capacity to make decisions for themselves.
- The Adult Guardian will usually not investigate matters which are more appropriately handled by other agencies (e.g. complaints which relate to the quality of disability service provision are more appropriately handled by the Department of Communities, Child Safety and Disability Services.)
- An investigation will discontinue if the adult in question has died. In 2012-13, a small number of adults died before an investigation could be concluded. As with the previous year, the average age of these adults was 85 years.

### Snapshot

In 2012-13, the OAG commenced **184** new investigations into allegations of abuse, neglect or exploitation of adults with impaired capacity, down from 224 the previous year. During the year, the OAG delivered investigatory services in relation to a total of **302 individuals** with impaired decision-making capacity. A total of **203** investigations were concluded during the year, down from 263 in 2011-12.

<sup>4</sup> Due to changes in data collection methodology, comparisons in statistics between 2012-13 and previous years may not be accurate, except where previous figures are provided.

Although the figures for 2012-13 show a reduction from the previous year, the patterns are broadly consistent with the 5-year average. The average duration of investigations concluded during the year was **32 weeks**, against a *Service Delivery Statement* benchmark of 24 weeks.

In addition to the increasing complexity of investigations, the average (i.e. mean) closure rate also reflects a concerted effort undertaken by the team to close those investigations which had been ongoing for some time, including 8 matters which had been ongoing for more than 18 months. (That is, a relatively small number of outliers has the effect of skewing the overall average closure rate.)

Notwithstanding the average closure rate for the year, more than 50 per cent of all investigations were completed in under 6 months, and more than 75 per cent within 12 months.

The observed reduction in the number of new and concluded investigation from the previous year is linked to an increase in the complexity and duration of investigations, specifically:

#### **Investigating “financial matters”**

These investigations are increasingly characterised by the adult having significant assets, highly complex financial structures in place, as well as the involvement of legal representatives by the respondents to the investigation.

#### **Investigating “personal matters”**

In more than 50 per cent of all investigations into non-financial matters, the allegations related to social isolation/restriction of contact, conflict between decision-makers impacting the adult and/or questions about the adult’s capacity to sign an enduring document. These allegations require considerably greater investigatory work, and a clear conclusion of substantiation (on the balance of probabilities) is often difficult to reach.

#### **Informal resolution**

Although the informal resolution of concerns is preferred (where this is appropriate and possible), this outcome invariably requires greater resources. For example, almost **15 per cent** of all investigation matters were concluded through mediation or the provision of advice/direction to an attorney. These matters took an average of 10.8 months to complete.

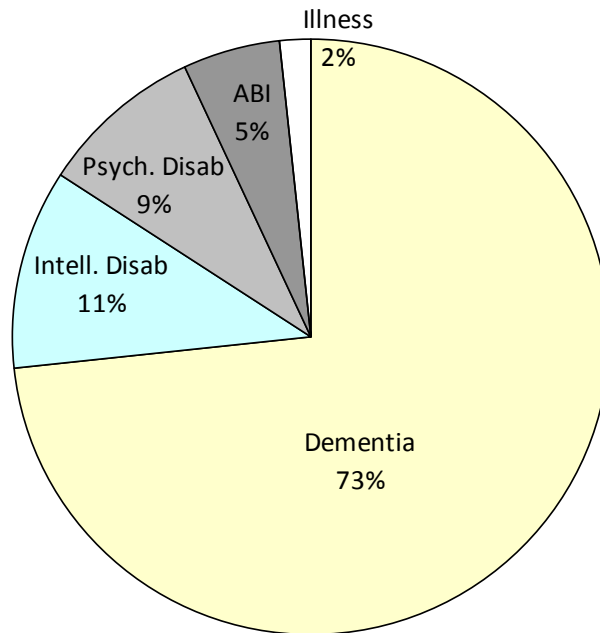
Of all investigations concluded during the year, **56 per cent** were assessed as Priority 1 or 2 matters. (Investigations are assessed on a 5-point scale, with 1 being the highest level of urgency/risk).

## **Demographics of adults subject to an OAG investigation**

The demographic profile of adults who were the subject of an OAG investigation concluded during 2012-13 is consistent with that of previous years, as detailed below.

In general, most investigations undertaken by the OAG relate to older adults with impaired capacity. Women are more heavily represented than men, and the cause of the adults’ cognitive impairment is primarily dementia.

## *Nature of impaired capacity*



## *Age of adults*

Average age of adults	<b>76 years</b>
• under 65 years	<b>19 %</b>
• 65 years and over	<b>81 %</b>

Less than **8 per cent** of all adults who were subject to an investigation were aged under 35 years.

## *Gender of adults*

Males	<b>33 %</b>
Females	<b>67 %</b>

## **Nature of allegations investigated**

Investigations may be made into allegations about the abuse, neglect or exploitation of a person's financial, personal and/or healthcare matters.

**Financial** abuse/exploitation may include:

- Fraud/theft
- Conflict transactions
- Non-payment of nursing home fees

**Personal** matters may include:

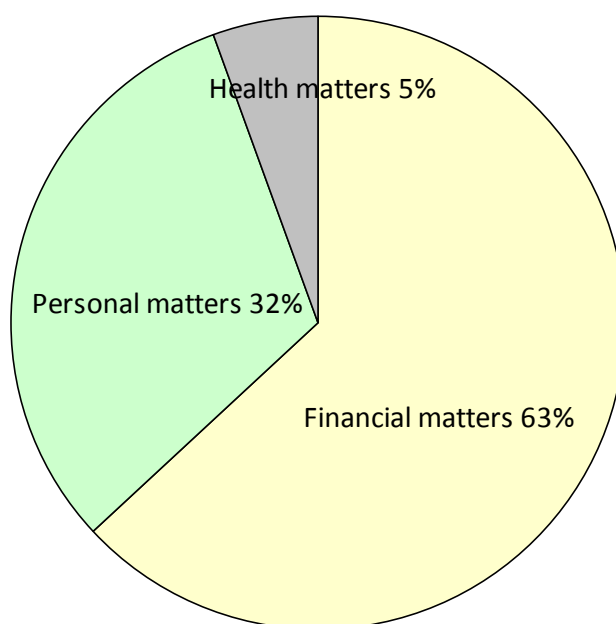
- Abuse (physical, sexual, emotional)
- Neglect (incl. preventing the adult from accessing necessary services)
- Social isolation (restricting the adult's contact with others)
- Self neglect

- Conflict occurring between attorneys/guardians which adversely impacts their ability to make appropriate decisions for the adult
- Inadequate or inappropriate decision-making arrangements in place.

### Primary allegations

The nature of investigations conducted was broadly consistent with previous years, as the pie chart illustrates below. Investigations where the primary allegation involved financial matters increased from **57 to 63 per cent**, and there was a concomitant decrease in investigations into personal matters from **38 to 32 per cent**.

### Primary allegations



However, more than one-half of all investigations active during the year focussed on allegations of both financial and personal abuse or exploitation, as illustrated below.

### Types of allegations under investigation

*(all investigations active during the year)*

<i>Allegations involving –</i>	Financial matters only	28 %
	Personal/health matters only	18 %
	Financial <u>and</u> personal/health	54 %

As noted above, allegations involving personal matters encompasses a wide range of different issues.



**Investigation relating to “Personal Matters”**  
(all investigations active during the year)

<i>Proportion of all investigations into Personal Matters which involve allegations of –</i>	Neglect	24 %
	Physical abuse/assault	9 %
	Emotional abuse	9 %
	Self neglect	6 %
	Sexual abuse	1 %
	Other *	51 %

\* *Other primarily includes:*

- Restricting contact between the adult and others (e.g. family members)*
- The adult lacked capacity to sign an EPA/will or to sell property*
- Conflict between decision-makers which impacts on the adult*

With regard to allegations of financial abuse/exploitation, a large number of these involved significant financial assets.

**Size of assets** (allegations of financial abuse or exploitation)

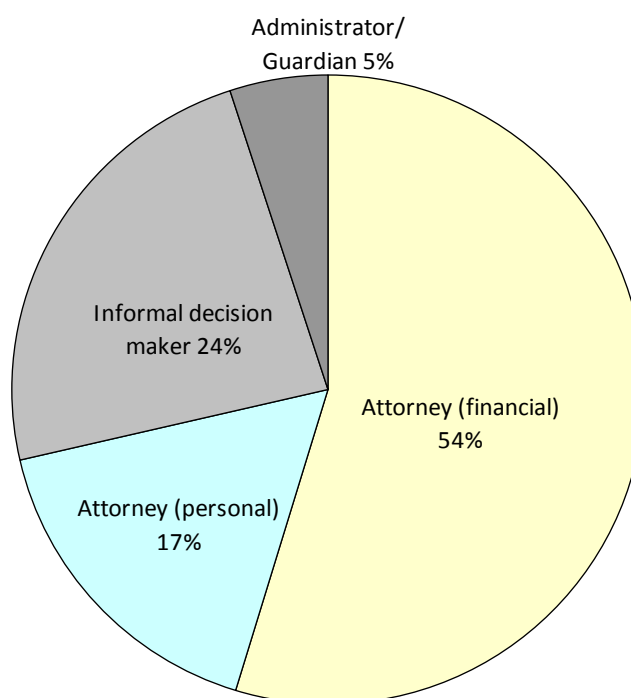
<i>More than \$100,000</i>	<i>54 %</i>
<i>\$50,000 - \$100,000</i>	<i>4 %</i>
<i>Less than \$50,000</i>	<i>20 %</i>
<i>Unknown</i>	<i>22 %</i>

## Nature of the respondents

The broad trends with respect to the respondents in investigations concluded by the OAG during the year are consistent with previous years. However there were 2 notable differences:

- Attorneys for financial matters accounted for **54 percent** of all respondents (up from 48 per cent in 2011-12)
- Informal decision-makers accounted for **24 per cent** (down from 30 per cent in 2011-12)

## *Respondents to the investigation*



## **Investigation outcomes**

Each investigation matter is unique and progresses in a different manner, depending on the adult's circumstances, the nature and severity of the allegations, the level of ongoing risk to the adult, and their unique social/family circumstances.

However, in general, an investigation into abuse, neglect or exploitation undertaken by the Adult Guardian will progress in a manner illustrated on the following page.

## **Suspending an attorney's powers**

Under s.195 *GAA*, the Adult Guardian is empowered to suspend an attorney's decision-making powers if it is reasonably suspected that the attorney is not competent (e.g. if they have neglected their duties, abused their powers or failed to adequately protect the person).

In 2012-13, there were **20 suspensions** of attorneys' powers by the Adult Guardian as a result of investigative activities undertaken by OAG officers (an increase from 5 suspensions in the previous year).

The suspension of an attorney's powers represents the overriding of a person's expressed choice of substitute decision-maker. Such decisions are not taken lightly; they occur only when there are no less intrusive means of protecting a person's rights and interests. An attorney's powers may be suspended for up to three months. During this period, the Public Trustee acts as attorney for financial matters and/or the Adult Guardian acts as attorney for personal/ health matters.

In 2012-13, only **8** of the 20 matters involved the suspension of an attorney's powers for personal/health decisions. (That is, the Adult Guardian was required to act as attorney for personal/health matters during the period of suspension in only 8 cases.)

## Investigations concluded in 2012-13

### Concluded investigations 203

An investigation is concluded either because formal findings are reached in relation to the allegations, or because of other intervening factors.

<i>Formal findings made</i>	68 %
<i>No formal findings made</i>	32 %

#### Formal findings made 138

An investigation may be concluded with a determination of adverse findings or no adverse findings.

<i>Adverse findings</i>	62 %
<i>No adverse findings</i>	38 %

#### Adverse findings 86

Adverse findings are made if the initial allegations are substantiated and/or if a breach of a relevant legislative provision is found. A range of protective actions may be taken by the OAG.

<i>QCAT application lodged</i>	32 %
<i>Provision of advice/directions</i>	32 %
<i>Suspension of attorney's power</i>	22 %
<i>Interim QCAT applic. lodged</i>	14 %

#### No adverse findings 52

No adverse findings will be made if the allegations are found to be unsubstantiated or if, based on the available evidence, cannot be substantiated on balance of probabilities.

#### No formal findings made 65

In some cases, an investigation will close without a formal finding, either because new information is obtained (e.g. new medical evidence confirming the adult's capacity, or evidence of a criminal offence leading to a referral to police) or because of other external events (e.g. a third party submits a QCAT application, or the adult dies).

<i>Adult found to have capacity</i>	34 %
<i>Adult deceased</i>	27 %
<i>Inappropriate referral</i>	17 %
<i>QCAT application by 3rd party</i>	9 %
<i>Advice/directions given</i>	5 %
<i>Referral to external agency</i>	3 %
<i>Other</i>	5 %

## Substitute decision-making<sup>5</sup>

### The Adult Guardian's client base

Adults with impaired capacity may become clients of the Adult Guardian through one of several ways:

Substituted decision-making:

- The Queensland Civil and Administrative Tribunal (QCAT) may appoint the Adult Guardian as **guardian** for personal matters for an adult with impaired capacity if there is no other appropriate person available for appointment.
- A person may appoint the Adult Guardian as their **attorney** for personal and/or health matters under an enduring document.
- The Adult Guardian may act as **attorney** for a person following the suspension of an attorney's powers.
- The Supreme Court may appoint the Adult Guardian as **guardian** for a person with impaired capacity.

Other forms of representation:

- QCAT may appoint the Adult Guardian as a **separate representative** for a person with impaired capacity, usually to represent a person's view, wishes and interests in relation to a Special Health Care matter.
- The Adult Guardian may be appointed under the *Mental Health Act 2000* as **Allied Person** for a person who is subject to an involuntary treatment order.

### Overview of guardianship clients

As at 30 June 2013, there were **2,071 clients** of the Adult Guardian, marginally greater than for 2012.

- 2,019** guardianship clients (QCAT)
- 24** attorney clients (enduring document)
- 6** attorney clients (EPA suspension)<sup>6</sup>
- 6** separate representative clients (QCAT)
- 16** Allied Person clients

The number of formal QCAT appointments represents **44** guardianship orders per 100,000 head of population.<sup>7</sup> Data from the Australian Guardianship and Administration Committee indicates that the Queensland rate is higher than almost every other jurisdiction.

<sup>5</sup> Due to changes in data collection methodology, comparisons in statistics between 2012-13 and previous years may not be accurate, except where previous figures are provided.

<sup>6</sup> Under s.195 of the GAA, the Adult Guardian may suspend an attorney's power for up to 3 months, during which time the Adult Guardian exercises the attorney's powers for personal/health matters.

<sup>7</sup> Derived using the Queensland population estimates obtained from "Australian Demographic Statistics, Mar 2013", Australian Bureau of Statistics, pub. 3101.0 (released 26 September 2013).

During 2012-13, there were **698 new clients** of the Adult Guardian:

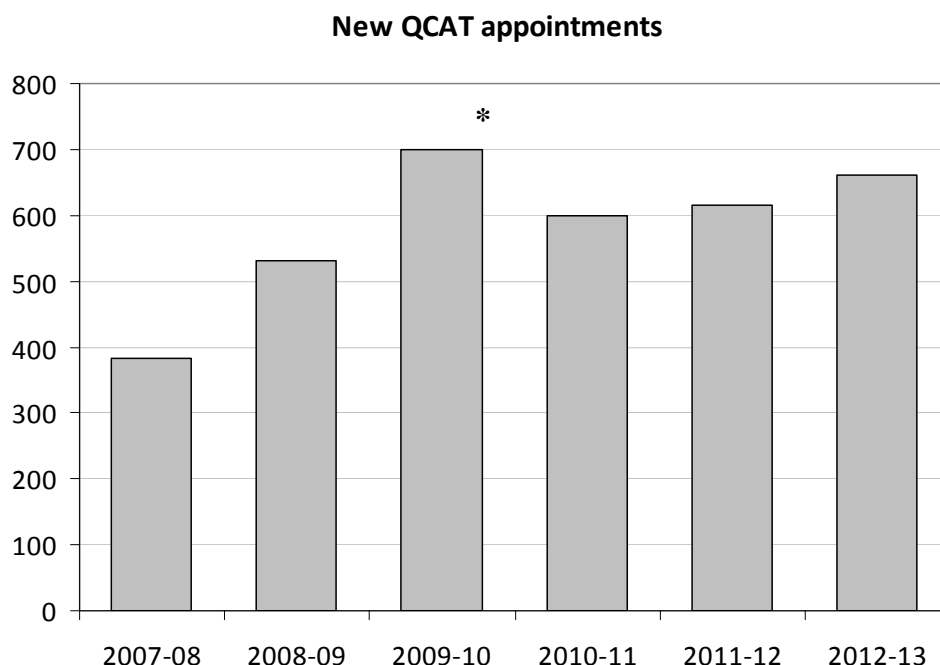
- 661** guardianship clients (QCAT) <sup>8</sup>
- 10** attorney appointments which became active (enduring document)
- 8** attorney clients (EPA suspension)
- 4** separate representative clients (QCAT)
- 15** Allied Person clients

The 661 new QCAT guardianship appointment in 2012-13 represents an increase of **7.5 per cent** over the previous year.

During the year, client services were provided to a total of **2,703 adults**:

- 2,639** guardianship clients (QCAT)
- 30** attorney clients (enduring document)
- 8** attorney clients (EPA suspension)
- 7** separate representative clients (QCAT)
- 19** Allied Person clients

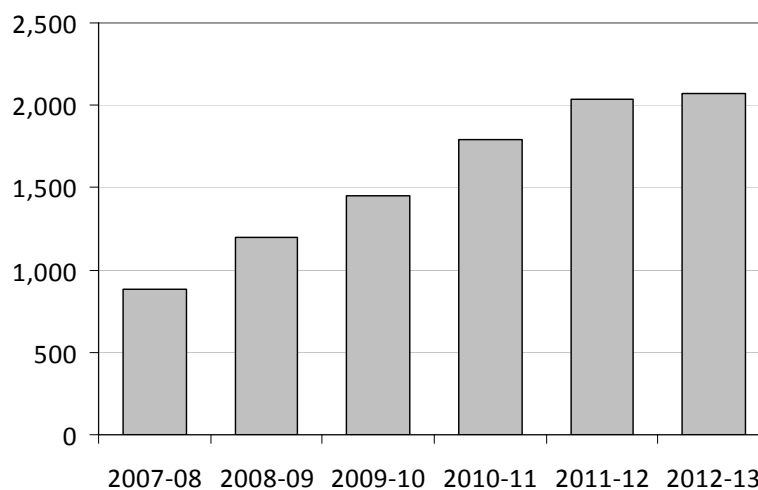
The following graphs show 6-year trends in new appointments and in the total OAG guardianship client base.



\* *the 2009-10 figures reflect an increase in appointments as a result of the implementation of the restrictive practices regime in Queensland.*

<sup>8</sup> For approx. 8 per cent of these clients, the Adult Guardian had held a prior QCAT appointment which had expired/been revoked some time previously.

### Total client base (at 30 June)



### Closed files

There were **648** (QCAT) guardianship files closed during 2012-13, resulting in a net increase in the total guardianship client base of only 13 appointments. The number of files closed during 2012-13 was significantly higher than in the previous year.

Of the 648 closed cases there were:

269	orders revoked	(42%)
234	orders expired	(36%)
145	deceased clients	(22%)

Client revocations may occur because the Tribunal determines a person no longer requires a guardianship order, or because another person is more appropriate to act as their guardian. The Adult Guardian routinely seeks the revocation of orders where it is considered that guardianship is no longer necessary for a client.

In addition, there were a further 15 client file closures:

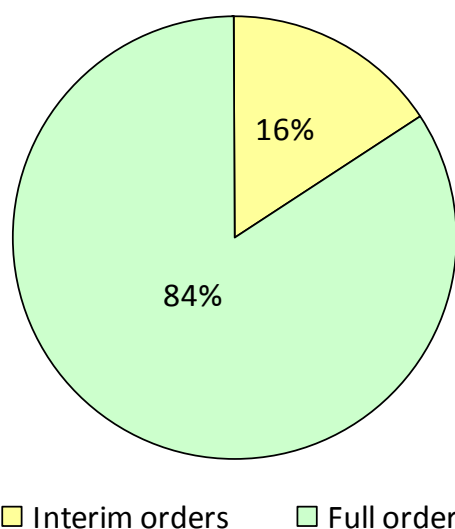
- 5 attorney clients (enduring document)
- 2 attorney clients (EPA suspension)
- 5 separate representative clients (QCAT)
- 3 Allied Person clients

### Interim and long-term orders

During 2012-13, a significant number of *interim orders* were received, consistent with previous years. An interim order can be made under s.129 of the *Guardianship and Administration Act 2000* if the Tribunal is satisfied, on reasonable grounds, that there is an immediate risk of harm to the health, welfare or property of the adult, including because of the risk of abuse, exploitation or neglect (including self-neglect).

An interim order may be granted without the Tribunal hearing and deciding the proceeding, and may be granted for a maximum of three months. The intention of the guardianship legislation is that interim orders be granted only when urgent action is required to protect a person’s rights and interests. It represents a departure from usual process in that interim orders are generally granted “on the papers” without a formal hearing. When received by the Adult Guardian, an interim order receives urgent attention. In most cases a visit to the client and a decision occurs quickly in order to safeguard the person’s health and welfare.

### Types of orders received by the Adult Guardian 2012-13 \*



\* This includes all QCAT orders received, both new appointments and re-appointments for existing clients (n=1,445)

A total of **1,445** QCAT orders were received in 2012-13.

#### **54 per cent** in relation to new clients

*In some cases there were multiple orders for a person during the year (e.g. an interim appointment followed by a subsequent long-term order).*

#### **46 per cent** in relation to existing clients

*In most cases, these were re-appointments following the expiry of an order, however it also may include an expansion of an existing order to include additional areas of decision making.*

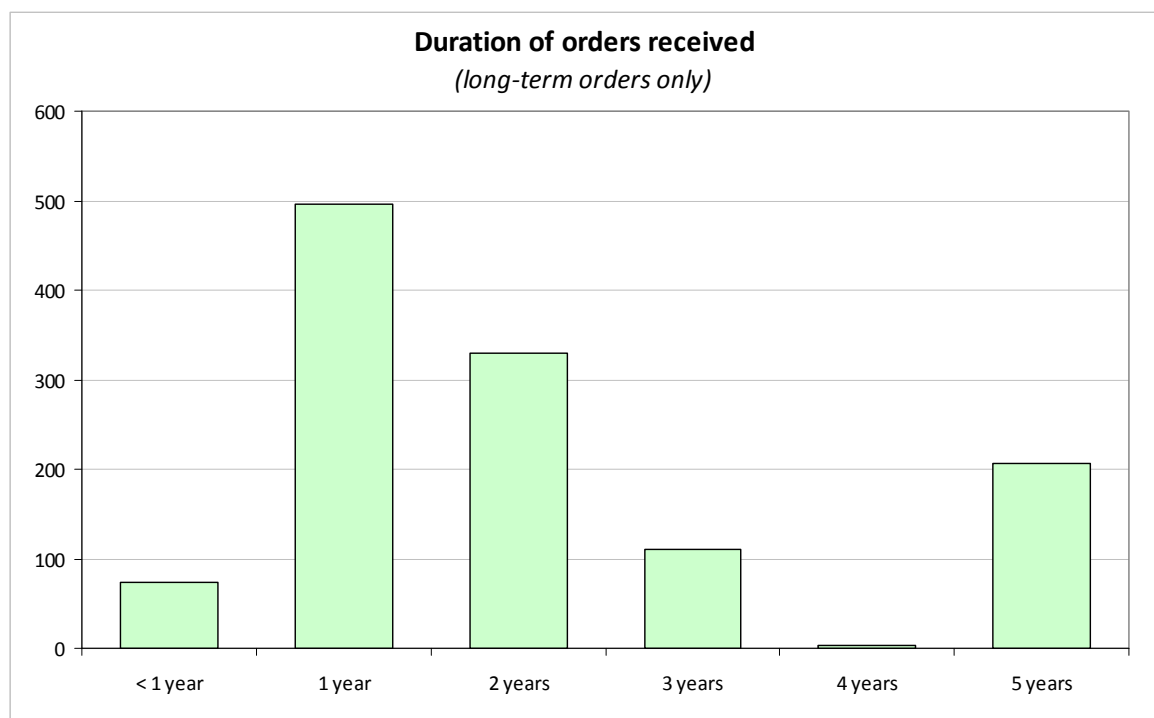
Interim orders accounted for **16 per cent** of all QCAT orders. However, interim orders account for **26 per cent** of all new clients received by the Adult Guardian. This is broadly consistent with trends from the previous year.

Of all interim orders received, **63 per cent** went on to become long-term guardianship appointments to the Adult Guardian.

## Duration of orders

Excluding interim orders, the average length of QCAT orders was just over **2 years** (25 months). This includes an approx. 300 orders for restrictive practices, which are limited by legislation to a maximum period of 12 months.

Long-term orders of 1 year duration (or less) accounted for **47 per cent** of all orders; 2-year orders accounted for a further **27 per cent**, and 3-5 year orders for the remaining **26 per cent**.



Average duration of orders:

All orders (incl. interims)	<b>22 months</b>
Long-term orders only	<b>25 months</b>

## Client characteristics

**56 per cent** of guardianship clients served during the year were male and **44 per cent** were female.

Consistent with previous years, adults whose primary cognitive impairment is **intellectual disability** represent the largest proportion of the Adult Guardian's client groups, followed by psychiatric disability and dementia.

This continuing trend in Queensland is in contrast to other Australian jurisdictions, in which older people with dementia represent the largest client group, primarily due to the ageing population and rates of dementia.



### Primary Disability type – all active clients during 2012-13

Intellectual disability	40 %
Dementia	24 %
Psychiatric disability	23 %
Acquired brain injury	12 %
Other *	1 %

\* *e.g. medical or neurological condition*

In addition to their primary disability, almost **one-fifth** (18 per cent) of all clients during the year had a secondary form of cognitive impairment. The most common secondary impairment was a psychiatric disability (49%).

### Clients with secondary types of cognitive impairment\*

1 type of impairment only	83 %
2 types of impairment	16 %
3 types of impairment	1 %

\* *These figures were calculated on a different basis from those in 2011-12, and are therefore not comparable.*

### Proportion of clients with secondary cognitive impairments

Primary Impairment type	% with secondary impairments
Acquired brain injury	27 %
Intellectual disability	20%
Psychiatric disability	20%
Dementia	8%

\* *These figures were calculated on a different basis from those in 2011-12, and are not comparable.*

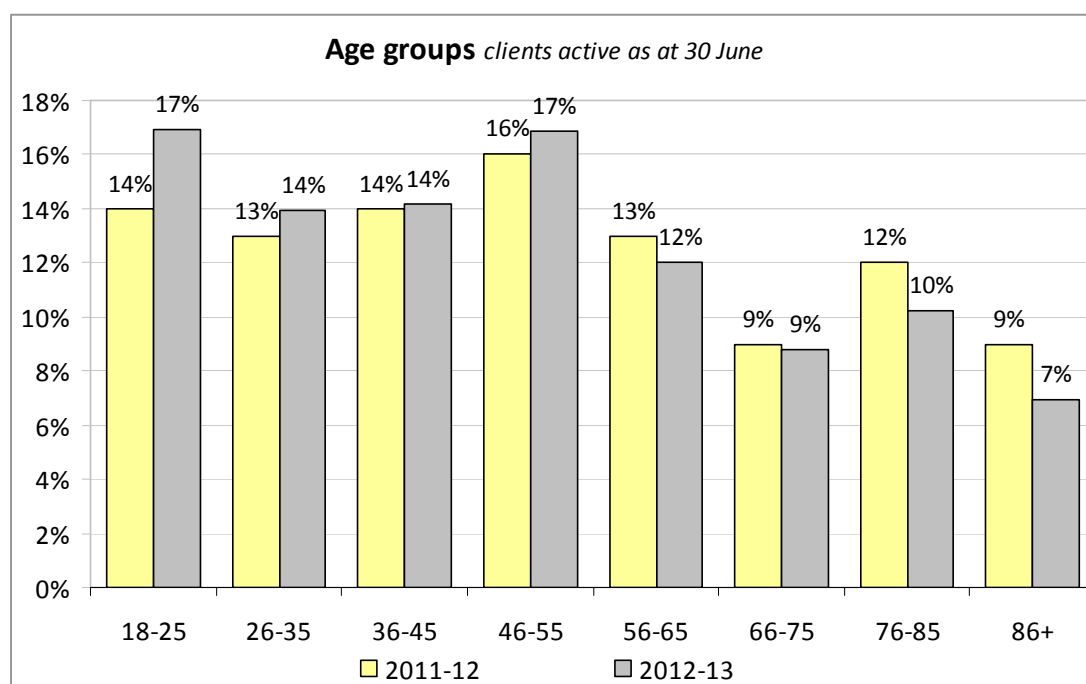
In addition to their cognitive impairments, a significant number of clients also have physical, sensory and/or speech impairments, as well as serious/chronic medical conditions.

### Client Ages

The average age of all guardianship clients served during the year was broadly consistent with previous years, however there are indications that the average age of guardianship appointments being made to the Adult Guardian may be increasing.

	All clients served in 2012-13	New clients only
Male	50 yrs	54 yrs
Female	56 yrs	60 yrs
Total	53 yrs	57 yrs

As at 30 June 2013, **73 per cent** of the total client base was aged under 65 years, and therefore potentially within scope of the National Disability Insurance Scheme.



#### Areas of appointment <sup>4</sup>

Consistent with previous years, appointments for Accommodation, Service Provision and Health Care matters were the most common among guardianship appointments.

Area of decision-making	% of <u>all</u> active clients	% of <u>new</u> clients
Accommodation	68 %	86 %
Service provision	62 %	80 %
Health Care	60 %	78 %
Contact	18 %	17 %
Legal	16 %	17 %
Restrictive Practices	13 %	5 %
All Personal Matters	14 %	11 %
Seeking help	4 %	4 %
Other *	8 %	8 %

<sup>4</sup> Most guardianship clients have two or more areas of decision making under a Tribunal appointment.

*\* Other includes: Education, training & employment matters, day-to-day matters and decisions about licences/permits.*

These figures are indicative of some potential trends:

- a reduction in the rate of **plenary** appointments (i.e. for all personal matters)
- an increase in the proportion of clients who require decision-making in the areas of **accommodation, service provision and healthcare**.
- a slowing in the growth of adults entering the **restrictive practices** regime

With regard to plenary appointments, during 2012-13 the Adult Guardian held decision-making powers for all personal matters for some **372** people (14 per cent of all active clients).

*Of this group, the Adult Guardian received plenary appointments for **74 new clients** – this accounted for 11.2% of all new clients.*

As at 30 June 2013, there were **268** clients for whom the Adult Guardian was appointed as guardian to approve the use of restrictive practices. In **122** of these cases (**46** per cent), the Adult Guardian also held guardianship appointments for other areas of personal decision making in addition to restrictive practices.

## **Appointments as attorney for personal/health matters**

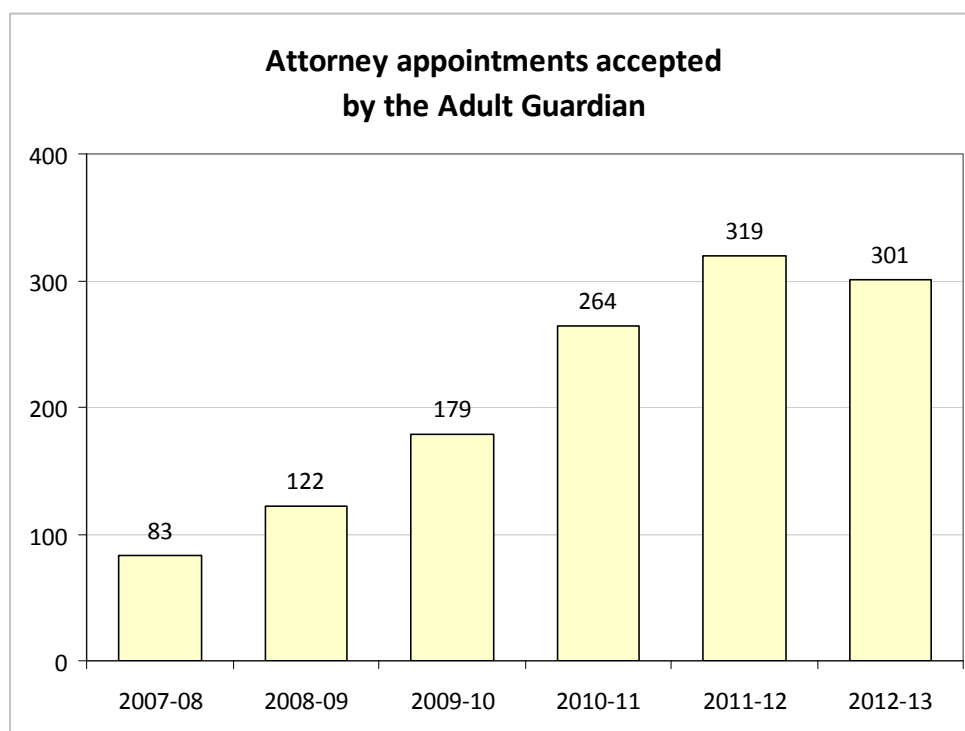
In addition to guardianship appointments by the Tribunal, the Adult Guardian can also exercise substituted decision making powers as attorney for a personal or health matter under an Enduring Power of Attorney or an Advance Health Directive. In these cases, a person elects to have the Adult Guardian as their substitute decision maker, in the event that they lose capacity at some point in the future.

As at the end of 2012-13, the Adult Guardian was acting as attorney for **30 adults**. During the year, the Adult Guardian accepted **301 new appointments** as attorney, bringing the total number of appointments now held by the Adult Guardian to **1912**. This represents a potential future demand on the Adult Guardian for decision making.

**Five** appointments as attorney ended during the year, either due to the adult's death or the revocation of the appointment by the adult or the Tribunal.

Appointments to act as attorney have increased significantly in recent years. There has been more than a **250 per cent** increase in the number of appointments received over the last six years, however the most figures may indicate a stabilisation of this trend. Around **16 per cent** of all current appointments were received in the last financial year.

### *6-year trends in new appointments as attorney*



### ***Acting as Allied Person***

The Adult Guardian can also be appointed under ss.341-2 of the *Mental Health Act 2000* to act as an Allied Person for a person who is subject to the involuntary provisions of the Act. The function of an Allied Person is to help the person to represent their views, wishes and interests relating to their assessment, detention, treatment and care under the Act. In 2012-13, the Adult Guardian acted as Allied Person for very small number of adults.

## Making health care decisions

During 2012-13, staff of the Office of the Adult Guardian made **1,186 health care decisions** for adults with impaired decision making capacity, both clients and non-clients. This is slightly higher than the previous year (1,101 health care decisions). Approximately **18 per cent** of these health care decisions were made after hours.

The Adult Guardian made **94** decisions in relation to **end-of-life matters** (i.e. for the withdrawal and/or withholding of life-sustaining measures). This figure is **19 per cent** higher than in the previous year.

The Adult Guardian received **7 requests** from medical professionals to make a decision where an existing guardian/attorney's decision for a health matter (or their refusal to make a decision) was contrary to the Health Care Principle (pursuant to s. 43 *GAA*). Two of these requests related to end-of-life decisions.

The Adult Guardian exercised the s.43 decision-making power in only **2 of these 7 cases**. The remaining 5 matters were able to be resolved through the provision of information, advice, support or mediation with medical professionals and/or family members to facilitate an informal resolution.

In 2012-13, the Adult Guardian was not requested to exercise powers under s. 42 of the *Guardianship and Administration Act 2000* to make a health care decision where there was disagreement between guardians or attorneys.

During 2012-13, there were **6 active matters** in which the Adult Guardian was appointed under s.125 of the *GAA* to represent an adult's views, wishes and interests in relation to a **special health care matter**. Of these appointments, 3 were new appointments and 3 were carried over from the previous year. All 6 cases involved the sterilisation of women. Five of these women had an intellectual disability; 1 had an acquired brain injury.

When appointed as separate representative, OAG staff meet with the adult, their family and service providers (where applicable). A written report is furnished to the Tribunal providing representation on whether the administration of the special health care is consistent with the adult's views, wishes and interests. This report is independent from the views/wishes of family members, doctors or other third parties.

Of the 6 special health care matters:

- In 4 cases the Tribunal provided consent for the sterilisation procedure
- 1 adult was declared by the Tribunal to have capacity for the matter
- 1 matter was still ongoing as at the end of 2012-13.

The Adult Guardian provided consent in **7 cases** for a **forensic examination** to be conducted under s.198A of the *Guardianship and Administration Act 2000*. These cases related to alleged sexual and/or physical assaults. In 6 of these cases, the adult in question did not lack capacity prior to the alleged assault.

Some **64 per cent** of health care decisions were made on behalf of a person for whom the Adult Guardian held a guardianship appointment (up from 60 per cent in 2011-12). A further **35 per cent** of decisions were made by the Adult Guardian as Statutory Health Attorney of last resort under s.63(2) of the *Powers of Attorney Act 1998*. The remainder of the decisions were made as Attorney appointed for personal matters, or through the exercise of powers under s.198A *GAA* (consent to forensic examination) or s.43 *GAA* (overriding another attorney/guardian's decision).

As illustrated below, most health care decisions were for medical and surgical procedures, which was broadly consistent with previous years.

Medical	47%
Surgical	31%
Dental	13%
End-of-life decisions	8%
Other *	2 %

\* *this includes consent for 9 high-level aged care placements, 8 forensic examinations and 1 participation in a clinical trial.*

### ***End-of-life decision making***

Requests for the Adult Guardian to override the wishes of families or other decision-makers with respect to end-of-life health care decisions are particularly complex, and are a last resort when all other avenues have been exhausted. In 2012-13, the Adult Guardian was able to successfully resolve 5 of the 7 requests he received without the need to exercise this overriding power.

During the year, officers of the Adult Guardian worked with a metropolitan Queensland Health district to help strengthen internal hospital processes with regard to requests by medical professionals for the Adult Guardian to override a guardian/attorney's health care decision. The Adult Guardian personally met with the hospital's legal counsel, the Executive Director of Medical Services and the hospital intensivists, and discussed the internal OAG decision-making processes for such requests.

Subsequent to this meeting, the hospital created its own internal document, based on the OAG's decision-making tool, designed to assist medical professionals to navigate the complex legislative issues involved in such requests. With the support of the hospital's legal counsel, this tool has since been distributed to legal counsel from all Queensland Health districts. Evidence to date indicates that this has been a very positive outcome for working relationships with hospitals, assisting both hospitals and this office to effectively resolve difficult situations.

### ***Other trends in 2012-13***

During 2012-13, the Adult Guardian observed that health providers are, in general, becoming more knowledgeable of the legislative provisions governing health care decision-making for adults with impaired capacity, as well as the role of the Adult Guardian. There has been an increase in requests from the medical community for

general advice and education on the substituted decision-making system in Queensland.

It is intended that in 2013-14, staff of the OAG will undertake a comprehensive engagement and education strategy of hospitals and health districts across Queensland, to further improve doctors' understanding and observance of the legislation.

During 2012-13 the Office of the Adult Guardian, in conjunction with the Office of the Public Advocate, made a joint submission to the public inquiry of the Community Affairs Committee of the Commonwealth Senate on Involuntary or Coerced Sterilisation of People with Disabilities in Australia. This submission discussed the legislative regime operating in Queensland for the lawful consent to sterilisations of adults with impaired capacity. It argued for an equal-rights approach and the importance of both self-determination of adults without capacity and adequate mechanisms for the protection of their rights. It also called for the strengthening of services to assist people to manage their reproductive and sexual health needs. The Adult Guardian also gave evidence in person to the Senate Committee in relation to the practices employed in Queensland in relation to applications for sterilisation for persons lacking capacity.

## Protecting the legal rights of clients

### Guardianship clients with legal matters

In 2012-13, the Adult Guardian received **112** new “legal appointments” – that is, clients received under a QCAT order which includes an appointment for legal matters not relating to financial/property. This equates to 17 per cent of all new QCAT appointments. Most appointments for legal matters are made in conjunction with other areas of personal decision making. In a small number of cases the Adult Guardian was appointed for legal matters only. As at 30 June 2013, there were **18** legal-only clients.

A total of **164** guardianship clients had active legal matters on foot at the end of 2012-13. This represents **8 per cent** of the total client base, consistent with previous years.

	2013	2012
Clients with legal matters on foot		
– at 30 June	164	148
– monthly average	160	164
Legal-only appointments (at 30 June)	18	25
New legal files opened (full year)	106	125

### Breakdown of clients' legal matters

	2012-13	2011-12
Criminal justice	65 %	71 %
Mental health	10 %	1 %
Child protection	9 %	7 %
Domestic violence	6 %	7 %
Other *	4 %	5 %
Family law (relating to children)	4 %	5 %
Victims of crime	1 %	2 %
Civil matters	1 %	1 %

\* *Other includes clients who have witnessed a crime, or who the police wish to interview in relation to an alleged crime.*

There was a notable increase in the proportion of legal matters relating to mental health, as a result of more timely and reliable notification to OAG of client matters which were before the Mental Health Court.

Although the majority of legal matters relate to criminal offences, most of these were for relatively minor offences, and were settled in the Magistrates Court. Only a very small number of legal matters related to serious criminal offences.



## Client matters before Court and Tribunals

In 2012-13, clients of the Adult Guardian had a total of almost 1,500 separate Court/Tribunal events (excluding guardianship hearings before QCAT).<sup>10</sup> As shown below, matters before the Magistrates Court accounted for more than 80 per cent of all hearings, consistent with previous years.

### *Jurisdiction of court events*

	2012-13
Magistrates Court	83 %
Children's Court	8 %
Mental Health Court	3 %
District Court	2 %
Federal Magistrates Court	1 %
Mental Health Review Tribunal	1 %
Special Circumstances Court	1 %
Other *	1 %

\* includes Family Court (7), Supreme Court (6) and High Court (1).

### *Hearing type*

	2012-13
Mention	87 %
Hearing	8 %
Committal Mention	2 %
Sentencing hearing	1 %
Court Ordered Conference	1 %
Family Group Meeting	1 %
Other *	< 1 %

\* Appeals and Committal hearings

An estimated **20 per cent** of all court events (300 events) were attended by OAG staff during the year, either legal and/or guardianship staff. This is consistent with previous years' attendances.

<sup>10</sup> There were 817 guardianship matters heard before QCAT for OAG clients.

## Delivering services to clients with active legal matters

In most cases, OAG staff will not play an active role in Court proceedings, but they routinely:

- advocate for clients to receive grants of aid from Legal Aid Queensland
- source legal representation for clients (including *pro bono* representation)
- advise clients' legal representatives, so that they can ably represent their client
- participate in family group meetings/conferences on behalf of the client
- liaise with other agencies in relation to the provision of clinical and non-clinical services for a client, insofar as this impacts on their legal matters.

When staff do play an active role in Court proceedings, they may:

- seek the assistance of duty lawyers and brief them on the client's circumstances
- Advocate for the client's rights/interest, and help express their views and wishes before the Court
- provide information and advice to clients' legal representatives
- provide information to the Court about the client, and the role the Adult Guardian is performing as the client's decision maker
- make submissions as a friend of the court about available options to protect the client's rights/interests, or in respect of mitigating circumstances at time of sentence
- act on behalf of the Adult Guardian in court proceedings.

Through this work, staff of the OAG can have a positive impact on client outcomes, including on:

- the Court's understanding of the client's impairment and the impact of this on offending behaviour
- whether a client is sentenced, and the nature of the sentence they receive
- the ability of the client's legal representative to discharge their role
- whether a client can maintain contact with a child who has been placed in care
- whether a client will be granted bail.

## Other activities: 2012-13

Under the *Guardianship and Administration Act 2000*, the Adult Guardian has a responsibility to educate and advise people about the operation of the guardianship system. During 2012-13, staff of the office conducted or participated in a wide range of community education events throughout the State. These included:

- Training sessions for the Justices of the Peace Branch (Department of Justice and Attorney-General) and forums for JPs
- Attendance at relevant disability and aged care expos.
- Presentations at educational institutions and hospitals
- Presentations at aged care, disability and advocacy services.

## Appendix 1: Performance

### Non-financial performance measures

There were two non-financial performance measures for the Office of the Adult Guardian in 2012-13.

<i>Measure</i>	<i>Target</i>	<i>Actual</i>
Average time to complete investigations *	5.5 months	7.3 months
Percentage of quality assurance audits of the delivery of guardianship services that meet targets	80 %	81 %

\* Refer to detailed discussion of Investigation closure rates on pp. 13-14

### Financial statement

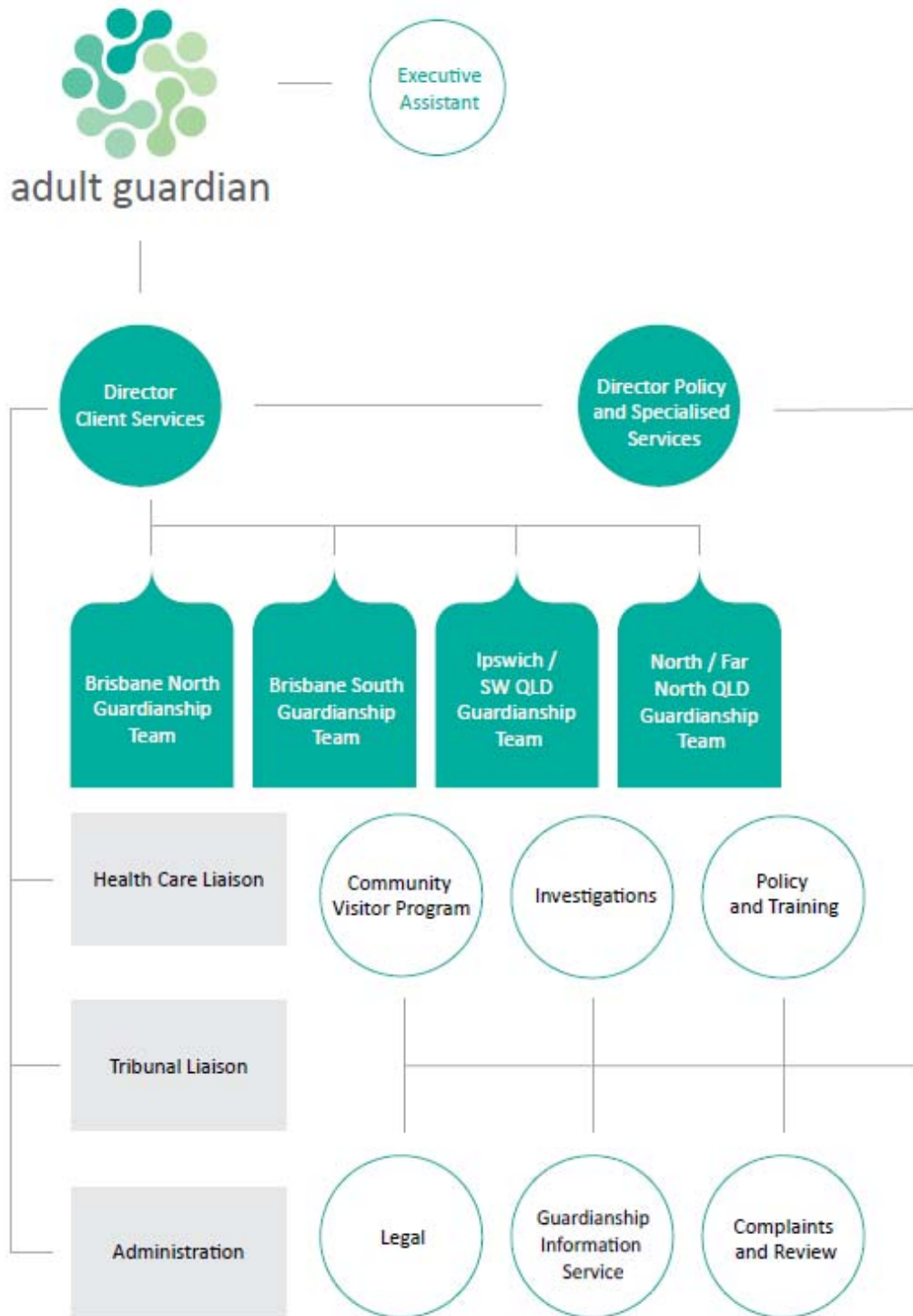
The operations of the Office of the Adult Guardian are funded from the Queensland Government's Consolidated Fund and by the Public Trustee of Queensland. The contribution from the Public Trustee of Queensland has been in place since the inception of the office, on unconditional terms and without any impact on the independence of the Office of the Adult Guardian from the Office of the Public Trustee. The Director-General of the Department of Justice and Attorney-General is the Accountable Officer pursuant to the *Financial Administration and Audit Act 1977*. The full financial details relating to the operations of the office appear in the Annual Report of the Department of Justice and Attorney-General for 2012-13.

*Financial summary* \*

<i>Actual</i>	<i>(000s)</i>
Income	11,551
Employee expenses	9,251
Supplies and services	1,332
Depreciation	282
Total operating expenditure	10,865
Operating result	686

\* includes Office of the Adult Guardian and the Community Visitor Program

## Appendix 2: Organisational chart



## Appendix 3: Adult Guardian's role and functions

The Adult Guardian was established as an independent statutory officer under the *Powers of Attorney Act 1998*, now contained in the *Guardianship and Administration Act 2000*. The *Mental Health Act 2000* added a power to act as allied person<sup>8</sup> for an adult with a mental illness who is under an involuntary treatment order.

The staff of the Office of the Adult Guardian are public servants. The office is a business unit of the Department of Justice and Attorney-General. Officers are given statutory delegations from the Adult Guardian to make certain decisions and accordingly represent the Adult Guardian in the fulfilment of their duties.

The statutory role of the Adult Guardian is to protect and promote the rights and interests of adults with impaired decision-making capacity for a matter. Adults with impaired decision-making capacity may have:

- an intellectual disability
- an acquired brain injury
- a psychiatric disability or
- an organic or deteriorating condition that affects capacity (such as dementia).

The statutory functions are set out in section 174 (and other relevant sections) of the *Guardianship and Administration Act 2000* and include –

- protecting adults with impaired capacity from abuse, neglect or exploitation
- investigating allegations of abuse, neglect or exploitation of adults with impaired capacity
- investigating complaints about the actions of attorneys under Enduring Powers of Attorney, guardians or administrators
- acting as guardian of last resort under an order of the Queensland Civil and Administrative Tribunal where there is no family or friends available or appropriate to act
- as Statutory Health Attorney<sup>9</sup> of last resort

<sup>8</sup> *The function of an "allied person" is set out in the Mental Health Act 2000 Chapter 9 Part 1: "The function of an involuntary patient's allied person is to help the patient to represent the patient's views, wishes and interests relating to the patient's assessment, detention and treatment under this Act".*

<sup>9</sup> *The Powers of Attorney Act 1998 defines a Statutory Health Attorney as the first, in listed order, of a range of people who is readily available and culturally appropriate to make decisions about a health matter. In order these are spouse in continuing relationship, unpaid carer, close friend or relative, and Adult Guardian as last resort.*

- as personal attorney of last resort when the Adult Guardian has accepted an appointment under an Enduring Power of Attorney or Advance Health Directive
- making representations or seeking assistance from agencies on behalf of adults with impaired capacity
- informally mediating or conciliating disputes between attorneys and between private guardians or between attorneys and guardians and others, including health care disputes, if the Adult Guardian considers this appropriate to resolve issues
- educating and advising people about the two Acts, and in particular on the role of the Adult Guardian.

The Adult Guardian also administers the Community Visitor Program on behalf of the Department of Justice and Attorney-General.

## Appendix 4: The General Principles

*(Guardianship and Administration Act 2000)*

### 1. **Presumption of capacity**

An adult is presumed to have capacity for a matter.

### 2. **Same human rights**

- (1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.
- (2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.

### 3. **Individual value**

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

### 4. **Valued role as a member of society**

- (1) An adult's right to be a valued member of society must be recognised and taken into account.
- (2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

### 5. **Participating in community life**

The importance of encouraging and supporting an adult to live a life in the general community, and take part in activities enjoyed by the general community, must be taken into account.

### 6. **Encouragement of self-reliance**

The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.

### 7. **Maximum participation, minimal limitations and substituted judgment**

- (1) An adult's rights to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.
- (2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.
- (3) So, for example –
  - (a) the adult must be given necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and



- (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
  - (c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.
- (4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.
- (5) However, a person or other entity in performing a function of exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.
- (6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

## **8. Maintenance of existing supportive relationships**

The importance of maintaining an adult's existing supportive relationships must be taken into account.

## **9. Maintenance of environment and values**

- (1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs) must be taken into account.
- (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition<sup>11</sup> or Island custom<sup>12</sup>) must be taken into account.

## **10. Appropriate to circumstances**

Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to be the adult's characteristics and needs.

## **11. Confidentiality**

An adult's right to confidentiality of information about the adult must be recognised and taken into account.

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<sup>11</sup> Aboriginal tradition means 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 – see *Acts Interpretation Act 1954*, section 36.

<sup>12</sup> Island custom, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships – see *Acts Interpretation Act 1954*, section 36.

## Appendix 5: The Health Care Principle

*(Guardianship and Administration Act 2000)*

1. The health care principle means power for a health matter, or special health matter, for an adult should be exercised by a guardian, the adult guardian, the tribunal, or for a matter relating to prescribed special health care, another entity –
  - (a) in the way least restrictive of the adult’s rights; and
  - (b) only if the exercise of power –
    - (i) is necessary and appropriate to maintain or promote the adult’s health or well-being; or
    - (ii) is, in all the circumstances, in the adult’s best interests.

Example of exercising power in the way least restrictive of the adult’s right –  
If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

2. In deciding whether the exercise of a power is appropriate, the guardian, the adult guardian, tribunal or other entity must, to the greatest extent practicable –
  - (a) seek the adult’s views and wishes and take them into account;
  - (b) take the information given by the adult’s health provider into account.
3. The adult’s views and wishes may be expressed –
  - (a) orally; or
  - (b) in writing, for example, in an Advance Health Directive; or
  - (c) in another way, including for example, by conduct.
4. The health care principle does not affect any right an adult has to refuse health care.
5. In deciding whether to consent to special health care for an adult, the tribunal or other entity must, to the greatest extent practicable, seek the views of the following person and take them into account–
  - (a) a guardian appointed by the tribunal for the adult;
  - (b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult;
  - (c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the Statutory Health Attorney for the adult.

## Contacting the OAG & CVP

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