

Office of the Public Advocate Systems Advocacy

Submission to the Health and Community Services Committee

Public Guardian Bill 2014

April 2014

Interest of the Public Advocate

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

Through our work, we estimate that there may be up to 113,000 people with impaired decision-making capacity in Queensland. Queensland adults with impaired decision-making capacity are among the most disadvantaged people in the community. An unacceptably high level of disadvantage is experienced across a range of social and economic indicators. This disadvantage significantly reduces quality of life and increases the risk of abuse, neglect and exploitation.

Position of the Public Advocate

In accordance with my responsibility to promote and protect the rights of adults with impaired capacity, I am writing to make a submission in response to the *Public Guardian Bill 2014 (the Bill)*.

The Bill forms part of a suite of legislative and other reforms (including the *Family and Child Commission Bill 2014* and the *Child Protection Reform Amendment Bill 2014*) that will overhaul the child protection system in Queensland.

'At-risk' children and young people who are in the care of the state and/or whose wellbeing is in jeopardy are among the most vulnerable in our society. I commend the Queensland Government for its commitment to ensuring effective safeguards for children and young people who are at risk.

I am hopeful that the collective reforms that will be implemented by these Bills and other supporting policy, program and systems changes will create a more robust, responsive and accountable child protection system. In particular I welcome the greater focus on advocacy for vulnerable children in the system, both at a local community level and through the new child advocate function proposed for the Public Guardian role.

The effectiveness of these reforms will be measured by the extent to which children and young people, particularly those in situations of risk, are supported to access opportunities that enable them to realise their potential while remaining safe from harm.

However, while I support the improved safeguards for children and young people, I have some concerns about the extent to which a single statutory position can effectively balance and manage the demands associated with upholding the responsibilities accorded to the Public Guardian role. While primarily related to the operationalising of the Public Guardian role, these concerns will be expanded upon in the body of this submission.

The Bill assigns the Public Guardian with responsibility for two groups of very vulnerable people in our society – adults with impaired capacity and 'at-risk' children and young people, including those who come into contact with the child protection system – the relative needs of whom must be equally balanced to ensure that the responsiveness for any one group is not compromised by the demands of the other.

Adults with impaired capacity and 'at-risk' children and young people represent significantly marginalised groups of individuals whose needs are, more often than not, extremely complex and challenging. Of these individuals, those for whom the Public Guardian will have statutory responsibility are likely to be the most vulnerable and, in many instances, will be in their present situation as a result of multiple systems failures.

This will require the Public Guardian to be both proactive and responsive in ensuring appropriate attention is given to issues arising, and in promoting and facilitating effective and sustainable solutions for individuals.

Furthermore, given the broad range of functions accorded to the role of Public Guardian, there is also a clear need to balance the work required by individual matters with the educative and advisory functions that provide the necessary vehicle by which to ensure understanding of the systems within which the role operates, and promote change.

The role of the current Adult Guardian

The current role of the Adult Guardian is focused on protecting the rights and interests of adults who have impaired capacity for a matter.¹ This involves:

- An investigative function including:
 - Investigating complaints and allegations about actions by attorneys, guardians and administrators, and other people acting under a power of attorney or advance health directive;
 - Investigating alleged neglect, exploitation or abuse of adults with impaired capacity.
- A mediating and conciliating function including:
 - Informally mediating or conciliating disputes between attorneys and between private guardians or between attorneys and guardians and others, including health care disputes.
- A substitute decision-making function including:
 - Acting as a statutory health attorney, of last resort;
 - Acting as a personal attorney of last resort under an Enduring Power of Attorney or Advance Health Directive;
 - Acting as a guardian of last resort on appointment by the tribunal;
 - Approving the use of restrictive practices;
 - Consenting to a forensic examination; and
 - Seeking help or making representations.
- An educative and advisory role including:
 - Educating and advising people about the *Guardianship and Administration Act 2000* and the *Power of Attorney Act 1998*.
- Administration of the Community Visitor Program on behalf of the Department of Justice and Attorney-General.

This is an extensive and significant role involving some of the most vulnerable adults with impaired capacity, often those without any other natural support networks to assist them in decision-making or where those networks have broken down due to conflict, or abuse, neglect and exploitation. The Adult Guardian also has an important role in monitoring the application of restrictive practices (including detention, restraint and seclusion) on adults with impaired capacity.

Guardianship in Queensland

As at June 2013 there were 2,071 clients for whom the Adult Guardian was appointed.² The number of formal Queensland Civil and Administrative Tribunal (QCAT) appointments represents 44 guardianship orders per 100,000 head of population. The 661 new QCAT appointments in 2012-13 represents an increase of 7.5% over the previous year.³ The rate of public guardianship appointments in Queensland is amongst the highest in Australia.⁴

¹ *Guardianship and Administration Act 2000* (Qld) s174.

² Office of the Adult Guardian, *Annual Report 2012-2013*, 20.

³ Office of the Adult Guardian, *Annual Report 2012-2013*, 21.

⁴ Office of the Adult Guardian, *Annual Report 2012-2013*, 20.

Clearly the Office of the Adult Guardian has a significant and growing workload.

Furthermore, dementia is on the rise globally with evidence supporting this growing 'epidemic' being increasingly referenced through research and reports associated this population group. The 2011 Deloitte Access Economic Report commissioned by Alzheimer's Australia estimated that by 2014 there would be 55,509 people with dementia in Queensland, increasing to 73,470 by 2020 and further to a massive 215,272 people with dementia by 2050.⁵

This issue was also identified by Mark Crofton, currently the acting Public Trustee of Queensland, in his 2011 Churchill Fellowship report on guardianship and financial abuse, in which he noted that 'the size and dimension of the malady and the very real personal social and economic cost of it is expected in Australia to grow exponentially in the coming years.'⁶

These figures, and the associated commentary, point to the likelihood that the number of people requiring guardianship services is unlikely to diminish at any time in the near future.

This is an important consideration in deciding the resourcing and structure for the Office of the Public Guardian.

Strengthening the decision-making system for adults in Queensland

Despite Queensland having one of the highest rates of public guardianship appointments, the increasing demand for guardianship services is not unique to Queensland and many jurisdictions, both nationally and internationally, are raising concerns about the growth of guardianship, the resource implications and whether the current system is sustainable.

There is now growing recognition, underpinned by the paradigm shift that the *Convention on the Rights of Persons With Disabilities*⁷ heralds, that the focus must move towards strengthening the decision-making capacity of adults and moving the emphasis towards supports that enable them to make decisions and exercise their legal capacity.

The Queensland *Guardianship and Administration Act 2000* and *Powers of Attorney Act 1998* are already underpinned by general principles that must be applied by any person who performs a function or exercises a power under these Acts. These principles emphasise the importance of empowering an adult to exercise their decision-making capacity. For example General Principle 7 '*Maximum participation, minimal limitations and substituted judgement*' preserves the right of people to be involved in decisions about their own lives to the greatest extent possible, and specifies that 'any necessary support' must be provided to enable a person to be involved in their own decision-making.

I am pleased to note that the responsibility of the Public Guardian to uphold these principles is maintained under the Bill. Furthermore, while the proposed reforms to the child protection system herald a new way forward for children and young people, it will be important to ensure that opportunities for continued improvement in those systems impacting adults with impaired capacity are also identified and pursued.

In accordance with this and given the paradigm shift heralded by the *Convention on the Rights of People with Disabilities* and contemporary discourse in relation to the provision of decision-making support for people with impaired decision-making capacity, it is timely to explore what implications the latter may have for Queensland's guardianship system.

To this end the Office of the Public Advocate has initiated a research project to explore the systemic barriers and enablers to protecting and supporting the right of a person to make their own decisions, within the context of Queensland's public guardianship system.

⁵ Deloitte Access Economics, *Dementia Across Australia: 2011-2050* (Alzheimer's Australia 2011).

⁶ Mark Crofton, *Winston Churchill Memorial Trust of Australia Report – To Investigate the Guardianship Laws, Policy and Education in Order to Prevent and Prosecute Elder Financial Abuse* (Winston Churchill Memorial Trust, 2011) 12.

⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) ('Convention on the Rights of Persons with Disabilities').

This research will seek to identify opportunities to enhance Queensland's decision-making regime, and inform discussion about how to improve the support provided to people with impaired capacity with a view to developing and strengthening their ability to make their own decisions.

My Office is supported in this endeavour by a range of expert stakeholders including the Office of the Adult Guardian, the Public Trustee (Queensland), the Queensland Civil and Administrative Tribunal, the Queensland University of Technology Centre for Health Law, the University of Queensland and Griffith University, among others.

I am confident that this project will identify a range of strategies for building the capacity of Queensland's guardianship and decision-making system.

Undoubtedly education, support, training and communication will be amongst those key strategies. This is time-consuming and potentially resource-intensive work, but holds significant potential with respect to both strengthening and substantially reducing demand on the current system over time.

The role of the Public Guardian, once established, in contributing to and facilitating effective outcomes for adults with impaired capacity should not be underestimated. This is of significant interest to my work as Public Advocate and I am committed to working closely with the Public Guardian to ensure the continual improvement of systems impacting adults with impaired capacity.

Concerns re: operationalising the *Public Guardian Bill 2014*

Given the serious and significant responsibilities of the current Adult Guardian role in relation to the protection of adults with impaired decision-making capacity in Queensland, as well as the growing demands on the current public guardianship system, I am concerned about the capacity of the new Public Guardian role to take on both the current role as well as the carriage of the new functions with respect to 'at-risk' children and young people, particularly those who come into contact with the child protection system.

My concern is heightened by my commitment to pursuing continual improvement and reforms in Queensland's guardianship system.

In particular, there is already a clear need for greater education, support, training and communication initiatives. Addressing these gaps, particularly with respect to ensuring sufficient education and information resources in relation to Queensland's guardianship and administration system, is an issue that has unfortunately been given insufficient priority over recent years.

While I acknowledge that the demands of individual matters, particularly those involving serious risk of harm and the associated complexity of the issues contributing to these situations, must take precedence, stemming the tide of such situations by ensuring due regard to the education and advisory role required by the Public Guardian must also be accorded appropriate priority.

I hold grave concerns that, in light of what will no doubt be significant workload and responsibilities associated with the Public Guardian role, the proactive education and advisory functions will not be accorded necessary priority and/or, within the context of competing demands, may be insufficiently resourced on an everyday and ongoing basis to ensure that they are adequately attended to.

Furthermore, should the education and advisory role continue to be accorded a low priority, a significant opportunity to facilitate continual improvement in the system may be lost, as will the associated opportunity to strengthen the system and reduce demand.

Concluding comments

Despite my concerns, I am pleased to lend my support to the *Public Guardian Bill 2014* to the extent that it maintains the existing functions of the Adult Guardian role and, in doing so, ensures an ongoing focus on the needs of adults with impaired capacity and the continuation of necessary safeguards to uphold the rights of those adults.

While I acknowledge that the majority of issues that I have raised in my submission are operational in nature, I believe that they are important to the success of the Public Guardian role.

I trust that the issues that I have raised may assist Government in its consideration of how best to ensure that the Public Guardian achieves the necessary balance between the issues impacting children and young people, and those impacting adults with impaired capacity.

Furthermore, I am hopeful that in establishing the Office of the Public Guardian, there will be sufficient support, infrastructure, and resources to ensure that adequate attention is given to both the urgent and unavoidable crises that will inevitably confront the Public Guardian on a day-to-day basis, as well as to the education and reform activities that are necessary to strengthen the system and ensure its future sustainability.

I would be pleased to further discuss the issues that I have noted in this submission should the Committee require additional information.

Yours sincerely,



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