



National Disability Services

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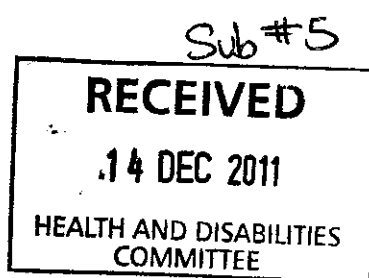
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11-1-4-3

13th December 2011

Ms Sue Cawcutt
The Research Director
Health and Disabilities Committee
Parliament House
BRISBANE QLD 4000

Dear Ms Cawcutt,

Please find attached a submission from National Disability Services (Qld) to the Health and Disabilities Committee Queensland Law Reform Commission Recommendations on Guardianship Laws Inquiry.

Thank you for the opportunity to make this submission.

Yours sincerely,

Valmae Rose
State Manager
National Disability Services Queensland



National Disability Services

Response to the Queensland Parliament Health and Disabilities Committee Inquiry

Queensland Law Reform Commission's Recommendations on Guardianship Laws

National Disability Services (Qld)

12th November 2011

National Disability Services (NDS) welcomes the opportunity to provide a response to this inquiry. The response is limited to those recommendations of the Queensland Law Reform Commission (QLRC) which have most potential impact on disability service providers and people with disabilities, and uses the 'issues for comment' questions as a guide for the response.

National Disability Services

National Disability Services Ltd is the National Industry Association for Disability Services with a membership of more than 700 organisations Australia wide. NDS is recognised by both Commonwealth and State Governments as the peak body for the disability industry and is made up of a National Secretariat and Divisional Committees in the respective states and territories. Currently, NDS Qld is hosting a series of conversations with interested people from across disability and other sectors to inform future work in Queensland around end of life issues for people with disabilities.

Response to recommendations

QLRC recommendation 9.11

The QLRC recommended changes to the GAA Act to place an obligation on hospitals and residential aged care and residential disability facilities to help ensure that health providers are aware of advance health directives or enduring powers of attorney for health matters.

Would the proposed obligation on health and disability services improve health providers' access to and awareness of advance health directives and enduring powers of attorney?

Ensuring the inclusion of Advance Health Directives (AHD) and Enduring Powers of Attorney for health matters (EPOA) in plans for electronic health records under National Health Reform, and the rapid implementation of this record system should be the preferred mode of ensuring increased access to AHDs and EPOAs in the future.



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- In the interim, NDS supports this recommendation to improve access to and awareness of advance health directives or enduring powers of attorney.

What impact would the proposal have on hospitals, residential aged care and residential disability facilities and health providers?

Impacts would include the need for:

- Education of residential disability facilities' staff to ensure understanding of the changed legislative requirements and the potential benefits for client health and wellbeing
- Revision of policies and procedures to ensure collection, prominent storage, appropriate sharing and review of the information.
- Inclusion of the requirements in the Disability Service Standards as an auditable indicator under several of the standards including Decision making and Choice and Protection of Human and Legal Rights

QLRC recommendation 9.18

The QLRC recommends amendments to reinforce the effectiveness of a direction in an advance health directive. The amendments would limit the circumstances in which a health provider could legitimately ignore a direction in an advance health directive. The most significant part of the recommendation is to omit the current protection for a health provider who ignores a valid direction because of their belief that it is inconsistent with good medical practice.

As a general principle, NDS supports any measure which will increase the effectiveness of directions contained in AHDs. Increased vulnerability or impaired decision making capacity should not effectively reduce the right of an adult to self-determination or increase the power of health professionals over the adult.

Should a health provider be required to consult with an attorney appointed under an enduring power of attorney before forming a reasonable belief that a direction in an advance health directive is uncertain (consistent with the current legislation, to consult with an attorney appointed under an advance health directive)?

- Yes. This will ensure that health professionals are required to consider all the information available about the adult's intentions and directions.

Should the protection for a health provider who does not follow a direction in an advance health directive because of changed circumstances be modified so that it is a valid reason only if the adult would have thought their direction to be inappropriate if they had known of the change in circumstances?



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- Yes. This prevents a health professional making a decision based on their own reasoning and centres decision-making on the adult.

Should the protection for a health provider who does not follow a direction in an advance health directive because he or she believes it is inconsistent with good medical practice be omitted?

- Yes. Again, this respects the autonomy of the adult and their right to self-determination and reduces the potential for health professionals to consider their own decisions to be most appropriate.

QLRC recommendations 9.26, 9.27 and 9.28

The QLRC recommends amendments to the POA Act and the GAA Act to ensure that an adult's common law rights to exercise control of their future health care are clear. It notes that the continued operation of common law rights was originally intended and reflected in s.39 of the POA Act. However some doubt has arisen about the effect of the guardianship legislation on common law decisions. The QLRC therefore recommends adding provisions to both Acts to clarify that nothing in the Act affects the operation at common law of an adult's consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the matter.

Should the guardianship legislation be amended to ensure that common law rights to consent to or refuse health care are not affected by the legislation?

- Yes. NDS supports any measure which clarifies the right of an adult with capacity to make decisions about their health care which will be respected under changed circumstances.

Overview of QLRC recommendations about withholding or withdrawing a life-sustaining measure

The QLRC made 16 recommendations about withholding or withdrawing life-sustaining measures, 12 of which are in the committee's terms of reference. Most of the QLRC recommendations are to remove limitations on the operation of advance decisions by a competent adult or on decisions made on their behalf by a substitute decision maker.

- NDS supports all of the (majority) recommendations in this section as reinforcing the right of an adult with capacity to make decisions about their health care which will be respected under changed circumstances



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- NDS particularly supports the safeguards recommended by the QLRC (as follows) as both responsive to the risks for vulnerable people and as not conflicting with an adult's autonomy:
 - *tighten the test for capacity to make an advance health directive (s.42, POA)*
 - *require an approved form for advance health directives that encourages consideration of unforeseen circumstances*
 - *stipulate that a direction would not operate if the direction is uncertain, or circumstances have changed to the extent that the adult would have considered the direction inappropriate (recommendation 9.3(b) above)*
 - *enable the Supreme Court and the Tribunal to decide whether a direction in an advance health directive is operative and make a declaration to that effect.*

QLRC recommendation 16.15

The QLRC considered whether registration of enduring powers of attorney should be required, and the possible features of a registration system. It concluded that the legislation should not require registration of enduring powers of attorney and recommended (16.15) that the POA Act should not be amended to require all enduring powers of attorney be registered.

Is it appropriate that registration of enduring powers of attorney is not required?

- Yes. NDS supports the recommendation as considerate of the circumstances of many of the vulnerable people in our community. Increased complexity and costs would be a considerable disincentive to advance health planning for many of those who may benefit from it most.

QLRC recommendations 28.1 and 28.2

The QLRC considered how to ensure that legal action can be commenced or continued if no-one is willing to be appointed as litigation guardian for a person who does not have legal capacity. The QLRC recommended that generally, a person should not be appointed as a litigation guardian without their consent, and that the Public Trustee or the Adult Guardian could be appointed by the court without their consent.

Should the courts have the ability to appoint, without consent, the Public Trustee or the Adult Guardian as a litigation guardian of last resort for a person who does not have capacity?

- Yes. NDS considers this essential to safeguard those adults with impaired capacity who have no-one else who will agree to act for them



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Should the court be able to appoint another person as a litigation guardian without their consent?

- No. The financial and administrative burdens associated with being appointed without consent should not be forced on anyone. In addition, a further emotional burden may be placed on families or carers likely to be appointed without consent with potential damage to relationships and the ability to care for the adult who does not have capacity.

QLRC recommendation 29.1

The QLRC examined whether fees or commissions should be charged for guardianship services provided by the Adult Guardian. The QLRC recommended retaining the status quo so that no fee is charged for guardianship services.

Should the Adult Guardian charge fees for guardianship services?

- No. This may impose a further burden on already vulnerable people.

A handwritten signature in black ink, appearing to read 'Valmae Rose', is positioned above a horizontal line.

Valmae Rose
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