Guardianship and Administration and Other Legislation Amendment Bill 2017

14 Sept 2017 - Submission from Chris Jenkinson

Background and reasoning: my submission raises experiences and questions rather than attempts to suggest having the legal answers – that is for the skilled legal people proposing the amendment changes.

Also my experiences are more complex than can be easily presented here: Hence my wife and I seek approval to answer questions and offer to provide this Committee documented examples of our real experiences. Particularly where Queenslanders, including those currently portrayed as Adults/Queensland Protected Persons, are clearly currently not adequately protected. Our experiences relate to my mother's appalling treatment: current legislation 'justice' avenues appear either badly managed/enforced, out of most peoples' reach, or not adequately able to provide viable means for recourse against the same abuses other Queensland residents have viable avenues to address. Tribunals demonstrated inconsistency in justice, process and management. The price of Justice for some, alive or dead has been made just too high or unreachable. State borders jurisdiction anomalies are actually providing barriers for protection of many Queensland residents. Many citizens don't know what lack of protection they are afforded until after it is too late to address the abuses they or loved ones are suffering. To correct or turn back bad Tribunal decisions is controlled by a self-review travesty and a culture that needs correction before further powers are afforded to it.

While amending this important legislation please better recognise the influence of other bad/unenforced State legislation, that complicity is rife and conflicts of interest play a greater role than justice; then add into consideration the complexity of serious un-addressable abuses crossing our Queensland border (from another State or Territory within Australia). These amendments need to look wider than they currently do, to cater for/act not as if protection is only needed from within a closed Queensland box; our boundaries, as can be demonstrated from my experiences, do not adequately protect Queensland residents – I am told repeatedly nothing can effectively and viably be done about what would be offences including criminal under our Law adversely effecting a Queensland resident, particularly when the Offender is a State Crown Office – why is an offence, even criminal offences ignored just because the source is from outside Queensland's border? How can this be when such abuses originate from within Australia, they have the same impact on a Queensland resident as an offence originating within this State. Please don't ignore offences stemming into Queensland from within Australia just because you don't hear about these abuses. Co-operation between States to bury these should mean when criminal offences are involved that those turning a blind eye become accountable as an accessory not given the freedom of unchecked powers or resolution by self-review. Please respect Queensland residents' lives by legislating Tribunal decision makers have the qualifications and experience necessary for the task proposed within these amendments. The abuses my mother had no choice but endure originated from South Australia not a scammer from within Nigeria.

Some matters are raised below following extracts of the related amendments; I will raise these in the hope that legislators consider and will cater for what I see as unacceptable anomalies effecting people's lives.

I am a Queensland resident and currently a Supreme Court appointed Executor for my late mother's estate and as such have obligations under Queensland laws; expectations and obligations which it appears I am expected to ignore or breach because there are no viable means for me to carry out my role when matters cross the SA Boarder. Particularly when the other Queensland Supreme Court appointed Executor living interstate chooses to violate their legal obligations under Queensland Law – stonewalling and denying incriminating Estate owned records from scrutiny leaves only Supreme Court actions that would dissipate most of the Estate's value to Lawyers and Court costs – I am therefore interested how will these amendments provide affordable but reliable justice, protect the rights and Estates of Queensland residents and how these amendments enforce our laws so protection equity is offered to all Queenslanders?

Hon YM D'ATH presented our Queensland Attorney General's 5 Sept 2017 expectations – I hope the following will be demonstrated applies to and will protect equally all Queensland residents.

Are these GAA amendments just rhetoric, do they have clear cost and practical benefits while really able to provide clear benefits? Will the amendments have 'teeth' and be comprehensive enough when abuses originate outside Queensland – or alternatively will some GAA related matters be made worse with unwise reallocation of judicial powers and subsequent elimination of existing process safeguards?

The **Explanatory Notes** advises:

> "The bill will also make it clear that QCAT can order a current or former attorney or administrator to compensate a person for loss caused by the attorney or administrator's failure to comply with their duties under the guardianship legislation."
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> "Previously, it was not clear if QCAT could exercise this jurisdiction in relation to former attorneys and administrators—for example, after the appointment had ended, the enduring power of attorney had been revoked or the adult had died. This amendment will enhance the availability of financial compensation for people subject to financial elder abuse. This is an action in the *Queensland: an age-friendly community: action plan*. The reforms will also require QCAT, when carrying out its functions or powers under the Guardianship and Administration Act 2000, to seek and take into account the views, wishes and preferences of the adult and their support network to the greatest extent practicable."
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> "An effective guardianship system is vital for upholding the rights and interests of adults with impaired capacity."

This QCAT administrative role in principle may provide some needed solutions. Yet my mother's experiences demonstrate, as a Queensland Protected Person, she was repeatedly not afforded proper protection by those that took over her rights and liberties and finances. It was evident some QCAT decision makers (effectively likely future panel members

demonstrated they are/were unfit for the positions they hold/held, little alone to be given extra judicial like powers). The powers being proposed rely on decision makers being competent in judicial decision making and legally astute enough to make many decisions previously made within the Supreme Court. It is important to recognise those wielding the powers of the important Qld Guardianship and Administration Act also have the ability to destroy lives through incompetence, improper consideration of evidence and that currently bad decisions are hard to reverse while means for proper/affordable independent review doesn't exist.

My experiences show QCAT has at times demonstrated complete bias and incompetence – maybe it's a culture problem thinking they are already equal to the Supreme Court. The Supreme Court would not have allowed another States Crown Solicitor to control Qld proceedings, hearings that don't leave a disabled Queensland Protected Person unrepresented when intentions/action are not in that person's best interests. Nor allow 'cooperation' arrangements between States, or deals to override a Queensland residents rights, or disadvantage a Queensland resident by further unnecessarily permanent removal of rights and liberties.

Currently too many conflicts of interest and lack of consistency exist at Tribunal levels to be relied on for important decisions. Some peoples' submissions may raise that the stripping of financial assets from the vulnerable is often the real objective behind many abuses of power and position, be it for personal or topping up State revenue. In the example raised above QCAT argued their powers stopped at the Border and that they would not consider what occurred across that SA/Qld Border. QCAT also chose to ignore obvious misrepresentations of 'Fact and Law' by the SA Crown Solicitor plus accepted presentation to our Qld legal process of financial records that had been manipulated and changed to hide significant errors. As criminal acts of fraud, even across borders, have no demonstrated penalty/ramifications then it must be recognised for justice to apply there needs to be a means to address such situations within these GAA amendments; account must be made for the fact that we do not live in isolation and abuses will also originate from outside our Queensland borders and also from State Crowns. I don't understand how amendments will cater for that situation, which is more common than legislators may be aware.

Yes, QCAT use may initially lower proceeding costs when compared to the often unaffordable Supreme Court alternative; I raise the concern that the real cost without better quality control may in some cases prove too high a cost for many Queensland residents (while the risks of conflicts of interest and legal incompetence are not also amended). New problems with higher outcome costs for those least able to appeal also needs be taken into account. Has the appeal process implications been addressed/incorporated into amendments within other legislations? Does this GAA legislation infer the abusers are individuals, which isn't only the case – the rules need to apply to all abusers and be enforceable against all offenders even if it's a Government Office or a decision maker including the proposed decision maker QCAT. Current QCAT self review is inadequate.

Actions in the Queensland: An Age Friendly Community - Action Plan and Implementation Schedule implemented or implemented in part by the Bill include:

•improving financial remedies for adults with impaired capacity when attorneys fail to comply with their duties (Action 38).

•Power for QCAT to order an attorney (or former attorney), administrator (or former administrator), guardian (or former guardian) to compensate a principal or a principal's estate

The practical effect of this is that all such claims must proceed in a Court which in some circumstances (dependent on the size of the adult's estate) may be prohibitively costly.

It is proposed to remove this uncertainty and enable QCAT to exercise the same jurisdiction as a court in relation to ordering compensation for a loss to the principal or the principal's estate caused by an attorney or a former attorney, an administrator, or former administrator, a guardian or former guardian who fails to comply with his or her duties.

Section 1317AE of the Corporations Act - here is a direct inconsistency between the Queensland and Commonwealth - Displacement provisions are necessary to resolve the conflicting state and federal statutory obligations

Will legislation address these practical problems?

I seek to understand if the proposed legislation amendments address what I raise re interstate 'former attorneys, administrators or guardians? If exempt 'please explain' why then can't all offences against a Queensland resident be investigated and prosecuted through the legal systems of the State the resident resides/resided at death? If a serious crime is committed in Australia then no free avoid gaol/exemption cards should exist.

Does the 'administrator' term generalisation equally apply to both Private Trustees and also Public Trustees – both operate under different Trustee legislations – Public Trustees under Queensland, other States and Territories Acts and Private Trustees under Federal Trustee Act – will this amended Queensland GAA have means to 'control' administrators under law and powers the above also claims is wanted? The States enjoy the financial benefits gained after Tribunals direct citizen's to be placed under Administration of their Public Trustees; it is not uncommon for clients' life savings to be reduced significantly and unnecessarily by bad appointments. To control the obvious conflicts of interest, before making legislation that can exacerbating this, I suggest maybe it is long overdue for better Administration safeguards starting with all Trustee's operating under the same Federal Act that Private Trustees are required to abide by and where ASIC can monitor – that simple and available option to place Public Trustee Queensland under the Federal Act would force some determinations away from risks off conflicts of interest or complicity resulting in effectively irreversible bad decisions not in the best interests of the vulnerable or so called Protected Person. This option was rejected by the States in around 2010 – complexity is increased by amendments that may expect Q AGD Office of QCAT to force compensation from Q AGD Office of the Public Trustee – next consider QCAT forcing compensation from another States Public Trustee. The

first priority of these legislative amendments should be to ensure in all situation Queenslander's can be better protected under Rule of Law. QCAT in a hearing claimed itself as without powers to direct the interstate Administrator of a Queensland resident and 'applicant' for the hearing, SA Public Trustee, to do anything it didn't want to do – that is surely ridiculous. How will these GAA legislation amendments fix such failures to protect Queensland Protected Persons?

– As alluded to I am raising real and practical experiences to test the amendments against: currently the Estate of a deceased Queensland resident (died 1 Nov 2015 remains in partial limbo). Supreme Court Probate was arranged through previous Administrator PTQ (Assumed best case test scenario: no delays or blocks experienced) yet the Probate process took until 24 May 2016. Note that took over 6 months. Probate appointed Joint executors - one in Qld and one in SA – SA Executor was previously a SA EPA which had been revoked in 2006 by SA Guardianship Board (allege without review of Elder Abuse; the argument was that EPA matters can be addressed later after the donor's death). Probate – both executors swore to abide by Qld Probate/relevant Qld Legislation. Since then the SA Executor chooses to withhold incriminating financial and EPA related documentation belonging to the Estate, hence preventing investigation of anomalies evident to the Qld Executor. The only known avenue for access to Estate withheld records, justice for my mother and recovery of lost principle, appears is to go through the Supreme Court for disclosure Court Orders (estimated $50000 cost) –where subsequent legal costs will remove much of the Estates value (the theft from my mother (which adversely impacted on her latter life, health and choices)) Legal advice was this stonewalling and hiding evidence by a past EPA is not uncommon. A lower cost alternative to Supreme Court action, particularly during estate administration and recovery stages, is long overdue.

The QCAT directed avenue for evidence discovery must service all likely needs, including cross border sources and Public Trustees. The full extent of theft from the Estate is unclear due to the SA Executor's unlawful gaining control of all the Estates records at an early stage and not disclosing full and accurate records. The policy of Banks/Organisations in not keeping records over around 7 years exasperates matter further (a period my mother, a Protected Person/Adult had no demonstrated say in/protection of her financial or legal rights under SA or Qld Law). The Federal Government allege they can't interfere in Offences occurring within a State or under State Legislation even if the State fails to enforce that Legislation and abide by the principles of Rule of Law. Will GAA amendments fix this? If not will the problem be ignored?

If as a Qld Supreme Court Probate appointed Executor of my mother's Estate I knowingly ignore theft from the Estate and hence do not abide by requirements of an Executor, I breach Qld Legislation – my mother's moral and ethical stand was not to condone theft of any kind - however to seek justice for her would dissipate much of her life savings (her Estate) in legal/court costs in Qld and SA, which would not have been her wishes. Will these Legislation amendments help real life cases like this?

To provide a focus on contemporary practice and human rights for adults with impaired capacity the Bill:

•clarifies that QCAT can exercise the same jurisdiction as a court in relation to ordering either an attorney or a former attorney, an administrator or former administrator, guardian or former guardian, to pay compensation for a loss to the principal or the principal's estate due to the attorney's, administrator's or guardian's failure to comply with his or her duties (Actions 33 and 38 Queensland – An Age Friendly Community –Action Plan and Implementation Schedule);

•provides that both a court and QCAT can order an attorney or a former attorney, an administrator, or former administrator, a guardian or former guardian, to account for any profits the attorney, administrator or guardian has accrued as a result of the attorney's or administrator's failure to comply with his or her duties (QLRC recommendations 17.17) (Actions 33 and 38 Queensland – An Age Friendly Community –Action Plan and Implementation Schedule);

•clarifies that QCAT can order either an attorney or a former attorney, an administrator or former administrator to file in the tribunal records and audited accounts of the administrator's or attorney's dealings and transactions conducted on behalf of the adult (Actions 33 and 38 Queensland – An Age Friendly Community – Action Plan and Implementation Schedule);

•clarifies that an EPA made under the POA by an adult residing interstate is effective in Queensland (QLRC recommendation 16.23);

•provides that the existing provision that provides that an EPA made in another state can be treated as if it is an EPA made under the POA (under certain circumstances) also extends to an EPA made in another jurisdiction, i.e. New Zealand (QLRC recommendation 16.22);

SA and Qld EPA Legislation are far different (Qld for the better) – e.g. a SA EPA under SA legislation can 'lose' records and the max Court imposed penalty is just $1000 (much more than the cost to get to Court; no deterrent when Estate asset theft exceeds this inadequate SA penalty). How then are cross Border offences like these EPA related likely to be treated after Qld GAA amendments are legislated? Will the same offence against a Queensland resident have different/lesser implications if the EPA was created or misused against a Queensland resident from within another State? Why should it have a greater cost to address or involve what appears State legal duplication? If too hard for the States to work out together then some matters like this should be voluntarily passed over to Federal jurisdiction. I thought our Australian Constitution expected all citizens, no matter where they live in Australia, should be afforded equal protection?

"The practical effect of this is that all such claims must proceed in a Court which in some circumstances (dependent on the size of the adult's estate) may be prohibitively costly."

Expectations of the amendments are argued to provide cost effective solutions. Will they in this form provide viable and proper means to protect Queensland residents from abuse no matter where it comes from within Australia? If not, then consider how many of the residents that moved to live in Queensland are not being afforded proper protection others have.

Consistency with fundamental legislative principles
The Bill is generally consistent with fundamental legislative principles. Potential breaches of fundamental legislative principles are addressed below.
Legislation has sufficient regard to the rights and liberties of individuals -section 4(2)(a) of *Legislative Standards Act 1992*.
Section 4(3)(g) Legislative Standards Act - legislation does not adversely affect rights and liberties.

Nevertheless, a note is inserted drawing attention to section 152 GAA (Tribunal authorisation and approval) which provides (once amended by clause 35 of the Bill) for QCAT to exercise its discretion and retrospectively authorise a conflict transaction.

Clause 25 replaces existing section 59 (Compensation for failure to comply) with a recast new section 59 (Compensation and accounting for profits for failure to comply).
The newly cast section 59 is amended firstly to clarify that a court's or QCAT's power to order a guardian or administrator (an appointee) to compensate the adult, or if the adult has died, the adult's estate, for a loss caused by the appointee's failure to comply with this Act in the exercise of a power, applies even where the appointee's appointment has ended.
Section 59 is also amended to allow both a court and QCAT to order that an appointee (or former appointee) account for any profits the appointee has accrued as a result of the failure to comply with this Act in the exercise of a power. This is intended as an alternative remedy to an action for compensation. As such subsection 59(2) (as renumbered by this Bill) is inserted to make clear that the court or QCAT may not order the payment of both in relation to the same exercise of power.

Clause 26 inserts new sections 60A (Effect on beneficiary's interest if property dealt with by administrator), 60B (Administrator not required to keep proceeds and property separate) and 60C (Application to court to confirm or vary operation of s60A), relating to the new statutory exception to ademption.
New section 60A (Effect on beneficiary's interest if property dealt with by administrator) provides a legislative exception to ademption where an administrator sells or disposes of property which is the subject matter of a specific gift in a deceased adult's will. A beneficiary will have the same interest in any surplus money or other property (the proceeds) arising from a sale, mortgage, charge, disposition of, or other dealing with, property by an administrator as the beneficiary would have had in the property had it not been sold or otherwise dealt with.

A beneficiary is also entitled to any traceable income or any capital gain generated by the proceeds. Section 60A applies even if the beneficiary is the administrator who sold or otherwise dealt with the adult's property.
While this section creates a legislative exception, so that ademption does not occur (without the need for a court order), it operates subject to any order made by the court under section 60C.

New section 60B (Administrator not required to keep proceeds and property separate) clarifies that section 60A does not require an administrator to keep the proceeds of sale or other dealing of property separate from the other property of the adult. (This does not impact on the continuing obligation (see section 50) for administrators to keep their property separate from the adult's property).

> The court may make such orders as it thinks fit to give effect to the legislative exception to ademption (under section 60A) or to ensure that no beneficiary gains an unjust and disproportionate advantage or suffers an unjust and disproportionate disadvantage, of a kind not contemplated by the will.
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> For example, an adult's will may be designed to treat beneficiaries equally via specific gifts, but, because of the operation of section 60A (that creates the exception to ademption) the sale or a disposition of a property may mean that one beneficiary receives a disproportionately higher or lower benefit under the will. New section 60C will enable a beneficiary to apply to the court for an order that adjusts the beneficiary's entitlements to better reflect the original intention of the testator. An order made has effect as if it had been made as a codicil to the adult's will executed immediately before the adult's death and applies despite any contrary operation of section 60A. An application must be made within six months of the adult's death. However, the court may extend the application time. Section 44(1) to (4) of the *Succession Act 1981* applies to the application and any order made.

Sometimes theft can't easily be traced, as the records needed above are withheld by the EPA. As my experiences can demonstrate this proposed 6 month time limitation without special extension is impractical, prohibitive and in a practical sense likely farcical – it should be recognised that evidence of Estate assets is the key to first determining the value of Estate assets yet is often delayed or withheld, holding up proper distribution. The vague 'may extend' is not sufficient. The proposed 'application' needs to be available not just for 6 months after death but continue to be available to Executors or interested parties until final Estate settlement is reached (in this case while the Executors have some powers available to them to seek, consider then act on that evidence). Without available evidence, how can matters be sorted outside Courts or as proposed within QCAT or the Supreme Court; just or informed decisions are not encouraged and are unlikely. Sadly I have experienced too many of those 'lesser Courts' demonstrating that when conflicts of interest exist, complicity, sophistry may result in predetermined bad decisions made without seeking or even properly considering the available cogent evidence. I therefore oppose unrealistic time limitations that dissolve accountability, and seek legal solutions that will act under and abide by court rules and that expects cogent evidence to be available and properly considered.

> *Clause 33* amends section 125 (Representative may be appointed) to allow any member of QCAT (not just the president or presiding member) to appoint a representative to represent an adult's views, wishes and preferences and interests; and clarifies the role of the representative appointed.

Who is appointed has an important bearing if 'representation' is intended to be in the Adults best interests; or the Administrators or an avenue to achieve a desired outcome (not necessarily in the Adult's best interest). 'May be appointed didn't work well; the view of my mother, a disabled Adult/Protected Person, was not properly considered in a recent QCAT hearing? By example, I attended a 'pseudo court hearing' which favoured one party and it wasn't the defenceless Adult;, the SA Public Trustee knew it needed to simply claim to QCAT under our Act 'complex matters of law or fact' exist to be able to use a Crown Lawyer in those Queensland hearings; in my mother's experience even when the Adult/ defendant was

a so called SA and Qld Protected Person unable to speak due to a stroke/incapacity; no defence was afforded her in a case that proved not in her best interests. The Adult was also actively denied the requested access to use her own assets to secure legal representation/counter a SA Crown Lawyer, and QCAT found it acceptable the Adult was not afforded any form or representation at its hearings – this Kangaroo Court like injustice/unbalance extends beyond abuses within Tribunals but raises the need for GAA amendments to be precise and return proper scrutiny before giving Tribunals more legal decision making powers and 'optional injustice'. Yes QCAT has a lower running cost than the true Courts – if given more powers then first amend Acts so QCAT has to fully abide by normal Court Rules also, including mandating equal legal representation to a Protected Person, even those silent or incapacitated. Please recognise and cater for the conflicts of interest and complicity that do exist between Tribunals and Public Trustees. Also recognise and address 'co-operation between States and between interstate counterparts' in 'problematic Crown cases' most likely will result in injustice to the vulnerable Adult as a predetermined outcome.

I need to add I did experience another earlier QCAT hearing where an adjudicator was thorough and competent with the necessary background and experience; without controlling influences it was demonstrated justice can prevail in QCAT and even powerful interstate bullies such as SA Public Trustee can be challenged under our laws (even if done 'off the hearing's taped record'). GAAT and QCAT had both rejected and blocked the same matter that was later through 'Cooperation between States' pushed through QCAT against the evidence and best interest for the Adult. SA PT's third and last attempt to force the revoking of their own Administration relied on that co-operation. Yes complex, until the motives are understood: this removed my mother any further viable legal avenues to seek rights as a Protected Person under SA Law and allowed problematic SA files to be buried for the next 60 years) – while inconsistency in the skills and qualifications to make GAA decisions varies so greatly, and matters are often determined before hearing, justice may not be improved by some of these proposed amendments. From these inconsistencies I suggest QCAT's proposed powers should be limited to more of an administrative role, or black and white issues. Initially a viable means just to force evidence disclosure is clearly needed, hence a means to help resolve nondisclosure stalemates – how that evidence can be addressed within a Tribunal often with conflicts of interest/associations and without magistrates making legal decision needs greater consideration – a start may be the better selection in QCAT panel representation for such legal matters, based on the type of decision being sort, rather than what appears as whose turn is up next on the panel or who wants a go or in some cases who sadly will support the outcome that has been predetermined before hearing.

> *Clause 34* amends section 129 (Interim order) to clarify that where QCAT is making an interim order in relation to an adult, because there is an immediate risk of harm to the health, welfare or property of the adult, one of the grounds of which QCAT must be reasonably satisfied is that the adult has, or may have, impaired capacity for a matter.

Clause 35 replaces existing section 152 (Tribunal authorisation or approval) with a recast section 152 (Tribunal authorisation or approval) that clarifies that QCAT can authorise a conflict transaction prospectively (before the administrator enters into a conflict transaction) or retrospectively (after the administrator has entered into a conflict transaction). Given the general duty (see section 37) on administrators to avoid conflict transactions, the recast section 152 provides that until QCAT retrospectively authorises a conflict transaction, an administrator has still acted contrary to his or her duty under section 37.
Subsection (5) maintains the existing position that the tribunal may approve an investment as an authorised investment.
Clause 36 amends section 153 (Records and audit) to clarify that that QCAT can order either an attorney or a former attorney, an administrator or former administrator to file in the tribunal records and audited accounts of the administrator's or attorney's dealings and transactions conducted on behalf of the adult. That is, section 153 is amended to clarify that the existing provision applies even if the administrator's appointment has ended, the enduring power of attorney has been revoked, or the adult has died

The truth behind being 'Reasonably satisfied' and clear 'conflicts' is where some of the greatest injustices stem from – it must be recognised a conflict of interest exists between QCAT and PTQ (an 'Administrator'). Cases where 'bad' impaired capacity determinations have destroyed a vulnerable persons rights [liberties, life and assets are many and normally cannot be addressed or incapacity overturned…] are many – recent cases in Adelaide and Brisbane demonstrate it can take 2 years and much of the Adult's assets to overturn a Tribunal's bad decision when the appointed administrator is a Public Trustee. Again without quality and competent assessors much will remain open for abuse – my experience of one QCAT panel demonstrated it both didn't understand basic accounting nor the laws involved or legal implications of its wrong decisions (alleged appeared manipulated and predetermined before the hearings) –when Tribunals argue it is accepting matters at 'face value' and there is no need to consider the cogent evidence available to it, QCAT self-review demonstrated this is apparently acceptable practice within its pseudo court jurisdiction. What was argued by QCAT/SA as being correct was later shown to be and admitted wrong – by then the bad decisions relying on lies couldn't be overturned and nothing able to be rectified. The implications are many for the above GAA amendments and again I ask - what are the time limitations proposed that will apply to these many amendments? Moving jurisdictions from one system to another and backlogs will follow – if fast tracking injustices in the ways I experienced are proposed as part of Queensland's 'new' justice system, then problems within Tribunals will only get worse not better.

Clause 59 amends section 32 (Enduring power of attorney) to clarify that an EPA may be made by an adult principal outside the State. This clarifies that where the person lives interstate or overseas and makes an EPA under Queensland legislation, the instrument will be effective in Queensland.

Clause 60 amends both the heading of section 34 (Recognition of enduring power of attorney made in other States), and the section itself, to expand the recognition in Queensland of an EPA made in another state (in accordance with the requirements in that state) to recognise an EPA made in another jurisdiction (that will include New Zealand). Previously such recognition only applied to another State. A corresponding amendment is made to schedule 3 (Dictionary) for the term *jurisdiction.*

Will 'recognition' come with a Queensland means to enforce and prosecute all EPA breaches against a resident of Queensland? Will this be with the equivalent consequences and penalties that occurs under Queensland EPA legislation? Otherwise recognition without equal consequences or the means to address offences may actually decrease protection of a Queensland resident.

The legislation should consider that many people over the years have moved to Queensland; like my mother did. Yet she was abused without viable recourse from within SA for much of her latter life - even though a so-called 'Protected Person' under Qld Law and I actively tried to protect her (some victims have no support whatsoever). Even after death her wishes continue to be abused today. EPA's are created and misused over many years and benefit from aged care/company/bank records not being retained for over 7 years and from legislated time limitations being impractical or unreasonable (it should be recognised theft is not a civil act but a criminal act no matter who does it). The Supreme Court would be expected not to use the same principles QCAT chose to use in my mother's hearings (there was no choice at that time but to use QCAT); that example arose from an unsupported application to QCAT from the SA Public Trustee; yet in rubber stamping QCAT said it not only won't look at matters in SA and that QCAT's powers stops at the Border but directed PTQ when appointed as Administrator not to look into past SA Administration where it can be shown financial offences against the Estate have occurred - as SA matters were key to expose injustice, QCAT's resulting bad decisions also effectively dissolved means to address SA abuses against a Queensland Protected Person. SA PT were very happy with our States co-operation which facilitated hiding SA offences.

Is it intended these amendments will better address protection of Queensland's most vulnerable from abuse and discrimination under Law? Will amendments also address that QCAT can self-decide if challenges to its decisions are reviewed. How does the proposed GAA and other legislation amendments ensure others will no longer be likely to experience the same abuses and adjudicator non-transparency and no accountability I have raised examples of in this submission?

> New section 61A (Application of sections 61B – 61D) provides that these sections only apply in relation to EPAs. That is, they do not apply to General Powers of Attorney.
> New section 61B (Effect on beneficiary's interest if property dealt with by attorney) provides a legislative exception to ademption where an attorney under an EPA sells or disposes of property which is the subject matter of a specific gift in a deceased principal's will. A beneficiary will have the same interest in any surplus money or other property (the proceeds) arising from a sale, mortgage, charge, disposition of, or other dealing with, property by an attorney as the beneficiary would have had in the property had it not been sold or otherwise dealt with.
> A beneficiary is also entitled to any traceable income or a capital gain generated by the proceeds. Section 61B applies even if the beneficiary is the attorney who sold or otherwise dealt with the principal's property. While this section creates a legislative exception, so that ademption does not occur (without the need for a court order), it operates subject to any order made by the court under section 61D(1).
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> New section 61C (Attorney not required to keep proceeds and property separate) clarifies that section 61B does not require an attorney to keep the proceeds of sale or

other dealing of property separate from the other property of the principal. This does not impact on the continuing obligation (see section 86) for an attorney to keep the attorney's property separate from the principal's property.
New section 61D (Application to court to confirm or vary operation of s 61B) enables the court, on the application of a beneficiary of the adult's will, a personal representative of a deceased beneficiary of the adult's will or a personal representative of the principal, to make orders confirming or varying the legislative exception to ademption. (Note that the term 'personal representative' is defined in the *Acts Interpretation Act 1954*).
The court may make such orders as it thinks fit to give effect to the legislative exception to ademption (under section 61B) or to ensure that no beneficiary gains an unjust and disproportionate advantage or suffers an unjust and disproportionate disadvantage, of a kind not contemplated by the will.

For example, a principal's will may be designed to treat beneficiaries equally via specific gifts, but, because of the operation of section 61B (that creates the exception to ademption) the sale or a disposition of a property may mean that one beneficiary receives a disproportionately higher or lower benefit under the will. New section 61D will enable a beneficiary to apply to the court for an order that adjusts the beneficiary's entitlements to better reflect the original intention of the testator.
An order made has effect as if it had been made as a codicil to the principal's will executed immediately before the principal's death and applies despite any contrary operation of section 61B. An application must be made within six months of the principal's death. However, the court may extend the application time. Section 44(1) to (4) of the *Succession Act 1981* applies to the application and any order made.

This all takes time. As my experiences can demonstrate the 6 month time limitation to seek evidence without special extension is impractical – in fact as evidence of Estate assets is often withheld that 'application' needs to be available not just for 6 months but continue to be available while the Estate settlement has not reached settlement (while the Executors have powers available to them). As current experience show, key property transactions may be retained within State records but the Family agreements (legal or not that were misused to gain access to assets are not held by the lawyers involved for more than the required 7 years). How will a Court make the decisions proposed without access to related cogent Estate records, take claims at face value?

What will be likely when bad decisions are made that allow or condone injustices – what will be the cost to appeal these uninformed decisions? Once again I assume a Court not a Tribunal is being discussed here for these serious and challengeable decisions; and will all contributors falsifying records to pass the face value test be accountable under the proposed amendments?

Who is the suggested application to – QCAT or still to the Supreme Court? What is the cost for application and are lawyers required? Hence as raised in the beginning of this submission – does the argument for legislation amendment really mean that the new proposed legislation will;

> ***"… in this form provide viable and proper means to protect Queensland residents from abuse no matter where it comes from within Australia?"***

Or will Elder Abuse and theft from the vulnerable or elderly remain an easy and safe crime unlikely to be prosecuted, deemed not worth the effort to legally address or remain unaffordable to address? Will the cogent evidence decision makers need to consider continue to be able to be withheld or destroyed without likely penalty? Queensland has the opportunity to better amend legislation so that all offences against its citizens have consequences, no matter the offender. Only then will the proper message be sent and Elder Abuse in its many forms reduce. Only after proper thought is given to all scenarios can 'viable and proper means be integrated to protect Queensland residents from abuse no matter where it comes from within Australia'.

> *Clause 74* replaces existing section 106 (Compensation for failure to comply) with recast section 106 (Compensation and accounting for profits for failure to comply).
> The newly-cast section 106 is amended to clarify that a court's or QCAT's power to order an attorney to compensate the adult, or if the adult has died, the adult's estate, for a loss caused by the attorney's failure to comply with this Act in the exercise of a power, applies even where the attorney's appointment has ended.
> Section 106 is also amended to allow both a court and QCAT to order than an attorney (or former attorney) account for any profits the attorney has accrued as a result of their failure to comply with this Act in the exercise of a power. This is intended as an alternative remedy to compensation. As such subsection 106(2) is amended to make it clear that the court or QCAT may not order the payment of both in relation to the exercise of the same power.
> The Bill makes a corresponding amendment to existing section 59 of the GAA.

Again if consequences for inappropriate actions are proposed then how will cross border implications be addressed to better protect all Queensland residents?

> *Clause 77* amends existing section 122 (Records and audit) to clarify that the Supreme Court or QCAT can order either an attorney or a former attorney to file in the court or the tribunal records and audited accounts of the attorney's dealings conducted on behalf of the adult. To this end, new subsection (4) is inserted to make it clear that the court or tribunal can make this order even if the enduring power has been revoked or the principal has died.
>
> New section 171 (Existing certified copy of enduring document) provides for the transitional application of the amendment to section 45 (Proof of enduring document). The amendment does not apply to a copy of an enduring document certified under section 45 before the commencement of the amendment Act.

The penalty for presenting false records, including to QCAT, needs to be in keeping with other fraud or theft crimes – particularly when the Adult is deemed unable to understand those records; arguing this is just a part of Elder Abuse, without being treated as a criminal act, disregards the Adult rights others expect and are given. The same should apply to Administrators or Trustees – Public and Private. How will QCAT now address criminal acts?

I experienced QCAT does not act to address false or fraudulent documents being submitted to it; how then will this weak link be rectified? I also suggest from my experiences, amendments consider pro-active terms to ensure that the Original EPA is sighted early on, not just a JP certified copy, sighted within an appropriate forum at least once before a donor's powers or assets passing over (which this legislation later reactively attempts to

recover) – applies particularly for non-lawyer prepared EPA's that may later demonstrate being unlawful, (or as experienced show contradicting copy clarity dependent on its use or a likely doctoring to hide the EPA JP's witness identity/stamp etc.)

> *Clause 88* amends section 21 (Records and audit) to expressly provide that the Public Guardian's power to require certain attorneys/administrators to file a summary of receipts and expenditure, or more detailed accounts of dealings and transactions for the adult, applies even after the adult's death. Minor renumbering to the section occurs as a consequence.

Again as this is likely in the interest of the Adult, why the wording ambiguity of 'certain attorney/administrators'? What is the purpose of exclusions considering the Public Guardians extended powers? Again what about Queensland access to records that are denied/retained over our State's border? – my mother's case demonstrates so much that has and continues to go wrong because things were done badly, and because no known viable independent means was/is provided for recourse - changes to legislation and practices are urgently needed so that protection of a Queensland Protected Person is more like a reality not a façade and where possible amendments designed to remove the likelihood of conflicts of interest will not enable more conflicts – the cogent evidence I hold is extensive and I am prepared to provide whatever will help this Committee make informed and correct decisions about amendments to such an important piece of Queensland legislation. My wife and I would be more than happy to attend and answer whatever questions are asked of us at a future public forum.

Unfortunately in practice justice depends less on the wording of the Australian Constitution or Laws than in how they are enforced and if manipulation and abuse is condoned by blind eyes being turned.

Sincerely

Chris Jenkinson