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20th September 2017

Legal Affairs and Community Safety Committee

Parliament House

George Street

Brisbane QLD 4000

Attention: Acting Committee Secretary

Via email transmission: lacsc@parliament.qld.gov.au

ATSILS' (Qld) Ltd. Submission to LASCS on the Guardianship and Administration and Other Legislation Amendment Bill 2017.

Dear colleague,

The Aboriginal and Torres Strait Islander Legal Services (QLD) Ltd. (ATSILS) welcomes and appreciates the opportunity to make a submission on the Guardianship and Administration and Other Legislation Amendment Bill 2017 (the Bill).

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). As an organisation, which for over four decades has practised at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

ATSILS is pleased to provide our support to the Bill's amendments of the *Integrity Act 2009*, the *Government Owned Corporations Act 1993* and the *Public Interest Disclosure Act 2010*. However, although we generally support the amendments to the Queensland guardianship legislation we still have concerns with certain clauses as outlined below.

Comments on the Queensland Guardianship Legislation

We understand the Bill objectives is to: focus on contemporary practice and human rights for adults with impaired capacity; enhance safeguards for adults with impaired capacity in the guardianship system; and improve the efficiency or improve the clarity of Queensland's guardianship legislation¹. Achieving these objectives requires legislative reform of the Queensland guardianship legislation consisting of the *Guardian and Administration Act 2000* (GAA), the *Powers of Attorney Act 1998* (POA) and the *Public Guardian Act 2014* (PGA), as well as incorporating the Queensland Civil and Administrative Tribunal (QCAT) to overview the GAA. When considering the reforms ATSILS noted the drafters took into account the recommendations from the Queensland Law Reform Commissions' (QLRC) final report², the United Nations Convention on the Rights of Persons with Disabilities (the Convention)³, the Inquiry into the adequacy of existing financial protections for Queensland seniors⁴ (certain recommendations incorporated into the Queensland – An Age Friendly Community - Action Plan and Implementation Schedule⁵), interstate comparable legislation⁶, *Legislative Standards Act 1992* and significant stakeholder consultations.

ATSILS acknowledges the extensive consultation and thought that has gone into the making of the Bill and commends the Queensland Parliament with the administrative affairs

¹ Explanatory notes, Guardianship and Administration and Other Legislation Amendment Bill 2017, 1.

² Queensland Law Reform Commission, A Review of Queensland Guardianship Laws, Report No 67 (2010) Volume 1.

³ Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

⁴ Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into the adequacy of existing financial protections for Queensland's seniors* (2015) Report 19.

⁵ Department of Communities, Child Safety and Disability Services, *Queensland: an Age-friendly community* (6 July 2017) Queensland Government <

<https://www.communities.qld.gov.au/communityservices/seniors/queensland-age-friendly-community>>

⁶ i.e. *Powers of Attorney Act 2003* (NSW).

oversight in the areas under discussion. We provide the following comments with the upmost respect for the process and presentation of the Bill.

(i) Clause 57 and 67

These clauses amend sections 29 and 63 of POA which addresses the meaning of eligible attorney. Section 29(1) of POA amendment extends the requirement that a paid carer for the principal is not eligible as an attorney for the carer to also a person who had been a paid carer within the previous three years. Section 29(2) of POA inserts that a service provider for a residential service where the principal is a resident is not an eligible attorney under an Advance Health directive, while section 63 (1) & (2) of POA sets in where a person who is 18 years or more and who has the care of the adult or who is a close friend or relation of the adult is not eligible as a statutory health attorney, if he or she is a health provider for the adult or a service provider for a residential service where the adult resides.

ATSILS appreciates the basis for the 'amendments is to ensure unsuitable people cannot act as attorneys and to reduce the risk of abuse or exploitation to an adult by a person appointed under an enduring document'.⁷ However consideration should be given to Aboriginal and Torres Strait Islander remote communities in Queensland where the above amendments can be limiting due to population numbers and availability of job positions, such that the appointment of an attorney(s) can be far more problematical. **Discretion** for a determination by the Public Guardian is recommended to overcome this limitation.

(iii) Clause 67

As mentioned this clause amends section 63 of POA which sets out that for a health matter, who is an adult's statutory health attorney. A new subsection 63(5) of POA provides the meaning of a **relation** of the adult for the purposes of subsection 63(1)(c) of POA to make it clear that it is a person 18 years or more who is a close friend or relation of the adult and is not a paid carer for the adult. Section 63(5) of POA inserts that for an Aboriginal person

⁷ Above n 1, 14.

(63(5)(b)(ii)) or a Torres Strait Islander (63(5)(b)(iii)) is an adult who under custom is regarded as a relative of the adult.

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

We note Australian family is defined as:

A group of two or more people that are related by blood, marriage (registered or de facto), adoption, step or fostering, and who usually live together in the same household. This includes newlyweds without children, gay partners, couples with dependants, single mothers or fathers with children, and siblings living together. At least one person in the family has to be 15 years or over. A household may contain more than one family⁸.

This definition does not fit the more extensive Aboriginal concept of family. 'The traditional social structure of Aboriginal communities is based around kinship systems that adopt an entirely different terminology to that of an "Anglo-Celtic" system'⁹. It has been said, 'the most outstanding aspect of Aboriginal kinship systems was, and in many places still is, the existence of whole classes of people identified by an Aboriginal person as his or her 'brothers', 'fathers', 'sisters', 'other', 'husband', 'wives, or other classes of affines'.¹⁰ It is important to note here a relative of an Aboriginal or Torres Strait Islander adult might be a non-Aboriginal or Torres Strait Islander adult as long as they belong to the kinship system.

ATSILS affirms the need for the definition to be broad to encompass the kinship system, but suggests that section 42 of GAA be amended to support this new subsection. Section 42(1) of GAA deals with the disagreement about a health matter for an adult and how the

⁸ Australian Bureau of Statistics, *What is Family?* (1 May 2013) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/6224.0.55.001~Jun%202012~Chapter~What%20is%20a%20Family%3F>>

⁹ Frances Morphy, *Lost in Translation? Remote Indigenous households and definitions of the family* (2006) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.542.4007&rep=rep1&type=pdf>>

¹⁰ Eleanor Bourke and Colin Bourke, *3. Aboriginal Families in Australia* (1995) Australian Institute of Family Studies <https://aifs.gov.au/publications/families-and-cultural-diversity-australia/3-aboriginal-families-australia>

disagreement can be resolved. For disagreements around s42(3)(b) of GAA being between or among 2 or more eligible statutory health attorneys for an adult about which of them should be the adult's statutory health attorney or how power for the health matter should be exercised, s42(1) of GAA should be extended to include that the public guardian consults with the elders or Community Justice Group of the said kinship group before exercising power for the health matter. This may be able to be dealt with at the mediation stage by inviting the elders or Community Justice Group representatives into the mediation with the parties' consent of course.

In closing, once again our thanks for this opportunity to provide feedback on the Guardianship and Administration and Other Legislation Amendment Bill 2017.

Please do not hesitate to contact us at our head office in Brisbane should you have any questions or require any clarification.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Shane Duffy". The signature is written in a cursive, flowing style.

Shane Duffy

Chief Executive Officer