



20 September 2017

Acting Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

by email only: lacsc@parliament.qld.gov.au

TASC National Limited submission on the Guardianship and Administration and Other Legislation Amendment Bill 2017.

Dear colleague

TASC National Limited (TASC) welcomes the opportunity to make this submission on the Guardianship and Administration and Other Legislation Amendment Bill 2017 (the Bill).

TASC is a Community Legal Centre incorporating generalist and specialist legal, advocacy and social services. TASC has been in operation in the Toowoomba region since 1982 and now incorporates the Toowoomba, Ipswich and Roma Community Legal Services. Our Vision is 'Social Justice for All' and our Mission is to provide legal, advocacy and social services to vulnerable and marginalised members of our communities, by creating solutions together. Our services are targeted primarily to people in regional, rural and remote areas who are financially disadvantaged, and specifically we respond to the high legal need in people who have a disability and/or mental illness, people from a culturally and linguistically diverse background, those experiencing or at risk of domestic and family violence and those who are over 65.

TASC largely supports the proposed amendments to the Queensland guardianship legislation however we make the following comments with respect to the presentation of the Bill.

Objectives of the Bill

TASC commends the Bill's objectives and understands in part these are to: provide a 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 of Queensland's guardianship system or improve the clarity of Queensland's guardianship legislation¹. Achieving these

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

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objectives requires legislative reform of the Queensland guardianship legislation, namely the *Guardian and Administration Act 2000 (GAA)*, the *Powers of Attorney Act 1998 (POA)* and the *Public Guardian Act 2014 (PGA)*. TASC also notes that the Bill takes into account many of the recommendations from the Queensland Law Reform Commission's final report, *A Review of Queensland's Guardianship Laws (QLRC Final Report)*.²

Embracing international conventions

TASC welcomes the import of the United Nations *Convention on the Rights of Persons with Disabilities (CRPD)*³ into the Bill recognising that this signals a willingness by parliament to ensure that guardianship and administration legislation meets the principles, intent and spirit of the convention. Significantly the general principles and the health care principle have been redrafted to be more consistent with the CRPD's principles (*Clause 8*). More importantly the principles have been relocated to the beginning of the GAA and the POA from their current location in the schedules. There is added emphasis on ensuring the principles are applied by informal and formal decision makers. Collectively these changes ensure the legislation is consistent with contemporary human rights practice.

Presumption of capacity

TASC is concerned that tension exists between *Clauses 7 & 75* and the fundamental legislative principle that legislation should not adversely affect the rights and liberties of individuals.⁴ These clauses will, in effect, restrict the rights and liberties of people subject to a guardianship or administration order. Additionally these provisions are discriminatory in nature as they treat one class of people, those who lack capacity, differently to other societal members. Further these provisions protect a guardian or administrator as opposed to enhancing safeguards of those subject to the guardianship legislation, thereby potentially breaching an objective of the Bill. It is also questionable that these provisions breach CRPD Articles 5 (Equality and non-discrimination) and 14 (Liberty and Security of the person).

Whilst the aim of these provisions is to address the concerns raised in *Bucknall v Guardianship and Administration Tribunal (No 1) [2009] 2 Qd 402* around the presumption of capacity, they fail to satisfy obligations under the CRPD to ensure that people with disability 'enjoy legal capacity on an equal basis with others in all aspects of life'. This is because if an order or declaration has been made that the adult has impaired capacity then a guardian, administrator, person or entity is not required to presume at a later time that the adult has capacity for the matter. To adopt this approach is a failure to demonstrate the least restrictive philosophy where a person's autonomy is restricted only to the extent necessary and then only in limited circumstances. Further there is an outright failure to consider informal supports that assist an adult to exercise legal capacity when their capacity fluctuates, undermining both the integrity and rights of the adult. Finally the obligations of informal and formal decision makers to apply the principles are likely to be eroded if this approach is accepted.

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

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 Section 4(3)(g) *Legislative Standards Act 1992*

TASC is concerned that the Bill fails to recognise fluctuating capacity and that this breaches the CRPD and undermines both the objectives and principles espoused by the Bill. TASC believes this would be ameliorated if recommendation 15.1 from the QLRC Final Report is adopted.⁵

TASC however recognises that the proposed provisions in no way restrict a person from making an application to QCAT for a review of the appointment of a guardian or administrator.

Conflict transactions

TASC praises the Bill's strengthened provisions regarding fiduciary obligations of an administrator to avoid conflict transactions (*Clause 20*, see also *Clause 35*). Importantly this provision is augmented by amending section 59 GAA to clarify that a court or QCAT can order a guardian or administrator to compensate the adult or the adult's estate, for a loss caused by their failure to comply with the Act. Additionally this provision provides an alternative remedy to compensation through an account of profits order (*Clause 25*). Such amendments and clarification lend themselves as being preventative measures against financial exploitation of the elderly or those with a disability.

Please do not hesitate to contact TASC should you have any questions or require clarification. We again thank you for the opportunity to provide this feedback.

Yours faithfully



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⁵ 15.1 The Guardianship and Administration Act 2000 (Qld) should be amended to provide that, when making an order to appoint a guardian or an administrator (an 'appointee') for an adult who has fluctuating capacity, the Tribunal may limit the exercise of the appointee's powers to periods when the adult has impaired capacity.