Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Legal Advocacy for vulnerable people with Disability

Guardianship and Administration and Other Legislation Amendment Bill 2017

20 September 2017

Legal Affairs and Community Safety Committee

Ph: (07) 3844 4200 or 1300 130 582 Fax: (07) 3844 4220 Email: qai@qai.org.au Website: www.qai.org.au

2nd Floor, South Central, 43 Peel Street, STH BRISBANE QLD 4101

Summary of recommendations

Proposed amendments to the *Guardianship and Administration Act 2000* (Qld):

1. Section 5 should be broadened to explicitly recognise that capacity is time, domain and decision-specific and that capacity can be increased with appropriate support.
2. The General Principles and the Health Care Principles should be extended as proposed in the Bill, with the principles not limited in application.
3. The starting point for all decision-making processes must be the presumption of capacity, not incapacity.
4. The fourth limb of General Principle 10 (structured decision-making), whereby Advance Health Directives and Enduring Powers of Attorney must inform the decision-making, should be amended as proposed.
5. The Health Care Principles in s 11C should be extended as proposed.
6. Being a 'paid carer', or a past 'paid carer', should not preclude a person from eligibility to be a guardian or administrator. If this exclusion is applied, it should be limited in scope and duration.
7. The terminology 'paid carer' should be clarified. Being a former paid support worker should not be listed as an appropriateness consideration.
8. The new sub-section 5A should be inserted into s 31 as proposed in the Bill.
9. The increased obligations to consult flowing from the new s 68A should be broader than an obligation to consult with the statutory health attorney, and should require the Tribunal to consult with the following (if appointed): guardian; attorney; statutory health attorney; and qualified medical practitioners, including the individual's treating team.
10. In performing its functions or exercising its powers under the Act in relation to an adult, QCAT must be required, to the greatest extent practicable, to seek and take account of the views, wishes and preferences expressed or demonstrated by the adult and the views of any member of the adult's support network.
11. The extended requirements proposed for notification of hearings should be applied.
12. The proposed amendment of s 125, permitting any member of QCAT to appoint a representative for an adult, where they are concerned the adult's views, wishes and preferences are not being properly represented, should be made, with appropriate adjournments required where necessary to achieve this. Section 125 of the GAA should be redrafted to reflect the new MHA provision on the role of an appointed representative.
13. The Act must oblige QCAT to consult prior to the making of interim orders.
14. The whistleblower protections in the Act should be extended as proposed.
15. The new Part 4A of Chapter 11 of the Act should be introduced as proposed.
16. The scope of personal and special personal matters should be extended as proposed by Clause 44 and 45.
17. The definition of capacity should be amended by reference to a more inclusive understanding of the different methods of communication that may be used by a person, including facilitated communication.

18. The GAA should take a supported decision-making approach.

Proposed amendments to the *Powers of Attorney Act 1998* (Qld):

19. All persons or entities performing a function or exercising a power under the POA should be required not only to comply with, but also to apply, the General Principles.
20. The proposed inclusion of an express statement of the expanded General Principles and Health Care Principles should be affirmed.
21. Terminology around 'paid carers' and support workers should be amended.
22. The amendment proposed by Clause 59 permitting an EPOA to be made by a principal residing outside of the state should be made.
23. Advance Health Directives should be able to be made by an adult principal who is outside the state, which are valid in Queensland.
24. While the test for capacity for making an EPOA or AHD should be differentiated from the test for capacity used elsewhere in the Act, appropriate safeguards must be included. QAI supports other amendments made to ensure accessibility and simplicity of these orders (such as to the proof requirements for enduring documents).

Proposed amendments to the *Public Guardian Act 2014* (Qld)

25. The scope of s 43 of the PGA should be broadened as proposed, to permit persons with an obvious interest in the adult to also be able to request a community visitor visit a visitable site.
26. The proposed amendment to s 47 of the PGA, enabling the person who made the request, as well as an interested person for the consumer, to access a copy of the visitation report, should be made.

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for almost a decade, highly in-demand individual advocacy through our individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service, the Justice Support Program and the NDIS Appeals Support Program. Our expertise in providing legal and advocacy services and support for individuals within these programs, particularly through our Human Rights Legal Service and our systemic advocacy around issues of guardianship and administration, has provided us with a wealth of knowledge and understanding about relevant issues in this area.

QAI deems that all humans are equally important, unique and of intrinsic value and that all people should be seen and valued, first and foremost, as a whole person. Further, QAI believes that all communities should embrace difference and diversity, rather than aspiring to an ideal of uniformity of appearance and behaviour. Central to this, and consistent with our core values and beliefs, QAI will not perpetuate use of language that stereotypes or makes projections based on a particular feature or attribute of a person or detracts from the worth and status of a person with disability. We consider that the use of appropriate language and discourse is fundamental to protecting the rights and dignity, and elevating the status, of people with disability.

QAI has made submissions to previous reviews of the *Guardianship and Administration Act 2000* (Qld) (the 'Act'). We thank the Committee for the opportunity to make a submission on this occasion.

Proposed amendments to the *Guardianship and Administration Act 2000* (Qld) (GAA)

Definition of Capacity (Clause 6)

QAI supports the removal of the references to impaired capacity from the acknowledgements section of the Act. We support the continuing recognition that an adult's capacity to make decisions can vary depending on the type and complexity of the decision and the availability of support. QAI has published, with Allens Linklaters, the *Queensland Handbook for Practitioners on Legal Capacity*,[1] which emphasises that:

1. capacity is time-specific;
2. capacity is domain-specific;
3. capacity is decision-specific; and
4. capacity can be increased with appropriate support.

At present, section 5 of the Act only recognises the third point, and to a limited extent the fourth (the right to appropriate support is recognised in s 5(e), but the connection is limited to associating capacity with support, not with *appropriate* support).

[1] This resource is freely available, including through our website (www.qai.org.au) and through the Queensland Law Society website (www.qls.com.au).

Application of the General Principles (Clause 7)

The Bill proposes to replace Section 11 of the Act with a new section which broadens the scope of the provision to require that whenever a person or entity performs any function or exercises any power under the Act, they must apply the General Principles, including the presumption of capacity. The application of the General Principles is presently limited to functions or powers performed for a matter relating to an adult with impaired capacity.

QAI supports this extension of the scope of operation of the General Principles and recommends that these principles, as core human rights principles, should not be limited in their application. A similar broadening is afforded to the Health Care Principles, consistent with the recommendations of the Queensland Law Reform Commission (QLRC).

However, the proposed s 11(2) states:

> *If the tribunal or the court has appointed a guardian or an administrator for an adult for a matter, the guardian or administrator is not required to presume the adult has capacity for the matter.*

Similarly, the proposed s 11(3) states:

> *If a declaration by the tribunal or the court that an adult has impaired capacity for a matter is in force, a person or other entity that performs a function or exercises a power under this Act is entitled to rely on the declaration to presume that the adult does not have capacity for the matter.*

This makes the initial presumption one of incapacity, rather than capacity, when a guardianship order or declaration has been made. QAI is concerned that this section blanket reversal of the presumption of capacity is not consistent with the appropriately nuanced understanding that capacity is time, domain and decision-specific, and could subject a person to an order that is not required, particularly in circumstances where they have limited support networks to assist them to advocate for themselves. Recognition of the fluctuating nature of capacity is critical given that guardianship orders can run for substantial periods of time, within which a person's capacity can significantly vary.

QAI submits that there should always be the requirement to start with the presumption of capacity, irrespective of any order or decision – as noted above, there should never be a presumption or a decision that someone lacks capacity. This is required by the United Nations Convention on the Rights of Persons with Disabilities (CRPD). It is also consistent with the recommendations of the QLRC. In our opinion, to presume incapacity until otherwise proven is inconsistent with the presumption of capacity established by General Principle 3(1), which must always be applied.

QAI supports both the insertion of the General Principles and the Health Care Principles at the beginning of the legislation and their amendment to align more closely with the CRPD, for example by:

- the extension of 'same human rights' (the second General Principle) to include 'same human rights and fundamental freedoms'; and
- the extension of the principles on which human rights and fundamental freedoms are based and which are to be taken account of;
- extending the existing requirement of confidentiality of information about the adult to the broader human right of respect for the adult's privacy;
- incorporating the adult's right to liberty and security of person on an equal basis with

others.[2]

While we note that this is not consistent with the QLRC's recommendations, we agree that commencing both the *Guardianship and Administration Act 2000* (Qld) and the *Power of Attorney Act 1998* (Qld) with the General Principles will help to bring attention to them and remind decision-makers to apply them, and encourage increased compliance with human rights principles. QAI is hopeful that this new prominence, coupled with the newly expanded scope, will be a step towards ensuring that the General Principles are authentically translated into practice by decision-makers applying the Acts.

QAI has held concerns, notwithstanding that the General Principles expressly recognise some of the human rights proclaimed in the CRPD, that in reality the human rights of a person facing a guardianship order are often given little or no consideration. In QAI's experience, this is particularly so in the making of an interim order or when a hospital or service provider makes an application for the appointment of a guardian or administrator. It is during these times that the General Principles are often overlooked or not considered and so the individual's human rights fail to be enlivened.

QAI recommends that safeguards also be introduced to ensure that entities do not give selective weighting to the General Principles in a way that skews the decision-making process to the statutory body's objectives. For instance, some decision-makers weigh *Principle 10 – Appropriate to the circumstances* more heavily than *Principle 2 – Same human rights*. As a result, the decision-making process is skewed to the statutory body's objective, rather than the individual's.

In this regard, we also submit that that the legislation should clearly establish the position that when applications for guardianship are made, there should be no presumption or entitlement for statutory bodies to be involved, unless the circumstances clearly warrant otherwise.

In QAI's experience, people living in supported accommodation are vulnerable to abuse, neglect, exploitation and the unlawful and/or coerced use of cruel, inhuman and degrading treatment commonly referred to as Restrictive Practices in the name of managing what is called 'challenging behaviour'. It is our experience that in congregate and shared care living arrangements the issue at hand is mostly that people are not in charge of their living or support arrangements, having had that decision removed from them and often the catalyst for the manifestation of such behavioural communications (indicating their distress, anger or angst). This is especially true for people with no family, friends or advocates to safeguard them. However, even informal familial and friendship relationships can be subjected to manipulations by combative service providers or others, and even indifferently enabled by bureaucracy including formal statutory guardians.[3] While QAI supports the introduction of the requirement that informal decision makers must also apply the General Principles, there must be due diligence to preserve the 'natural authority and authenticity'[4] of a supportive family and/or informal network.

Where family members have taken formal guardianship because of the difficulties that they encounter with telcos, banks etc, this points to a clear need for community education about guardianship being the last resort and least restrictive – the community must respond to informal supporters. Government has a role to play in providing community education with assistance from peaks such as Business Councils, Chambers of Commerce, banks, etc.

[2] Clause 8 of the Bill.
[3] See http://www.smh.com.au/nsw/mother-branded-mentally-ill-after-complaint-20100929-15xij.html.
[4] http://cru.org.au/wp-content/uploads/2014/04/4.-The-Natural-Authority-of-Families-MKendrick-CT45.pdf

QAI is concerned with the wording of the proposed amendment to the fourth limb of General Principle 10 (structured decision-making), which requires a person or other entity to merely 'recognise and take into account' the best interpretation of the adult's views, wishes and preferences. A person should make decisions and perform functions, as far as is practicable, in a way that is aligned with the adult's views, wishes and preferences (or that give priority to the adult's views, wishes and preferences). Simply requiring a person/entity to 'recognise and take into account' is not sufficient in our opinion.

QAI supports the extension of the Health Care Principles in Section 11C to specifically include the principle of non-discrimination in the provision of health care services and respect for inherent dignity and worth, individual autonomy (including the freedom to make one's own choices) and independence of persons in the extended right to the same human rights and fundamental freedoms.

Eligibility to be a guardian/administrator (Clauses 11 and 12)

QAI holds two concerns about this proposed amendment.

Firstly, QAI considers the use of the term 'paid carer' inappropriate. Carers are not support workers, nor are support workers carers. To conflate these terms potentially creates confusion. Rather than using the term 'paid carer', the reference should be to 'support worker' or 'waged employee'.[5]

Secondly, QAI holds the view that being a support worker, or a former support worker, should not render a person ineligible to be a guardian or administrator. Where a person is no longer in a paid formal employment arrangement, there is no ostensible reason why a conflict of interest would exist. While being a current paid support worker may give rise to the potential for a conflict, this should not be decisive and should only be one relevant consideration for the tribunal to consider. In some circumstances, a paid (or previously employed) support worker may be the best, or only, informal support that a person has and may therefore be the most appropriate choice of guardian. We acknowledge the potential vulnerability to abuse or conflict that may arise from permitting a paid support worker to also act as a person's decision-maker. In our opinion, the best way to safeguard against this, whilst ensuring people have options, is to vest the Tribunal with discretion to still make the appointment, subject to such restrictions, accountability and conditions that the Tribunal considers appropriate in the circumstances to protect against abuse.

While being a former support worker is only included as an appropriateness consideration for the Tribunal (and not a factor that renders a person ineligible for appointment, or gives grounds for automatic revocation of the order, as being a current support worker does), in our view including this as a specific consideration for the Tribunal may result in this being disproportionately weighted.

QAI proposes that the amendments should:

- delete 'or has ever been' from ss 15 and 16 of the GAA (as appropriateness considerations), so that these provisions only apply to current paid carers and not former paid carers;

[5] Carers can be children, neighbours, friends or family members. Support workers may also in some instances be in these roles, but the difference lies in remuneration – support workers draw a wage in payment for services rendered. Carers receive an allowance or pension or sometimes both from Centrelink as financial support as the carer may have given up work to care for the person, or an allowance to cover some of the costs in caring for someone. This distinction between payment of a wage and allowance, and its relevance for the status of the person, is recognised in the definition of 'paid carer' in the Dictionary in Schedule 4 of the GAA.

- clarify the terminology regarding 'paid carer', to define the separate roles of support workers and carers not in receipt of wages or salaries; and
- confirm that attorneys should not be in paid arrangements with the adult.

Appointment review process (Clause 17)

QAI agrees with the insertion of 5A into s 31 as this:

- is more closely aligned with the CRPD and the General Principles themselves; and
- reflects that a person's circumstances do change and where they once may not have had the support network they do now.

This insertion arguably makes it easier to have an individual appointed when the Public Guardian is already in place. This is particularly important with regards to interim orders (up to three months) appointing the Public Guardian, as this appointment is often made without full appreciation of the relevant facts or asserted risks of the applicant requesting the interim order. In practice, if the Public Guardian is appointed under an interim order, they are routinely appointed if a longer order is made. The new subsection 5A helps to safeguard against this.

Increased obligations to consult (Clause 28)

The new s 68A of the GAA imposes obligations on the Tribunal to consult with the listed people/entity in making decisions about special health care. This section requires greater clarity, as it is not yet clear what the obligation to consult will encompass. We propose that the requisite consultation should be broader than an obligation to consult with the statutory health attorney, and should require the Tribunal to consult with the following (if appointed):

- guardian;
- attorney;
- statutory health attorney; and
- qualified medical practitioners, including the individual's treating team.

Although it is clear that the tribunal must consult with medical professionals and the person's informal support network as well as the guardian or attorney, in our view this should be explicitly stated.

We note that it must be made clear that, by specifically designating these people/entities, this does not restrict the scope of the Tribunal's considerations.

Tribunal's Functions (Clause 30)

QAI supports the addition of the requirement that QCAT must, in performing its functions or exercising its powers under the Act in relation to an adult, to the greatest extent practicable, seek and take account of the views, wishes and preferences expressed or demonstrated by the adult and the views of any member of the adult's support network. This is consistent with the principles of supported decision-making and with the requirements of the CRPD.

Notification of Hearing (Clause 32)

QAI supports the extension of the notification requirements proposed by Clause 32.

Power to Appoint a Representative (Clause 33)

QAI supports the proposed amendment of s 125 of the GAA to permit any member of QCAT to appoint a representative for an adult, where they are concerned the adult's views, wishes

and preferences are not being properly represented. At present, if a person does not have a support person or advocate or if they cannot attend the hearing, the Tribunal often only hears the version presented by the applicant for the order and will not consider the person's rights.

QAI submits that, in circumstances where the person or their support person/advocate/legal representative cannot attend, the hearing should be adjourned until such time as the person and their support people can attend. A relevant consideration in this regard is the risk that this could potentially see an increase in 'on the papers' decisions and/or orders being extended or interim orders being made – QAI asserts that this should be avoided as much as possible. The overriding consideration should be to ensure that all measures are taken to enable the person and their support persons to be prepared and attend in person, by phone or video-linkage, and to guard against the practice of scheduling hearings without sufficient notice or consideration of the person's support needs.

We are concerned that the proposed amendments regarding the role of the representative appointment imply, to some degree, that the person will not have capacity to give instructions, insofar as they emphasise promoting and safeguarding the person's rights, interests and opportunities. This is not consistent with the recognised role of a legal representative to represent a client's views, wishes and preferences where they have capacity to give instructions. The requirement to promote and safeguard the person's rights, interests and opportunities may conflict with a client's competent instructions on a matter, which would be contrary to the duties of the legal representative. In our opinion, the ambit of the responsibility to 'promote and safeguard the adult's rights, interests and opportunities' is not sufficiently defined.

QAI submits that s 125 of the GAA should be amended to reflect the new MHA provision on the role of an appointed representative. We draw your attention to s 739(3) of the MHA, which provides:

> *A person who represents the person at the hearing of a proceeding must:*
>
> *(a) To the extent the person is able to express the person's views, wishes and preferences – represent the person's views, wishes and preferences; and*
>
> *(b) To the extent the person is unable to express the person's views, wishes and preferences – represent the person's best interests.*

Interim Orders (Clause 34)

QAI is eminently concerned that current legislation and the proposed amendments are silent on the Tribunal consulting with the adult and family when making interim orders. We know of cases where interim orders have been made without speaking to either of these parties, or even notifying the adult or their family, who may not even be aware of the proceedings until after the order has been made. This is particularly concerning given the common practice of routinely affirming interim orders. QAI submits that the GAA must *oblige* the Tribunal to consult, and that this requirement should be mandated in an enforceable way.

Whistleblowers Protection (Clause 39)

QAI supports the extension of the whistleblowers protection. In Queensland, statutory protection of whistleblowers is provided by the *Public Interest Disclosure Act 2010* (Qld) (PIDA). This legislation replaces the *Whistleblower Protection Act 1994* (Qld), which was introduced in the post-Fitzgerald Inquiry climate.

Under the PIDA, any person can disclose information about a substantial and specific danger to the health or safety of, *inter alia*, a person with a disability or a reprisal action following a

public interest disclosure. A person may make a public interest disclosure to a journalist in circumstances where they have already made essentially the same disclosure to an appropriate public sector entity and that entity has decided not to investigate or deal with the disclosure, did not recommend taking any action, or failed to report the results of the investigation to the discloser within the prescribed six month timeframe. This extension of whistleblowing power to the media under the PIDA is significant, and was enacted following recommendations from leading academics.[6]

Yet while the new legislative framework offers some improvement on the old model, substantive issues remain. Of particular relevance for people with disability in positions of acute vulnerability is the power imbalance that exists and the fear of informal reprisal. Recent concerns about the misuse of executive power and lack of accountability under the Newman government have reignited concerns about the proliferation of inappropriate conduct and the potential for reprisals in Queensland, notwithstanding the public interest disclosure protective legislation. There remains in Queensland a climate of fear and reluctance to report official misconduct, particularly by vulnerable persons.

Recently, the Federal Government has introduced equivalent protection at a commonwealth level: *Public Interest Disclosure Act 2013* (Cth). This legislation is currently subject to review, with the Report of the Parliamentary Joint Committee on Corporations and Financial Services - Whistleblower Protections handed down on 14 September 2017.

Recommendations of the Federal inquiry include significantly enhanced standards and broadened protections for whistleblowers. The recommendations extend to a call for legislative reform to harmonise whistleblowing across the different states, territories and Commonwealth – responding, in part, to recent research calling for the development of stronger processes for ensuring support and protection across all sectors.[7]

We emphasise that care needs to be taken to ensure that the environment in which complaints can be made by individual workers is honest, transparent and accountable, and that workers do not experience a fear of reprisals that may discourage them from notifying their concerns.[8] We also note the importance of developing rigorous, independent and proactive inspection functions to ensure that the system is not only reactive.

Insertion of New Chapter 11, Part 4A (Clause 41)

QAI supports the introduction of Part 4A and considers it a much-needed addition to the legislation. Section 250 vests the Minister with responsibility for preparing guidelines to assist persons required to make assessments about the decision-making capacity of adults in making those assessments.

QAI considers that the content of the Minister's guidelines will be critical to the impact of this amendment. The proposed s 250(3) requires the Minister, in preparing the guidelines, to consult with persons who have qualifications relevant to, or experience in, making assessments about the capacity of adults to make decisions about matters. QAI submits that the Minister should make reference to the Chief Psychiatrist guidelines in assessing capacity under the MHA 2016 in drafting the guidelines. This would help to ensure consistency with

[6] See for example: AJ Brown, 'Restoring the Sunshine to the Sunshine State Priorities for Whistleblowing Law Reform in Queensland' Griffith Law Review (2009) 18(3) 666.
[7] Brown, AJ & S Lawrence. 2017. Strength of Organisational Whistleblowing Processes – Analysis from Australia & New Zealand: Further Results: Whistling While They Work 2: Survey of Organisational Processes & Procedures 2016. Griffith University, July 2017.
[8] Fear of reprisal is recognised as a significant deterrent to whistleblowing, and one which continues notwithstanding safeguards introduced to address this.

the MHA 2016, which is particularly important given that capacity is likely to be challenged through QCAT. QAI emphasises, however, that it is important to ensure that this does not result in conflation of disability and mental illness, but rather provides a consistent method for assessing capacity. We also caution the need for safeguards to ensure informal supporters are not required to obtain professional capacity assessments at their expense to comply.

QAI seeks to be included as a relevant stakeholder in the development of these guidelines. As previously advised, QAI (in conjunction with Allens law firm) has developed a *Handbook for Practitioners on Legal Capacity.*[9] This is a useful tool for understanding capacity in the Guardianship regime and may assist in the preparation of these guidelines.

QAI recommends the following are considered when developing the guidelines:

1. Should the draft guidelines be published and open to public submission?
2. In assessing capacity, the functional approach should be used.
3. The appropriate timeframe for review, in light of the supported decision making movement and Article 12 CRPD, should be no longer than three years, with a mechanism for early review of the guidelines included.
4. Who would be using these guidelines and in what circumstances?
5. What happens if someone does not follow these guidelines? Is there a penalty?
6. The principles encompassed within the guidelines must include:
    a. that capacity is decision, domain and time specific, that the person's decision-making ability is assessed, not the decisions made.
    b. that the person's privacy is respected.[10]
7. The availability of decision-making support.

We understand the draft guidelines will be provided at a later date for feedback and we welcome the opportunity to do so, particularly in light of the principles of presumed capacity and support for decision making.

Personal and special personal matters (Clauses 44 and 45)

Clause 44 proposes extending the list of personal matters for an adult (defined as a matter, other than a special personal matter or special health matter, relating to the adult's care, including the adult's health care, or welfare), to include who may have access visits or other contact with the adult and advocacy relating to the care and welfare of the adult. Clause 45 includes entering a plea on a criminal charge for the adult as a special personal matter (one outside the scope of the guardian's powers). QAI agrees with the QLRC that these are appropriate matters to include.

Amendment of definition of capacity (Clause 47)

QAI agrees with the proposed extension of the definition of capacity to require that, in deciding whether an individual is capable of communicating decisions in some way the tribunal must investigate the use of all reasonable ways of facilitating communication, which may include symbol boards, signing, or the use of facilitated communication. Facilitated

[9] Available on our website: www.qai.org.au.
[10] Refer to submission by Victoria Legal Aid petitioning the inclusion of these principles in Commonwealth Law, which we contend should appear in state law: *Equality, Capacity and Disability in Commonwealth Laws : Submission to the Australian Law Reform Commission's Issues Paper (January 2014*).

communication is not dissimilar than the use of interpreters and any communication that a person uses on a regular basis must be considered valid.

Other matters

QAI is concerned that the proposed reforms fail to incorporate a supported decision-making approach which, in our view, should be the overarching framework for this legislation.

Certain proposed reforms are consistent with a supported decision-making approach (such as the proposed requirement that QCAT must seek and take account of the views, wishes and preferences expressed or demonstrated by the adult and the views of any member of the adult's support network to the greatest extent practicable in performing its functions or exercising its powers under the Act in relation to an adult). However, the GAA does not progress, in a substantive way, towards the paradigm shift required by the CRPD.

In our experience, there is significant value in requiring appointed decision-makers to take a proactive role in encouraging the development of decision-making capacity by adults. We submit that the GAA should include provisions requiring this to occur.

Proposed amendments to the *Powers of Attorney Act 1998* (Qld) (POA)

For the reasons noted above, QAI supports the proposal to amend the POA to ensure that all persons or entities performing a function or exercising a power under this Act must not only comply with, but must also apply, the General Principles. QAI supports the inclusion of an express statement of the (expanded) General Principles and Health Care Principals at the start of the POA.

Clause 57 amends the meaning of 'eligible attorney' for s 29 of the Act, and imposes as an additional eligibility criteria that the person must not have been a 'paid carer' for the principal in the past three years. As noted above, the terminology must be clarified to distinguish between 'carers', support workers and 'service providers'. Further, this requirement could limit a person's ability to appoint an attorney, particularly if their network is limited. QAI is concerned that the criterion that the attorney has capacity, which was presumably added to lessen the risk of abuse or exploitation, may be difficult to enforce unless the matter ends up before QCAT.

QAI supports the amendment contained in Clause 59 permitting an EPOA to be made by a principal residing outside of the state. QAI also supports the amendment contained in Clause 61 (advance health directives) to declare that AHDs may be made by an adult principal who is outside the state, which means that regardless of whether person lives interstate or overseas and makes an AHD under Qld legislation it is valid in Qld.

Clause 62 amends Section 41 of the Act to require that a principal may only make an enduring power of attorney if they are capable of making it freely and voluntarily. A further subsection is added (s 41(3)) to clarify that the definition of 'capacity' in Schedule 3 does not apply to this section. A similar qualification is added to s 42 by Clause 63, with the effect that the definition of capacity also does not apply to the principal's capacity to make an advance health directive. QAI supports the attempt to balance accessibility and user-friendliness of these orders whilst safeguarding against abuse. However, QAI is concerned that this definition may not contain appropriate safeguards. QAI recommends that prior to approval of applications, there are assurances that the person has adequate and appropriate support to understand the consequences of this application.

While we agree with differentiating this test from the test for capacity used elsewhere in the Act, we emphasise the importance of including appropriate safeguards. QAI supports other

amendments made to ensure accessibility and simplicity of these orders (such as to the proof requirements for enduring documents).

With respect to the amendments made by Clause 67, we again note our concerns with the terminology 'paid carer, in this case in the eligibility for being a statutory health attorney.

QAI supports the incorporation of the presumption of capacity to the Court's powers when determining capacity by Clause 75. Similarly, we support the replacement of the reference to 'best interests' with the application of the General Principles in Section 118 of the POA (Clause 76).

QAI supports the extension of the definition of 'personal matter' in Schedule 2 of the POA by the addition of those who may have access visits to, or other contact with, the principal and advocacy relating to the care or welfare of the principal. We also support the extension of the definition of special personal matters to include entering a plea on a criminal charge for the principal.

Proposed amendments to the *Public Guardian Act 2014* (Qld) (PGA)

QAI supports the broadening, by Clause 92, of the scope of s 43 of the PGA to permit persons with an obvious interest in the adult to also be able to request a community visitor visit a visitable site. We also support the amendment, by Clause 93, to s 47 of the PGA, enabling the person who made the request, as well as an interested person for the consumer, to access a copy of the visitation report. In our view, this is appropriate and brings the legislation into greater alignment not only with the CRPD but with the requirements of natural justice. It is also consistent with the future direction to be taken by all institutions once the Optional Protocol to the Convention Against Torture (OPCAT) is ratified by Australia[11] and the phased-in process of implementation commences, insofar as this will open up many presently closed places of detention and detainment to inspection and scrutiny.

Conclusion

QAI supports the direction of the proposed amendments to the GAA, the POA and the PGA and applauds the Department for taking steps towards greater compliance with the CRPD. QAI is pleased to see that the QLRC recommendations have been considered and are reflected in the draft bill.

QAI thanks the Department for the opportunity to have input into the proposed legislative amendments. We look forward to working with you further.

[11] The Federal Government has committed to ratify OPCAT by December 2017.