



No 26

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LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW
COMMITTEE

Ms Karen Struthers MP
Chair
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE Q 4000

Dear Ms Struthers

Thank you for the opportunity to provide input into your committee's enquiry into various issues raised by the Queensland Constitutional Review Commission (QCRC) in its Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution.

The considerations applicable to a number of the statutory officers referred to in Appendix B to the Report also appear to apply to the independent statutory officers under the *Guardianship and Administration Act 2000*, namely the Adult Guardian and Public Advocate. Unfortunately they do not seem to have been included in the deliberations of the QCRC. This may be due to the fact that although the Adult Guardian, originally constituted under the Powers of Attorney Act 1998 was established on 14 May 1998, the Public Advocate was not established until after the coming into operation of the Guardianship and Administration Act 2000. The Act was assented to on 20 April 2000 and came into operation on 1 July 2000.

That Act also established the Guardianship and Administration Tribunal and it would seem that the independence issue may also be pertinent to the President and Deputy Presidents.

Submission in response to the issues relevant to my office is enclosed.

Yours sincerely

J V COCKERILL
ADULT GUARDIAN



SUBMISSION

**SUBJECT: LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE
COMMITTEE
ISSUES PAPER – APRIL 2002
ISSUES OF SUBSTANTIVE CONSTITUTIONAL REFORM**

STATUTORY OFFICE HOLDERS

33. Is there a need for special recognition of certain statutory office holders in the Constitution? Are existing statutory provisions sufficient and/or appropriate to make independent status of the offices clear?

The Adult Guardian concurs with the QCRC that the list of statutory office holders in clause 58 requiring Constitutional recognition is sufficient. However there are other statutory office holders whose independence, for the reasons set out in relation to those officers specifically identified in the QCRC's issues paper, should be more clearly protected.

34. If special recognition of certain statutory office holders is to be made in the Constitution, is the QCRC's list of statutory office holders appropriate? Should other office holders be added to, or removed from, this list?

The Adult Guardian and the Public Advocate should be included in the Appendix B list.

The President and members of the Guardianship Tribunal are in a similar position to members of the judiciary in so far as the desirability of independent status is concerned.

The Governor in Council appoints the Adult Guardian, and the Public Advocate as well as the President and members of the Tribunal.¹

The Adult Guardian and the Public Advocate are each established by the *Guardianship and Administration Act 2000* as independent statutory officers, to protect the rights and interests of adults with impaired capacity.² One of the specific roles of the Adult Guardian is the investigation of complaints or allegations of abuse, neglect or exploitation, or inappropriate or inadequate decision-making arrangements for an adult with impaired capacity. Other functions of the Adult Guardian include, acting as attorney for personal matters or guardian if appointed by the tribunal, mediating between attorneys, guardians and administrators and others, making health care decisions in case of dispute and acting as statutory health attorney, and educating and advising the community about the operation of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*.

¹ *Guardianship and Administration Act 2000*, ss199(1), 213(1), 86(1), respectively

², *ibid* s173-174

The Public Advocate is a systemic advocate.

The roles of both officers has the propensity to bring them into conflict with a particular Minister or the government generally.

The *Guardianship and Administration Act 2000* specifically confers on the Adult Guardian wide investigatory powers which are inquisitorial by nature. The Adult Guardian has a statutory right to information in relation to an investigation of a complaint and can audit records of an attorney or administrator. The Adult Guardian can issue a Notice to attend before the Adult Guardian to give information, answer questions or produce documents in relation to an investigation.³ There is a requirement to answer questions and self-incrimination is not an excuse. Any information obtained by the Adult Guardian is however subject to derivative use protection.

The Adult Guardian considers that while protection in the form of Constitutional recognition may not be essential, it is important that the independence of the office be and be seen to be maintained. In keeping with this philosophy, the Adult Guardian in the performance of the functions of that office is not under the control of any Minister.⁴ However, as has been observed by the QCRC, "the independence of a statutory office holder can potentially be undermined if the executive diminishes the office's resources to such an extent that the office is unable to fulfil its functions."⁵ This was also recognised by the Queensland Law Reform Commission in its report on Assisted and Substitute Decision Making by and for Adults with a Decision-making Disability.⁶ It sought to achieve this through its recommendation that the Adult Guardian should have the power of a chief executive in relation to staff

35. If special recognition of certain statutory office holders is to be made in the Constitution is clause 58 of the QCRC's Constitution appropriate? If not, how should the clause be amended?

The Adult Guardian considers the recognition of the statutory office holders mentioned in s58 of the QCRC's Constitution is appropriate.

36. Is there a need for the Constitution to include a removal procedure for certain statutory office holders such as the QCRC proposes? Are existing provisions regarding the removal of the identified statutory office holders sufficient, might they be sufficient with certain amendments?

The *Guardianship and Administration Act 2000* provides that the Adult Guardian shall be appointed for a term of not longer than five years⁷ and may be removed by the Governor in Council⁸ for any of the following reasons:

³ *ibid*, s183

⁴ s176

⁵ Legal, Constitutional and Administrative Review Committee, *The Queensland Constitution: Specific Content Issues*, Legislative Assembly of Queensland, 29

⁶ Report No 49 Queensland Law Reform Commission, *Assisted and Substitute Decision-making for and by people with a decision-making disability*, p.438

⁷ s201(1)

⁸ s203(2)

- Physical or mental incapacity to satisfactorily perform official duties; or
- Neglect of duty; or
- Dishonourable conduct; or
- Being found guilty of an offence the Minister considers makes the person inappropriate to perform official duties.

Part 8 of the *Public Service Act 1996*, provides for the removal of statutory office holders who are term appointees, despite another Act⁹. The Governor in Council may remove a term appointee from office at any time.¹⁰ The Adult Guardian and Public Advocate would only be considered term appointees if declared to be so under a regulation.

There would seem to be a desirability in certain statutory office holders who perform functions likely to bring them into conflict as indicated by the QCRC being subject to removal only by virtue of the provisions of the Act under which they are constituted and appointed.

37. If special provision is to be made in the Constitution for the removal of the identified statutory office holders along the lines recommended by the ACRC, does the process contained in clause 59 of the ACRC's Constitution of Queensland 2000 require amendment in any way?

No comment

38. If special provision is to be made in the Constitution for the removal of identified statutory office holders along the lines recommended by the QCRC, should special provision also be made for their appointment? (As the table in Appendix B reveals, there is currently no consistent procedure by which the identified office holders are appointed. Arguably, the independence of such officers would be enhanced by a procedure which required multi-party support for their appointment, such as occurs in the case of the Crime and Misconduct Commission.)

The appointment provisions in relation to the Adult Guardian and Public Advocate are adequate.

40. Is there a need for parliamentary committee involvement in the budget of the identified statutory office holders beyond that which already exists?

The involvement of such a committee be a worthwhile element in addressing potential independence issues for all entities established under the *Guardianship and Administration Act 2000*. Importantly, it would contribute to the achievement of transparency in a situation where officers who report to parliament are subject to budgetary control by the executive.

⁹ s109

¹⁰ s.110

43. Instead of a number of committees having responsibilities regarding the resourcing of statutory office holders, would it be preferable for a designated committee – for example, a statutory office holders committee – to be conferred this role?

This would seem to be an appropriate method of dealing with the issue.

Dated at Brisbane this thirty-first day of May 2002.



J V COCKERILL
ADULT GUARDIAN