

21 September 2017

Our ref: Succession/Elder/Health/VK

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

By email: lacsc@parliament.qld.gov.au

Dear Acting Committee Secretary

**GUARDIANSHIP AND ADMINISTRATION AND OTHER LEGISLATION
AMENDMENT BILL 2017**

Thank you for the opportunity to comment on the Guardianship and Administration and Other Acts Amendment Bill 2016 (the **Bill**). The Queensland Law Society (**QLS**) welcomes the opportunity to provide feedback on the draft Bill.

QLS is supportive of efforts to improve the efficiency of Queensland's guardianship system and to advance clarity in relation to the current guardianship legislation. The **attached** submission is written with the assistance of the Succession Law, Health & Disability, and Elder Law committees.

Please do not hesitate to contact our Senior Policy Solicitor Vanessa Krulin on (07) 3842 5872 or via email at v.krulin@qls.com.au should you wish to discuss.

Yours faithfully,



Christopher Coyne
Vice President

Submission

Guardianship and Administration and
Other Legislation Amendment Bill 2017

Legal Affairs and Community Safety Committee

*A Submission of the
Queensland Law Society*

21 September 2017

Table of Contents

Overall observations.....	2
2. Specific issues.....	2
2.1. Clause 8 – Insertion of s 11B (General principles)	2
2.2. Clause 9 – Insertion of new ss 12A and 12B.....	3
2.3. Clause 10 – Amendment of s 14 (Appointment of one or more eligible guardians and administrators).....	3
2.4. Clause 16 – Insertion of new Chapter 3, Part 3, Division 1A.....	4
2.5. Clause 20 – Amendment of s 37 (Avoid conflict transaction) and clause 35 – Replacement of s 152 (Tribunal authorisation or approval).....	4
2.6. Clause 26 – Insertion of new ss 60A and 60B.....	4
2.7. Clause 44 - Insertion of new Chapter 11, Part 4A, proposed section 250.....	4
2.8. Clause 56 – insertion of new Chapter 1A.....	5
2.9. Clause 58 – Amendment of eligible witness.....	5
2.10. Clause 59 – Amendment of s 32 (Enduring powers of attorney).....	6
2.11. Clause 62 – Amendment of s 41 (Principal’s capacity to make an enduring power of attorney).....	6
2.12. Clause 63 – Replacement of s 42 (Principal’s capacity to make an advance health directive).....	6
2.13. Clause 64 – Amendment of s 43 (Appointment of one or more eligible attorneys).....	6
2.14. Clause 66 – Insertion of new sections 61A - 61D.....	7
2.15. Clause 68 – Amendment of s 73 (Avoid conflict transaction).....	7
2.16. Clause 70 – Replacement of s 88 (Gifts).....	7
2.17. Clause 73 – Amendment of s 102 (Protection of health provider unaware of health directive).....	7
2.18. Clause 74 – Replacement of s 106 (Compensation for failure to comply)....	7
2.19. Clause 86 – Amendment of s 6 (Principles for adults with impaired capacity for a matter).....	8
2.20. Clause 87 – Amendment of s 19 (Investigate complaints).....	8
2.21. Clause 90 – Replacement of s 31 (Report after investigation or audit).....	8

Overall observations

QLS commends the Attorney and the Department for the consulting on this Bill that it undertook earlier this year, prior to its introduction into Parliament. The Society's view is that early consultation is the key to good law. QLS is grateful that an opportunity was provided to make comments at that time, and is pleased that several of the recommendations which were made have come to fruition in this iteration of the Bill.

QLS is also pleased that the Bill title appropriately recognises the Bill as an omnibus bill. To this end, QLS commends the Attorney and the Department for this recognition and transparency as the Society considers it is important that omnibus bills be distinguished from standalone bills.

The QLS submission includes input from the Succession Law, Health & Disability Law and the Elder Law committees. The Society largely supports the proposed amendments contained in the Bill, and would like to draw the Legal Affairs and Community Safety Committee's (the **Committee**) attention to some specific issues raised by our committees with respect to the Bill which, in our view, are deserving of additional consideration.

2. Specific issues

Amendments to the *Guardianship and Administration Act 2000*

2.1. *Clause 8 – Insertion of s 11B (General principles)*

The insertion of a new Chapter 2A and the inclusion under this chapter of a new s 11B has the effect of bringing the general and health care principles which were previously found in the Schedule forward, to the front of the Guardianship and Administration Act 2000 (the **Guardianship Act**). Section 11B effectively adopts the recommendations of the Queensland Law Reform Commission (the **QLRC**) report¹.

In addition to the QLRC recommendations, the clause adds a 'Liberty and Security' general principle which confirms that an adult has a right to liberty and security and should not be deprived of their liberty except in accordance with the law.

¹ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 2.

In relation to General Principle 10 – Structured Decision-Making which is contained within clause 8 of the legislation, the explanatory notes and the QLRC report demonstrate a clear intention that the approach set out in subsections (2) to (5) is a mutually exclusive order of priority however, the language does not make that clear. That is, it should be clear that when a decision-maker is performing a function or exercising a power under this Act, the application of this section is to be carried out by following and prioritizing the values in the order in which they are listed in the clause. QLS considers that the legislation should be amended to make this intention clear.

We note that an aspect of this general principle as it appeared in the QLRC report has not been included in the Bill, that being, an injunctive that the substituted decision-maker must recognise and take into account any other consideration that an application of the general principles might require. QLS considers this element important, as it is a reminder that all considerations which arise pursuant to the general principles must be contemplated and weighed up in the process of decision-making on behalf of an adult. The Society recommends that a similar obligation be included in this section.

Insertion of s 11C (Health care principles)

We note the insertion of the words “*within a reasonable time*” into the health care principles at 3(e), amending the Guardianship Act. There is no guidance in the Guardianship Act as to what constitutes a ‘reasonable time’ when considering whether the proposed health care can be postponed because a better health care option *may* become available.

QLS suggests that the legislation be amended to include guidance in this respect.

2.2. Clause 9 – Insertion of new ss 12A and 12B

The amendments allow for appointment orders exercisable when the tribunal is satisfied that an adult is a missing person. QLS supports the insertion of these provisions into the Guardianship Act.

2.3. Clause 10 – Amendment of s 14 (Appointment of one or more eligible guardians and administrators)

It appears that the amendment intends to deal with appointment orders for a parent, and the non-binding requirement on the tribunal to alert a parent of its

power to make successive appointments. QLS considers that clarification is required as to whether this amendment will mean that the notice provided to parents will extend to a 2nd or additional appointments to be made at a later date, or to a 'double-headed' appointment at the outset. Should the amendment intend the latter, it would allow for a parent to be made aware of who would follow the parent in the decision-making role, and potentially allow the parent to be involved in who would succeed them as appointee once they can no longer act.

2.4. Clause 16 – Insertion of new Chapter 3, Part 3, Division 1A

Similarly to the proposed amendments in clause 9, this amendment seeks to provide clarity to the extent that it states the appointee needs to be satisfied that the adult is missing.

QLS supports the inclusion of this clause to the Guardianship Act.

2.5. Clause 20 – Amendment of s 37 (Avoid conflict transaction) and clause 35 – Replacement of s 152 (Tribunal authorisation or approval)

QLS welcomes the proposed amendments to clarify the meaning of conflict transactions. The proposed amendment provides for prospective authorisation of conflict transactions, as well as additional examples of conflict transactions and clarification on when they may arise as a result of a relationship status, or gifts (s 54 of the Guardianship Act). Whilst QLS supports this amendment generally, we suggest that the Committee consider a stronger deterrent to an appointee who may enter a conflict transaction and then beg forgiveness later. In this case, the tribunal must be satisfied that reasonable action has been taken to avoid a conflict and should only provide approval if it is demonstrably in the interests of the principal.

2.6. Clause 26 – Insertion of new ss 60A and 60B

QLS strongly supports the insertions of these sections and is of the view that the statutory exception to ademption provided for in the Bill largely reflects section 23 of the *Powers of Attorney Act 2003* (NSW).

2.7. Clause 44 - Insertion of new Chapter 11, Part 4A, proposed section 250

This amendment seeks to provide clarity to the extent that it states the appointee needs to be satisfied that the adult lacks capacity.

QLS considers that a medical certificate, for example, is somewhat helpful and might be used to establish capacity, however, the Society notes that it will largely depend on how the order is structured and the experience of a practitioner as to whether difficulties will manifest into dispute. QLS is aware of an instance where a dispute has occurred between substitute decision-makers as to whether medical advice on capacity should be accepted.

Amendments to the Powers of Attorney Act 1998

2.8. Clause 56 – Insertion of new Chapter 1A

QLS supports the insertion of the general principles and the health care principles into the *Powers of Attorney Act 1998* (the **POA Act**).

The explanatory notes and the QLRC report demonstrate a clear intention that the approach set out in subsections (2) to (4) is a mutually exclusive order of priority however, the language does not make that clear. That is, it should be clear that when a decision-maker is performing a function or exercising a power under this Act, the application of this section is to be carried out by following and prioritizing the values in the order in which they are listed in the clause.

QLS considers that the legislation should be amended to make this intention clear.

2.9. Clause 58 – Amendment of eligible witness

QLS considers that the amendment to s 31(1)(f) is acceptable. However, the Society considers that further amendment is required; namely that an enduring powers of attorney ought to be signed off by an independent medical practitioner.

This is particularly relevant given that Australia's population of elderly people is increasing, and with it, the potential for elder abuse. Medical practitioners are usually located in communities and are therefore relatively accessible. Further, medical practitioners have completed some level of formal training in evaluating cognitive ability, and in that respect have a more structured knowledge of the subject than legal practitioners, justices of the peace or commissioners for declarations.

2.10. Clause 59 – Amendment of s 32 (Enduring powers of attorney)

The amendment clarifies that a person outside the State can make an enduring power of attorney, a clarification that is supported by the Society.

We suggest that consideration might also be given to the interrelationship of multiple enduring powers of attorney for different States.

2.11. Clause 62 – Amendment of s 41 (Principal's capacity to make an enduring power of attorney)

The amendment provides the test for making an enduring power of attorney and supersedes the general definition of capacity in the Schedule. QLS supports the amendment, however suggests that it does not go far enough to ensure that a witnessing party is aware of the requirements of capacity and appropriately employs their discretion. The Society supports closer professional liaison between legal and medical practitioners to provide appropriate training and knowledge development for and of witnesses.

2.12. Clause 63 – Replacement of s 42 (Principal's capacity to make an advance health directive)

QLS objects to the structure of an advance health directive (**AHD**), that is, the option of including an enduring power of attorney within an AHD. This structure causes confusion at both practitioner and layperson levels, particularly as an enduring power of attorney may have already been entered into as a standalone document. An inadvertent completion of the enduring power of attorney within the AHD could easily bring about two conflicting documents.

QLS strongly supports the removal of the enduring power of attorney form from the advanced health directive form.

2.13. Clause 64 – Amendment of s 43 (Appointment of one or more eligible attorneys)

We note the inclusion of the wording "*for a matter*" in the proposed amendment to s 43 of the POA Act. This wording is supported, as it will ensure that the clause does not cause difficulty in the case of a long form power of attorney where, for example, three attorneys might be appointed for financial matters and three might be appointed for personal and/or health matters.

Rather, the clause appears to intend to impose a limit on how many joint attorneys can be appointed. To add further clarification, QLS suggests that the

clause be amended to replace “*4 attorneys acting jointly*” with the wording “*4 joint attorneys*”, which should alleviate any confusion in this respect.

2.14. Clause 66 – Insertion of s new sections 61A - 61D

QLS strongly supports the insertions of these sections and is of the view that the statutory exception to ademption provided for in the Bill largely reflects s 23 of the *Powers of Attorney Act 2003* (NSW).

2.15. Clause 68 – Amendment of s 73 (Avoid conflict transaction)

QLS notes that the proposed amendment is similar to the proposed changes for approving of conflict transactions, as dealt with in clause 20.

Further, clause 68 includes provision for a principal to retrospectively ratify a conflict transaction. QLS reiterates the response to clause 20 with respect to situations where the principal is incapable of retrospectively authorizing the conflict transaction under s 73 and tribunal approval is required.

2.16. Clause 70 – Replacement of s 88 (Gifts)

The insertion of the expression “*unless otherwise authorised under this Act*”, which replaces the previous wording “*unless there is a contrary intention expressed in the enduring power of attorney*” is not supported.

This subtle change has the effect of removing the principal’s capacity to determine what are appropriately gifts or donations. QLS suggests that the previous wording be reinstated to this section.

2.17. Clause 73 – Amendment of s 102 (Protection of health provider unaware of health directive)

QLS strongly suggests that this section ought to go further, placing an express onus on health professionals and health services to make a reasonable attempt to check whether a person has an enduring document in place.

An amendment of this sort might be appropriately positioned after s 44 of the current POA Act.

2.18. Clause 74 – Replacement of s 106 (Compensation for failure to comply)

The proposed inclusion of the principal’s estate is welcomed by the Society. QLS considers that the section should go further to include an express retrospective effect.

Amendments to the *Public Guardian Act 2014*

2.19. *Clause 86 – Amendment of s 6 (Principles for adults with impaired capacity for a matter)*

QLS generally supports the amendments to the *Public Guardian Act 2014* (the **PG Act**). However, we consider that the reforms could go further, particularly, to ensure that the tribunal has jurisdiction to deal with a former administrator where a person seeking compensation has regained capacity.

Further, it is the Society's view that the tribunal ought to act to safeguard the rights of people who are the subject of an application, and suggests that broadening s 6 so that it reflects s 4 of the *Guardianship and Administration Act 1990* (WA) would be appropriate. This broader focus would require amendment to s 11A of the Guardianship Act.

2.20. *Clause 87 – Amendment of s 19 (Investigate complaints)*

The proposed amendment will allow the Public Guardian to investigate a complaint or allegation even after an adult's death. QLS welcomes this amendment, which reflect both the recommendations of the QLRC report and the more recent inquiry undertaken to assess the adequacy of existing financial protections for seniors.

We note that this amendment may have considerable resourcing implications for the Office of the Public Guardian.

2.21. *Clause 90 – Replacement of s 31 (Report after investigation or audit)*

QLS supports the proposed amendment, which will give the Public Guardian the ability to inform a person who has requested an investigation and other parties about the result of an investigation or audit (in such a way that the Public Guardian considers appropriate).

The Queensland Law Society would welcome further consultation on the issues raised in this letter and on the Bill more generally. Thank you again for providing QLS with an opportunity to comment on the Bill, and for the Committee's consideration of QLS feedback.