public guardian

Submission to the Queensland Government Department of Health

Consultation: Exposure Draft Mental Health Bill 2015

26 June 2015

Introduction

On 1 July 2014 a new independent statutory body—the Office of the Public Guardian (OPG)—was established to protect the rights and wellbeing of vulnerable adults with impaired decision making capacity, and children and young people in out-of-home care (foster care, kinship care), residential care and youth detention.

The OPG combines the roles that were previously undertaken by the Adult Guardian and Child Guardian and has special responsibilities to support and protect the rights of children and young people in the child protection system. The OPG supports children in care through two specific programs; the community visitor program for children in care, which aims to ensure children and young people in the child protection system are safe and well and are being properly cared for, and the child advocacy program, which gives children in care an independent voice, ensuring their views are taken into consideration when decisions are made that affect them.

Children and young people in out-of-home care have particular needs that must be addressed in order to ensure their safety and improve their emotional, physical and psychological well-being.

The Charter of Rights for a child in care under the *Child Protection Act 1999*, section 74 and Schedule 1 describes the core rights that apply to every child and young person who is in the child protection system and includes the right to be provided with a safe and stable living environment and to be placed in care that best meets their needs and is culturally appropriate.

The OPG also works to protect the rights and interests of adults who have an impaired capacity to make their own decisions, recognizing that everyone should be treated equally, regardless of their state of mind or health.

Our charter with respect to adults with impaired capacity is to:

- Make personal and health decisions if we are their guardian or attorney
- Investigate allegations of abuse, neglect or exploitation
- Advocate and mediate for people with impaired capacity, and educate the public on the guardianship system.

The OPG also provides an important protective role in Queensland by administering a community visitor program to protect the rights and interests of the adult if they reside at a visitable site.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* set out our legislative functions and powers and the *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision-makers.

Position of the Public Guardian

The Office of the Public Guardian (OPG) welcomes the opportunity to comment on the exposure draft of the Mental Health Bill 2015 (MH Bill).

In the 2013-14 financial year, there were 2,774 persons for whom the Adult Guardian (now the Public Guardian) was appointed as guardian. Of this cohort, approximately 40% have an intellectual disability, with almost one quarter of guardianship clients having diagnoses of complex co-morbidities and behavioural issues, requiring specialist disability and mental health services.

A significant proportion of guardianship clients come into contact with the mental health system and may be subject to the provisions of the MH Bill, particularly under the proposed concept to use guardians and statutory health attorneys as a less restrictive way of consenting to mental health treatment and care. It is also likely that with the large numbers of persons currently on a long term involuntary treatment order, there may be a spike in guardianship appointments if the proposals under clause 409 (to consider seeking guardianship appointments for clients on involuntary treatment authorities in excess of 12 months) are made law. These proposals will directly and indirectly impact upon the work of the OPG which is already over-stretched and under-resourced.

While the OPG applauds the concept of seeking a less restrictive means to provide treatment, rather than coerced and involuntary mental health treatment and care, there are concerns that insufficient consideration has been given to the wider impacts of the MH Bill upon other service systems and their limited resources. There are also concerns regarding the disjunction between the proposed use of guardians and statutory health attorneys within the mental health system and their purpose under the guardianship and powers of attorney systems. The proposed use in the mental health system is inconsistent with the underlying philosophy of the guardianship and powers of attorney schemes, and also the international and national paradigm shift towards supported rather than substitute decision-making in guardianship.

In addition to this it is critical that review mechanisms, safeguards and operational oversight relating to mental health treatment and care should remain within the mental health system, and be subject to oversight by the Mental Health Review Tribunal and Mental Health Court. Safeguards for a separate class of mental health patients should not become the responsibility of the guardianship or powers of attorney systems. Neither of these systems are philosophically, legislatively or operationally equipped to monitor and review mental health treatment and care.

Key issues for the OPG are raised below and the OPG Recommendations regarding the Bill can be found at Attachment A. The OPG would be pleased to lend any additional support regarding development of the Bill. Should clarification be required regarding any issues raised, the OPG would be happy to make representatives available for further discussions.

Key Issues

Philosophical disparity between the guardianship and mental health systems

The guardianship and mental health systems operate from two different paradigms. The primary purpose of the *Guardianship and Administration Act 2000* (GAA) is to provide a simple and inexpensive way of meeting the decision-making needs of adults with impaired capacity, while the primary purpose of the MH Bill is to provide for the involuntary assessment and treatment, and protection of persons who have mental illness.

Substitute decision-making under the GAA prioritizes the autonomy of the person over other competing rights and persons. The GAA seeks to balance the right of an adult with impaired capacity to exercise autonomy in decision-making with the right to adequate and appropriate support for decision-making. To this end, the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent (section 5(d) GAA). The GAA recognises the right of an adult with impaired capacity to be involved in decisions that affect their life, while enabling members of their support network to be involved in

decision-making by and for the adult. However, in balancing the rights of persons with impaired capacity with the rights of others, the GAA favours the rights of persons with impaired capacity.

In contrast, the MH Bill provides for the involuntary assessment and treatment, and protection of persons who have mental illness, while safeguarding their rights. It provides a scheme for involuntary admission, treatment and protection of people with mental illnesses where necessary. Further, the rights of people with mental illness who are subjected to involuntary treatment are case-managed through the health system, and their rights protected through ongoing and independent review of their involuntary status through the Mental Health Review Tribunal (MHRT).

When balancing the rights of persons with mental illness with the rights of others under the MH Bill, the rights of others can trump the person's rights to autonomous decision-making and liberty, to the extent required to 'protect the person's health and safety or to protect others'. A key element of treatment criteria under the MH Bill is that the person lacks capacity to consent to treatment for a mental illness and there is a risk of serious harm to the person or others, or risk of the person suffering serious deterioration of their physical or mental health (Clause 12 MH Bill).

The MH Bill criteria of risk and harm, management and oversight of treatment and care, are incongruous with the philosophy currently underlying the guardianship system. They are also inconsistent with the recommendations and reforms proposed by the Queensland Law Reform Commission[1] and Australian Law Reform Commission[2] to move away from substitute decision-making, towards a more supported decision-making role within guardianship in keeping with the United Nations Convention on the Rights of Persons with Disability.

Guardianship and decision-making

The Public Guardian may be appointed by the Queensland Civil and Administrative Tribunal (QCAT) as guardian for a matter to make personal decisions for adults with impaired capacity. Personal matters can include, for example, appointments for health, accommodation or legal matters. However, the appointment is only with respect to making decisions regarding these matters.

Health care should not be carried out without consent under the GAA if the health provider knows that the adult objects to the health care (section 63 GAA). The exception under section 63 requires the health provider to certify in the adult's clinical records that the adult has minimal or no understanding of either what the health care involves, or why the health care is required. They must also certify that the health care is likely to cause the adult no distress, or any temporary distress is outweighed by the benefit to the adult of the health care. Section 63 was not intended as a backdoor to enable a guardian to consent to ongoing and long term mental health treatment for a non-consenting adult.

A guardian also does not have any power to enforce decisions made. Even if a guardian consented to health care that the client objected to under section 63, the guardian has no power to: enforce treatment decisions; authorise detention of a person against their will; consent to restrictive practices or to the person being physically searched; or returned to the authorise mental health service should the client abscond from the premises.

It was always envisaged that the GAA and mental health legislation would provide for separate and distinct protections for persons with impaired capacity. The GAA for decision-making needs, and mental health legislation for enabling involuntary assessment, treatment and care. The GAA was not designed to manage risk regarding mental health treatment (of either harm to the person or others), nor provide oversight or enforcement of treatment and care of persons with mental illness.

[1] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* Report No 67, September 2010, at p31-32, accessed 22 June 2015 at http://www.qlrc.qld.gov.au/publications

[2] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws (ALRC No 124),* August 2014, at p23ff, accessed 22 June 2015 at http://www.alrc.gov.au/publications/equality-capacity-disability-report-124

Register for Advance Health Directives and Nominated Support Persons

The Bill proposes that a register be kept of Advance Health Directives and appointments of nominated support persons.

There are concerns that this will raise public expectations for the provision of a register for all advance health directives and enduring powers of attorney. Any broader considerations for a state-wide registration system will have significant resource implications for government and should be considered within a whole-of-government approach to this issue. It is inappropriate to establish a record system within the mental health system alone without the whole-of-government having considered the broader policy and resource implications of establishing a register.

Inadequate safeguards – where third parties provide consent

Seeking to promote less restrictive ways for the treatment and care of persons with mental illness is a commendable principle. However, the weakness of the current approach as proposed under the MH Bill is that those for whom consent to treatment and care is provided by a third party (such as a guardian or statutory health attorney) will have significantly less protections and safeguards than those persons who are treated involuntarily. For example, there is a risk that different statutory health attorneys may be contacted for consent to mental health treatment, particularly if treatment is required over an extended period of time and the person has ongoing fluctuating capacity issues. There is significant risk that a person could have consent provided by various third parties to ongoing mental health treatment and care, whether as in-patients or in the community, without any limitations of time, or any independent and impartial review of their treatment and care, and capacity.

The GAA and PAA were not designed for the purpose of overseeing and reviewing mental health treatment and care. They were designed for the purpose of providing decision-making support when a person has impaired capacity. Therefore neither act provides for safeguards or review mechanisms that are adequate in their current form for overseeing and reviewing mental health treatment and care consented to by a guardian, enduring power of attorney or statutory health attorney. Further, it would be inappropriate to establish such safeguard mechanisms under the GAA or PAA, as this would lead to the creation of a dual oversight system. Namely, for those under involuntary treatment authorities oversight would be through the MHRT, whereas those under the GAA or PAA would have oversight under QCAT. To create dual systems of oversight is an inappropriate and inefficient use of government resources, and will duplicate and over-complicate an already over-stretched and under-resourced system.

It is essential that adequate safeguards and review mechanisms are in place for those persons who have consent to treatment and care provided by a third party. The most appropriate means of providing this oversight is through the MHRT and Mental Health Court (MHC) under the MH Bill.

Operational Issues

There are concerns that the use of guardians and statutory health attorneys as a less restrictive way of providing treatment and care will also have resource implications for the OPG. The requirement for the MHRT to consider whether to seek appointment of a guardian after a person has been on an involuntary treatment authority for longer than a year may result in a spike in guardianship appointments (under Clause 409). In addition to this, current guardianship staff are not equipped and trained to make mental health treatment and care decisions, and expansion of the role to include this decision making role will likely require consideration of the need for the appointment of internal specialist mental health practitioners to provide advice to officers of the OPG.

There are also concerns regarding the lack of adequate notifications to the OPG regarding minors and those subject to guardianship orders. There have been significant operational problems under the *Mental Health Act 2000* (MHA 2000) where OPG guardianship staff have been unable to obtain information from the MHRT and MHC regarding guardianship clients due to a lack of adequate notification provisions under the MHA 2000. This

has frustrated the ability of guardians to fulfil their QCAT appointed role and provide appropriate decision-making support for their clients. It is crucial that the MHRT and MHC provide notifications to personal guardians in all circumstances where written notifications are required to be provided to the patient, so that guardians can fulfil their obligations as appointed by QCAT.

Recommendations

A table of recommendations is attached (**Attachment A**).