public guardian

Legal Affairs and Community Safety Committee

Submission on the Human Rights Inquiry

Public Guardian

April 2016

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Office of the Public Guardian

The Office of the Public Guardian (OPG) protects 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 (prior to 1 July 2014) previously undertaken by the Adult Guardian and Child Guardian respectively.

The OPG supports children in care and in youth detention through two related programs.[1] The community visitor program aims to ensure children and young people in the child protection system are safe and well and are being properly cared for. The community visitor program also conducts visits to youth detention centres and to 17 year olds in adult correctional centres. The child advocacy program gives children in care an independent voice, ensuring their views are taken into consideration when decisions are made that affect them, thereby implementing a key plank of the United Nations Convention on the Rights of the Child (CRC).[2]

Both the visitors and advocates provide an oversight mechanism to ensure that the Charter of Rights for a child in care under the *Child Protection Act 1999* are upheld.[3] These include other rights in the CRC such as 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.[4]

The OPG also works to protect the rights and interests of adults who have an impaired capacity to make their own decisions, recognising that everyone should be treated equally, regardless of their state of mind or health.[5]

Our legislative obligations with respect to adults with impaired capacity are to:

- make personal and health decisions if the Public Guardian is their guardian or attorney[6]
- investigate allegations of abuse, neglect or exploitation[7]
- advocate and mediate for adults with impaired capacity, and educate the public on the guardianship system, and
- provide a community visitor program for adults residing in government funded facilities and some private hostels.[8]

Once again the OPG has a direct role in implementing obligations and ensuring rights as prescribed by a United Nations Convention – this time the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

When appointed by the Queensland Civil and Administrative Tribunal (QCAT) as guardian, the Public Guardian routinely makes complex and delicate decisions on health care and accommodation and guides adults through legal proceedings in the criminal, child protection and family law jurisdictions.

The *Public Guardian Act 2014* and the *Guardianship and Administration Act 2000* (the Guardianship Act) set out the OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an Advanced Health Directive or an Enduring Power of Attorney.

Should Queensland have a Human Rights Act?

(Inquiry Terms of Reference 1 and 2)

The legislation governing decision making by the Public Guardian is already underpinned by rights adopted from the CRC and the CRPD. This submission explains how there are often competing rights and a need to limit certain rights to achieve just outcomes.

The model for a Human Rights Act or Charter in the United Kingdom,[9] New Zealand,[10] Victoria[11] and the Australian Capital Territory,[12] has to date been what has become known as a "dialogue" model. Such a model preserves parliamentary sovereignty, but creates a dialogue on human rights between the executive, the legislature, the judiciary and the people. In doing so, the model continually interrogates the nature of human rights, the values behind them, how they are to be implemented in culturally appropriate ways, and how competing rights are to be balanced against one another.

The rhetoric of rights is a dominant one in our community and yet it is not an area that is necessarily well understood. Government decision makers and also service providers in the community sector make complex decisions every day, often with very little guidance on how to balance extremely important but apparently competing rights. If someone is so unwell from a mental illness that they are at risk of dying, how is the right to health balanced against the right to autonomy? If a child wishes to return to their birth parents, but it is not clear that those parents can protect the child from harm or neglect, then how can the best interests of the child be protected?

A Human Rights Act would not only buttress the rights framework for the Public Guardian's decisions but it would help to educate public servants and the community on how these decisions are made. It would provide another very important layer of accountability for government and its partners in the non-government sector.

There are many arguments raised against a Human Rights Act or the concept of "human rights" more broadly, which need to be heard and discussed. In particular, there are arguments that human rights are a "Western" concept or that they represent the rights of the European coloniser rather than of the Aboriginal and Torres Strait Islander communities.[13] However the best way of ensuring that these arguments are made and heard, and also that existing rights are interpreted and implemented in a way that takes account of cultural context is to have a Human Rights Act that encourages this dialogue to take place.

As Geoffrey Robertson QC has written:

> *"Many of those who argue against a bill of rights think we live in the best of all possible worlds, but they should think again. We live in the best of all geographic locations, but the way we live – the life that we allow our poor, sick and vulnerable to live is far from perfect. If the evidence shows that their lives can be measurably improved by a charter that draws on the best of our history and makes amends for the worst, surely we should embrace it."*[14]

The adoption of a Human Rights Act or Charter in Queensland would:

- *increase the accountability of government decision makers and*
- *ensure that we all learn and understand what human rights are and mean, for us and for others.*

The role of the Public Guardian as a decision maker for persons with impaired capacity

(Inquiry Terms of Reference 3 (a))

What does it mean for an adult to have "impaired decision making capacity?"

The Guardianship Act provides for a functional or social definition of "impaired decision making capacity":

> *"capacity, for a person for a matter, means the person is capable of –*
>
> *(a) Understanding the nature and effect of decisions about the matter; and*
> *(b) Freely and voluntarily making decisions about the matter; and*
> *(c) Communicating the decisions in some way."*

In practice a person may lack capacity to make a certain decision for one or more of a variety of conditions or reasons including but not limited to: intellectual disability, acquired brain injury, mental illness, age related dementia or conditions associated with problematic alcohol and drug use. In 2015 the Office of the Public Advocate in Queensland (OPA (Qld)) estimated that there were approximately 115,745 Queensland adults with impaired decision making capacity (or 1 in 32 adults).[15] These numbers are expected to increase due to both the ageing population as well as improvements in neonatal care.[16]

Overriding safeguards in the Guardianship Act are the legal presumption that a person has capacity[17] and the principle that the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent.[18] In cases where a decision is required of a person and that person does not have capacity to make that decision then a substitute decision maker – or guardian – may be appointed.[19] The Guardianship Act provides that the guardian may be any individual – usually a relative, carer or close friend – and that the Public Guardian may be appointed only as a guardian of last resort.[20]

A guardian can be appointed under the Act to make decisions in one or more domains – accommodation, health, personal matters or "legal matters."[21] An appointment is time limited, only for as long as a decision or decisions need to be made. The Guardianship Act makes it clear that an adult is to be supported[22] to make their own decisions so that a guardian need not be appointed. It further provides that the principle of "substituted judgment" applies so that in making a decision a guardian has to put themselves in the shoes of the adult and to consider the adult's will and preferences.[23]

Historical context

Historically people with disabilities had been treated as objects of pity, benevolence and charity. Their disability was not defined functionally, but as a medical condition or an immutable status.[24] Up until the 1980s in Australia it was common for people with disabilities to live in institutions. However, it soon became clear that these institutions did not always uphold the rights of the people whom they were serving. Following a number of inquiries into violence, abuse and neglect in these institutions, in the 1980s and 1990s Queensland progressed the closure of many large institutions and relocated many people with disability to community-based living.[25] It was out of this environment that the

Guardianship Act was developed and passed – so that the rights of those in community based living as well as those still living in institutional settings, could be exercised and upheld.

However, the Guardianship Act and its counterparts in other states[26] are nevertheless criticised for incorporating some elements which are arguably inconsistent with a contemporary human rights model. For example, the Act provides that when it comes to making health care decisions, a guardian should make a decision that is "in all the circumstances, in the adult's best interests."[27] The term "best interests" implies a paternalistic and protective approach which is generally seen as inconsistent with a rights based framework, except in the case of the rights of children as articulated in the CRC (see further below).

More holistically, the recent Australian Law Reform Commission Report on *Equality, Capacity and Disability in Commonwealth Laws* notes criticism by human rights advocates of the legislation's substitute decision making principles. There is an argument, at the more extreme end of the continuum, that there is no room for substitute decision making at all and that "supported decision making" should prevail in all instances to ensure the agency of the person with impaired capacity.[28] The CRPD has often been said to mark a "paradigm shift" in the positioning of people with disabilities from the medical or charity paradigms to a functional or social paradigm for viewing disability.

The United Nations Convention on the Rights of Persons with Disabilities

Australia ratified the CRPD in 2008. The CRPD emphasises nation states' obligations to take a positive approach to rights, to protect people rather than just refrain from discriminating against them. The rights incorporated in this convention include:

- equality before the law and prohibition of discrimination – articles 5 and 12
- the right to life – article 10
- access to justice – article 13
- enjoyment of liberty and security of the person – article 14
- prohibition of torture or cruel, inhuman or degrading treatment or punishment – article 15
- freedom from exploitation, violence and abuse – article 16
- protection of physical and mental integrity – article 17
- liberty of movement, including the freedom to choose their residence on an equal basis with others – article 18
- an equal right to live independently and be included in the community – article 19
- freedom of expression and opinion, and access to information – article 21
- respect for privacy and for home and family – articles 22 and 23
- a right to education and health care – articles 24 and 25
- a right to participation in political and public life, cultural life and recreation – articles 29 and 30.

Like all Human Rights Instruments, the CRPD emphasises the "indivisibility, interdependence and interrelatedness of human rights and fundamental freedoms."[29] However, only some of these rights are set out in the Guardianship Act,[30] with the result that many fundamental rights, such as the rights to adequate standard of living and social protection, risk being subordinated to those specifically included in the Act.[31]

Many commentators and review bodies have recommended that Australian Human Rights Acts and Charters should include economic and social rights.[32] The OPG supports all of those rights in the CRPD being incorporated into a Queensland Human Rights Act or Charter.

The Public Guardian supports the inclusion of the full range of rights set out in the Convention on the Rights of Persons with Disabilities being incorporated in a Queensland Human Rights Act.

The discussion below singles out just a few of the indivisible and interdependent rights which are not always enjoyed to their full extent by persons with impaired decision making capacity.

Increased human rights protection for adults with impaired capacity

Right to legal capacity

Article 12 CRPD provides that:

> *2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
>
> *3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity*.

As set out above, article 12 CRPD provides that persons with disabilities, including those with intellectual disability, have the same legal capacity as others and that they should be supported to make decisions (including decisions that have legal effect). The Guardianship Act does enshrine the principle of "supported decision making" when it provides that: "An adult with impaired capacity has a right to adequate and appropriate support for decision making."[33] It also specifically provides that "the right to make decisions includes the right to make decisions with which others may not agree."[34] However, as described above it does follow a "substituted decision making" model and also incorporates a protective "best interests" test which is potentially at odds with the article 12 approach.

But commentators have pointed out that if substituted decision making is used only when other less restrictive means are not available, then "protection can also be rights-affirming." Substituted decision making may effectively protect adults from harm, especially by asserting the economic and social rights of adults with impaired decision making capacity.[35] The value of a Human Rights Act or Charter would be that these arguments will be more fully ventilated in the community and the courts so that decision makers will be educated to consider a full range of rights in arriving at these important but difficult decisions.

Right to life and the right to health care

The OPA (Qld) recently released a report on *Deaths of people with disability in car*e,[36] concluding that:

> *"Queensland's first report on deaths in care of people with disability has found more than half (53%) of those reviewed were potentially avoidable. Most (59%) were unexpected 24 hours earlier and many involved relatively young men and women with nearly half (47%) dying in their 20s, 30s and 40s…..There were several cases of people with known swallowing difficulties choking to death simply because they were served the wrong meals….The review found other people died from serious diseases that should have been identified and treated earlier, but the symptoms were missed or misdiagnosed."*

Many of these people include those with impaired decision making capacity, because communication challenges associated with that cohort can impose additional challenges on carers. This is consistent with academic research which concludes that:

> *"While people with intellectual disability are not the only vulnerable group in Australia to experience health inequities, the extent of their collective inequality is arguably greater than that of other excluded groups. This is evidenced by their standardised mortality ratio, which, for adults with severe intellectual disability, is 4.1 times treater than that of the general population …. [so]…are likely to experience death 20 years earlier than the general population."*[37]

None of us have a right to good health, but community expectations are that all Australians have a right to accessible quality health care, and most of us do. We do not expect to die at a young age from choking, from severe constipation or even from late diagnosis of cancer. Unfortunately the data shows that persons with intellectual disabilities are much more likely to suffer ill-health leading to premature death. A Human Rights Act or Charter would both create an environment where such issues can be acknowledged and discussed and also place increased obligations on service providers and decision makers to consider their own actions and deliberations within that environment.[38]

The right to liberty and security of the person

Many adults with impaired making capacity who are failed by the service system, find themselves in prison for petty crimes such as wilful damage or creating a public nuisance.[39] A condition of bail is that a person must have an address. Decision makers at the OPG frequently find themselves in a situation where they are unable to find safe and secure accommodation for their clients who therefore inevitably stay on remand when they would be otherwise eligible for release. A Human Rights Act which asserted the right to liberty and security of the person, as well as the right to adequate standard of living and social protection, would make decision makers, the courts and government more accountable in this sphere.

Other decisions of the Public Guardian and service providers demand an ongoing balancing of competing rights. In Queensland there is a legal regime for the use of "restrictive practices" by disability service providers. "Restrictive practices" which are highly regulated in Queensland include – physical restraint, chemical restraint, seclusion and restriction of access to objects. These can only be used by service providers for therapeutic purposes, and where an individualised "positive behaviour support plan" exists to support the practice.[40]

While the use (and arguably legitimisation) of restrictive practices remains contentious,[41] it is also crucial that decision makers for restrictive practices fully understand the gravity of the decisions which they make. In the context of human rights discussions, it is important that the debate in this area is informed by an understanding of the rights framework.

The right to social inclusion

A recent decision of the Queensland Court of Appeal illustrates the different and improved result for people with disabilities, when decisions are made in adherence with human rights norms. In *Abrahams (by his litigation guardian The Public Trustee of Queensland) v Abrahams* [2015] QCA 286 a forty year old son with Downs Syndrome had been excluded from his father's Will. On application by the Public Trustee on behalf of the son, the primary Judge refused to make a decision that the son should inherit. The Court of Appeal, in allowing the Public Trustee's appeal, stated that:

> *"The primary judge failed to recognise that the applicant has the same basic human rights as anyone else and that he has a right to respect for his human worth and dignity."*

The Court of Appeal decided not only that the son needed funds for allied health care, but also that the son's "dignity would be enhanced" if he were provided with new clothes, furniture and a TV set. The Court further stated that:

> "*The applicant is a valuable member of the community. He should be recognised as such by being encouraged and supported to participate more actively in the community. …Such participation would be facilitated by financial provision from the estate of his late father to attend social and recreational activities and to undertake an annual holiday."*

This decision also highlights the need for better education of the judiciary in human rights principles (in relation to the erroneous comments of the primary judge) and also the importance of enshrining these principles in domestic law. Judges and commentators have noted that while other common law jurisdictions are increasingly having their law shaped by Human Rights Acts and Charters, the absence of a Human Rights Act in Queensland leaves this state vulnerable to detrimental isolationism.[42]

How would a Human Rights Act impact on the work of the Office of the Public Guardian?

A Charter of Human Rights would impose an additional level of guidance for decision makers in the OPG. It would also create an additional level of scrutiny. The Office of the Public Advocate in Victoria (OPA (Vic)) has, in its 2015 submission to the review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) cited the Supreme Court of Victoria in Patrick's Case[43] where it states that:

> *"If the inherent purposes of the [Guardianship and Administration Act] GAA can, despite safeguards, give rise to a culture of paternalism, the express object of the Charter is to promote a culture of justification….The GAA is capable of being, and in law must be, administered compatibly with human rights. But the enactment of the Charter means that stronger regard must be had to the human rights implications of guardianship and administration orders and decisions than was previously the case."*

The submission by OPA (Vic) goes on to assert that the existence of the Charter obliges the guardian to take a "sophisticated approach when weighing the merits of any proposed limitation of a person's human rights." To quote Geoffrey Robertson QC once again when commenting on the *Human Rights Act 1999* (UK):

> *"The most important effect has been educational – teaching public servants how to protect human dignity when they deal with vulnerable people."*[44]

How would a rights charter impact on service provision under the National Disability Insurance Scheme (NDIS)?

(Inquiry Terms of Reference 3(b))

The *Human Rights Act 2000* (UK) and the Victorian *Charter of Human Rights and Responsibilities* both apply to the actions of a "public authority." The definition of "public authority" in the Victorian Charter is wide enough to capture State Government agencies but also other agencies funded by the State Government. This means that disability service providers are also bound by the Charter.

In order to protect and uphold the rights of Queenslanders with disabilities, it is imperative that any Human Rights Act or Charter should apply to Commonwealth funded disability services under the National Disability Insurance Scheme (NDIS). The OPA (Vic) made this point in its submission to the

review of the *Charter of Human Rights and Responsibilities Act 2006*.[45] The OPA (Vic) concluded that as the legislation stands the Charter would not apply to services provided by non-government organisations funded by the NDIS to clients in Victoria. The OPA (Vic) proposes that this could be addressed by regulations made under s.207(2) *National Disability Insurance Scheme Act 2013 (Cth)* to provide that the public authority obligations of the Charter come into effect whenever formal disability services are funded and provided in Victoria.

If a Queensland Human Rights Act or Charter did not apply to decisions made and actions taken by service providers funded under the NDIS, then its beneficial impact on OPG clients would be significantly limited. OPG's clients are amongst the most vulnerable in the community and it is therefore imperative that service providers are held to the highest levels of accountability.

It is imperative that a Human Rights Act should apply to decisions and actions taken by service providers funded by the National Disability Insurance Scheme.

Children in the care and detention systems

(Inquiry Terms of Reference 3(a))

Historical context

Many commentators have described the emergence of the notion of children's rights. In the 19th and early 20th centuries children (like unmarried women) were proprietary interests of their fathers.[46] From that model emerged a welfare or charity model evident in the 1924 Geneva Declaration on the Rights of the Child which emphasised children's rights to protection and support.[47] The CRC is the first international instrument to recognise children as rights bearers, potentially with interests different from those of adults, including their parents.

United Nations Convention on the Rights of the Child

As described above, the CRC contains a range of human rights protections which have been adopted into the *Child Protection Act 1999.* These include the right to health care (article 24), education and job training (article 28). They also have a right to family life, subject to other rights for instance, to be free from exploitation and abuse (article 19). The CRC does specifically allow for a system of foster care when needed, provided that the system respects and upholds all of these rights (articles 9 and 20).

Resistance to the notion of children having rights has largely been based on concerns that they don't have the capacity to necessarily make the best decisions when it comes to their own interests. Hence, the CRC modulates this rights framework with the overriding principle that actions by states need to be taken in the best interests of the child. The "best interests" principle operates most effectively where there is a tension between apparently competing rights, to shift the balance in favour of the child.

While the child protection legislation is replete with references to the text of the CRC, child protection decisions are rarely if ever litigated in the higher courts, so there is no jurisprudence or guidance as to how this very complex web of rights is to be interpreted and applied in particular cases. The existence of a Human Rights Act by elevating these rights to the status of general law, and allowing for their litigation in the courts in various contexts, would lead to a more sophisticated understanding and application of these rights in the child protection context. Moreover, a Human Rights Act would embed these rights in legislation outside of the child protection system and therefore apply to all children.

A Human Rights Act should unequivocally apply to children and consider which rights specific to children and young people should be included. For instance, a child's right to participate in legal proceedings affecting them is one which needs to be articulated separately for children, because of their different status from adults in the legal system.

A Human Rights Act should unequivocally apply to children and include rights specific to children, given their particular legal status as recognised in the Convention on the Rights of the Child.

The right to participation

In particular, individuals and communities can be reluctant to allow children the right to freedom of speech and to participate in decision making that concerns them. One reason given is that this participation would give children false expectations that their views will always be adhered to.

The CRC enshrines the rights of children to participate in decisions made about them, not so that they have total autonomy over their lives, but so they have a right to an active role in the determination of their best interests. The OPG's child advocate program was commenced in response to findings of the Queensland Child Protection Commission of Inquiry that:

> *"….being heard and included in decisions that affect them allows children and young people to feel respected and to develop a greater understanding of the impact of intervention and action in and on their lives."*

The child advocates are legally qualified officers who operate by way of referral from a variety of sources including community visitors, foster parents, courts and the Department of Communities, Child Safety and Disability Services. With so many players in this complex system, it is often difficult for the children themselves to be heard and also for them to understand the way the system is operating around them and as to why decisions are made. The child advocates do not represent children as such – that is they are not lawyers who act according to the child's instructions. But they explain to the children how the system works and support them to articulate their views, especially to the Childrens Court or QCAT in a way that upholds their rights under the CRC. In this way, the OPG child advocacy program clearly upholds the right of children to freedom of expression.[48]

The child advocates have wide powers under the *Public Guardian Act 2014* to intervene in court and tribunal proceedings in appropriate cases. This participatory right is seen by the OPG as a critical one, because it allows marginalised children to have a stake in their lives and also is the mechanism by which other rights – e.g. the right to education or to family life, can be upheld.

A Human Rights Act should include a specific right for children to express their views freely in matters affecting them, including in court or tribunal proceedings, as provided for in article 12 of the Convention on the Rights of the Child.

Summary

- The adoption of a Human Rights Act in Queensland would increase the accountability of government decision makers and ensure that we all learn and understand what human rights are and mean, for us and for others.
- The Public Guardian supports the inclusion of the full range of rights set out in the Convention on the Rights of Persons with Disabilities being incorporated in a Queensland Human Rights Act or Charter.
- It is imperative that a Human Rights Act should apply to decisions and actions taken by service providers funded by the National Disability Insurance Scheme.
- A Human Rights Act should unequivocally apply to children and include rights specific to children, given their particular legal status as recognised in the CRC.
- A Human Rights Act should include a specific right for children to express their views freely in matters affecting them, including in court or tribunal proceedings, as provided for in article 12 of the Convention on the Rights of the Child.

The OPG would be happy to lend further support as required to the Committee as it progresses this inquiry. Should clarification be required regarding any issues raised, the OPG would be happy to make representatives available for further discussions.

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[1] *Public Guardian Act 2014* s.13 "Functions – relevant child, etc".

[2] *Public Guardian Act 2014* s.13 Chapter 4 "Provisions relating to relevant children and children staying at visitable sites."

[3] *Child Protection Act 1999* s.74(2) "Schedule 1 "Charter of rights for a child in care".

[4] The *Child Protection Act 1999* Schedule 1 "Charter of rights for a child in care" but also s.5A "Paramount principle. The main principle for administering this Act is that the safety, wellbeing and best interests of a child are paramount" and s.5B "Other general principles" all embody rights from the CRC.

[5] *Public Guardian Act 2014* s.12 "Functions – adult with impaired capacity for a matter".

[6] *Public Guardian Act 2014* s.12(1)(e), *Guardianship and Administration Act 2000* s.9 "Range of substitute decision makers," Schedule 1 Part 1 "General principles" and Part 2 "Health care principle" and *Power of Attorney Act 1998* s.63 "Who is the statutory health attorney".

[7] *Public Guardian Act 2014* s.19.

[8] *Public Guardian Act 2014* chapter 3, part 6 "Community visitor program (adult)".

[9] *Human Rights Act 1998* (UK).

[10] *New Zealand Bill of Rights Act 1990*.

[11] *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[12] *Human Rights Act 2004* (ACT).

[13] See for example, Malcom, Mr Justice David, "Human Rights at the End of the 1990s: Challenges to Universality", *Murdoch University Electronic Journal of Law* volume 5, no. 4 (December 1998); Davidson, J.S., "East versus West: Human Rights and Cultural Difference", *Canterbury Law* Review volume 3 (2001) page 37; Mikaere, Ani, "Seeing human rights through Maori eyes", *Yearbook of New Zealand Jurisprudence* volume 10 page 53. But see Hartley, Jackie, "Indigenous Rights under the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)" volume 11 no.3 (2007) pages 6 to 26, which argues that the existing charters due provide the opportunity to "infuse law and policy in Victoria and the ACT with developments in international human rights law regarding Indigenous Peoples" (at page 20).

[14] Robertson, Geoffrey. *The Statute of Liberty.* North Sydney: Vintage Books, 2009 at page 15. See also his assertion at page 12 in relation to the *Human Rights Act 1999* (UK).

[15] Office of the Public Advocate (Qld), "Submission to the National Disability Insurance Scheme: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework" (Brisbane: Office of the Public Advocate, April 2015), p.1.

[16] Brolan, Claire E, Robert S Ware, Miriam Taylor Gomez and Nicholas G Lennox, "The right to health of Australians with intellectual disability," *Australian Journal of Human Rights* 17, no.22 (2011), p.1.

[17] *Guardianship and Administration Act 2000* s.7(a).

[18] *Guardianship and Administration Act 2000* s.5(d)

[19] *Guardianship and Administration Act 2000* s.12(1)(b) also provides that a guardian may be appointed where an adult is likely to do something risking their health, welfare or property. Section 12(1(c) provides that an appointment may only be made where the adult's needs will not otherwise be adequately met or the adult's interests will not be adequately protected.

[20] *Guardianship and Administration Act 2000* s.9.

[21] See Schedule 2 definitions Part 2 – "personal matter", "health matter" and Part 3 "legal matter".

[22] *Guardianship and Administration Act 2000* ss.5 and 6.

[23] *Guardianship and Administration Act 2000* s.11 and Schedule 1, especially paragraph 7 – "Maximum participation, minimal limitations and substituted judgement".

[24] Gibson, Francis, "Article 13 of the Convention on the Rights of Persons with Disabilities – a right to legal aid?, *Australian Journal of Human Rights* 15, no.2 (2010), pages 123 to 142 at p.123.

[25] See Office of the Public Advocate (Qld), "Submission to the Senate Standing Committee on Community Affairs: Violence, abuse and neglect against people with disability in institutional and residential settings", (Brisbane: Office of the Public Advocate, 2015), pages 4 to 9.

[26] *Guardianship Act 1987* (NSW), *Guardianship and Administration Act 1986* (Vic), *Guardianship and Management of Property Act 1991* (ACT)*, Guardianship and Administration Act 1995* (Tas), *Guardianship and Administration Act 1993* (SA), *Guardianship and Administration Act 1990* (WA), *Adult Guardianship Act 1998* (NT).

[27] *Guardianship and Administration Act 2000* s.61.

[28] Australian Law Reform Commission, *ALRC Report 124 Equality, Capacity and Disability in Commonwealth Laws* (ALRC: 2014), especially at chapter 2.

[29] See the Preamble, paragraph c to the CRPD.

[30] See ss.5 (Acknowledgements), 6 (Purpose to achieve balance) and Schedule 1 Principles – Part 1: General Principles – "1 Presumption of capacity", "2 Same human rights", "3 Individual value", "4 Valued role as member of society", "5 Participation in community life", "Encouragement of self-reliance", "6 Maximum participation, minimal limitations and substituted judgment", "8 Maintenance of existing supportive relationships", "Maintenance of environment and values", "Appropriate to circumstances", "11 Confidentiality" and Part 2: Health care principle.

[31] See Chesterman, John, "The Review of Victoria's Guardianship Legislation: State Policy Development in an Age of Human Rights", *Australian Journal of Public Administration* volume 69, no.1, pages 61 to 65 at page 64.

[32] See Office of the Public Advocate Victoria. "Submission to the Review of the Victorian Charter of Human Rights and Responsibilities Act (2006), June 2011, at page 8. Hartley, Jackie. "Indigenous Rights under the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) in *Australian Indigenous Law Review* vol 11, No. 3 (2007), pages 6 to 27. Brolan, Claire E et al "The right to health of Australians with intellectual disability", *Australian Journal of Human Rights* volume 17(2) (2011) at page 16 describes how the Australian government's consultation on a Human Rights Act revealed that the "right most mentioned [in submissions] was the right to health, which was discussed in 1,183 submissions." Devereux, Annemarie. *Australia and the right to adequate housing". Federal Law Review* (1991) pages 223 to 239 discussed the importance of the right to housing.

[33] *Guardianship and Administration Act 2000* s.5(e).

[34] *Guardianship and Administration Act 2000* s.5(b).

[35] Chesterman, John, Office of the Public Advocate Victoria. "The Review of Victoria's Guardianship Legislation: State Policy Development in an Age of Human Rights." *The Australian Journal of Public Administration,* vol. 69, no.1. See also Carter, Barbara. "Adult guardianship: Human rights or social justice?" *Journal of Law and Medicine* (2010) vol. 18, pages 143 to 155, where it is argued that a social justice framework should be preferred over a human rights framework for guardianship.

[36] http://www.justice.qld.gov.au/public-advocate/activities/current/deaths-in-care. See also NSW Ombudsman, *Report on Reviewable Deaths in 2012 and 2013 volume 2: Deaths of people with disability in residential care (June 2015).*

[37] Brolan, Claire E, Robert S Ware, Miriam Taylor Gomez and Nicholas G Lennox. "The right to health of Australians with intellectual disability." *Australian Journal of Human Rights* 17(2) (2011) pages 1 to 32 at page 2.

[38] See also Harpur, Paul. "The Evolving Nature of the Right to Life: The Impact of Positive Human Rights Obligations." (2007) 9 UNDLR pages 95 to 114.

[39] See Toombs, Dan. *Disability and the Queensland Criminal Justice System.* Pyrmont: Law Book Co, 2012 3rd ed., especially the case study "Introduction: Melissa's story as told by her mother Collein at pages 1 to 15.

[40] *Disability Services Act 2006* Part 6, ss.139 to 200.

[41] See Parliament of Australia. Report of the Senate Committee on Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability. 25 November 2015 at Chapter 4.

[42] Carne, Greg. "Charting Opposition to Human Rights Charters: New Arguments or Recycled Objections?" *University of Tasmania Law Review* vol 28, no.1 (2009), pages 82 to 124 at page 115. McMurdo, the Honourable Justice Margaret, "An

Australian Human Rights Act: Quixotic Impossible Dream or Inevitable Natural Progression?" *Southern Cross university Law Review* vol 13, no.10 (2009), pages 37 to 55, at page 51

[43] Office of the Public Advocate, Victoria. "Submission to the review of the Charter of Human Rights and Responsibilities Act 2006" at page 8. The submission cites *PJB v Melbourne Health & Anor (Patrick's Case),* VSC 327 (2011).

[44] Robertson, Geoffrey. *The Statute of Liberty.* North Sydney: Vintage Books, 2009. At page 12.

[45] Office of the Public Advocate (Victoria). "Submission to the Review of the Charter of Human Rights and Responsibilities Act 2006. 9 June 2015 at pages 11 to 12. See also Victoria Legal Aid, "Charter of Human Rights and Responsibilities Act 2006 Eight year review, June 2015 at pages 11 to 12 regarding the limitations of the current definition of "public authority."

[46] Tobin, John. "Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?" *Melbourne University Law Review* (2009) 33(2) 579.

[47] Queensland Child Protection Commission of Inquiry. *Taking Responsibility: A Roadmap for Queensland Child Protection*. June 2013 at page 511. Shackel, Rita. "The UN Convention on the Rights of the Child: A review of its successes and future directions." *Australian International Law Journal* [2003] pages 21 to 60, at page 24.

[48] CRC article 13.