Laws Relating to Individual Decision Making

CHAPTER CONTENTS

Introduction

Making decisions is an important part of life as those decisions may impact upon a person's wellbeing, lifestyle, financial position and property. A person's ability to make decisions expresses their individuality and control over their life. However, the law recognises that adults may not always have the capacity to make their own decisions (decision-making ability). Substitute decision regimes provide systems for adults with impaired decision-making capacity by which choices can still be made.

It is important to note that the various substitute decision regimes do not prevent the involvement of informal or unauthorised networks in the decision-making processes for an adult with impaired decision-making capacity.

Human Rights and Decision Making

It is a fundamental human right that people are able to participate in their own decision-making and make choices about what they want and value. A finding that a person does not have capacity could impact multiple rights protected under the *Human Rights Act 2019* (Qld) (Human Rights Act), including:

- recognition and equality before the law (s 15 Human Rights Act)—a finding of impaired capacity impacts on a person's right to make decisions under the law in relation to that matter and may result in the appointment of a substitute decision-maker to make the decisions on their behalf
- protection from torture and cruel, inhuman or degrading treatment (s 17 Human Rights Act)—a finding of impaired capacity may mean a person is subject to medical treatment without their consent
- right to liberty and security (s 29 Human Rights Act)—a finding of impaired capacity may mean a person is subject to restrictive practices (e.g. restraint and seclusion)
- privacy and reputation (s 25 Human Rights Act)—a finding of impaired capacity may mean that decisions impacting a person's family and home, physical and mental integrity and even the exercise of their sexuality and individual identity (e.g. their clothing), are made by someone else.

All adults in Queensland are presumed to have capacity for decision-making. They can make decisions to live their lives independently and decide what is best for them, taking or leaving the advice of others. They can make unwise or risky decisions. Some groups of adults are more at risk of having their right to make autonomous decisions scrutinised including older persons and persons

who have a disability. The presumption of capacity for an adult is not affected by any personal characteristic such as disability, mental illness or age.

Decision-making Capacity

Decision-making capacity is defined in Queensland in three parts within the *Guardianship and Administration Act 2000* (Qld) (Guardianship Act):

- understanding the nature and effect of the decision
- deciding freely and voluntarily
- communicating the decision in some way.

If a person is unable to satisfy all three parts, they are said to have impaired decision-making capacity. The impairment may be a result of a congenital intellectual disability, acquired brain injury, dementia, mental illness or some other cause. Determining decision-making capacity is a legal and not a medical concept, but medical evidence may be informative.

The law recognises that a person's decision-making capacity may be variable and fluctuating depending upon the type of decision to be made, the time the decision needs to be made, the adult's physical health and the stresses they are experiencing. Capacity is not a black or white concept. It is graduated in accordance with the complexity of the specific decision required, the context in which the decision must be made, the timing of when the decision must be made and the support provided to make the decision.

Supported Decision Making

Most people can be assisted or supported to make their own decisions. Substituted decision making is a last resort option.

Supported decision making is helping someone to make their own decisions so that they have control over the things that are important to them, thus safeguarding their autonomy, independence and dignity. Support needs are different for everyone and every decision. There are steps in the decision-making process and different people will need different amounts of support for each step and may need more supports if the steps are complex or the environmental issues make it difficult to communicate their needs.

Principles for dealing with people with impaired decision-making capacity

The Guardianship Act sets out a number of general principles that must be applied by any person or entity acting on behalf of someone with impaired decision-making capacity (s 11B Guardianship Act):

- An adult is presumed to have capacity to make their own decisions unless incapacity for that particular decision is established.
- Each individual has the same basic rights including the protection of individual liberty and access to services.
- Each person should be valued as an individual, and their human worth and dignity should be respected.
- An adult has a right to be valued as a member of society.
- A decision maker must acknowledge the importance of encouraging the adult to take part in general community activities and to be as autonomous and self-reliant as possible.
- A decision maker must apply the least restrictive option that is consistent with the adult's proper care and protection.
- The adult has the right to participate, to the greatest practicable extent, in the decisions affecting their own life.
- If it is possible to determine the adult's views or wishes from their previous actions, then the decision maker must take these into account in any decision.
- A decision maker must recognise the importance of maintaining the adult's existing supportive relationships.
- A decision maker must recognise the importance of maintaining the adult's cultural and linguistic environment, including religious beliefs and lifestyle choices.
- Assistance given to an adult must meet their current needs and be adapted to their individual characteristics.
- A decision maker must recognise the adult's right to confidentiality in relation to personal information.

Any person or entity making a decision about the adult's health care must also exercise their authority in accordance with the health care principles (s 11C Guardianship Act), which include:

- electing the option that is least restrictive of the adult's rights, is necessary and appropriate and is in the adult's best interests, while taking into account the adult's views
- maintaining or promoting the adult's wellbeing, which must take into account the information given by the adult's health provider.

Powers of Attorney

Appointing an attorney is one way an individual can plan for circumstances where their ability to make decisions may become limited, either through a lack of decision-making capacity or in circumstances where an individual is not available to make decisions.

What is a power of attorney?

A power of attorney is a document by which one person (the principal) authorises another person (the attorney) to act on the principal's behalf. Usually, the person giving the authorisation will be referred to as the principal and the person receiving the authorisation to act will be referred to as the attorney.

The power to act under a power of attorney can be a general power or a specific power. Powers of attorney are used in many circumstances including in business, commerce and family matters.

Although powers of attorney are frequently granted for buying and selling property, they may be used for almost any purpose. An attorney can be authorised to collect debts, vote at meetings, operate a bank account, make lifestyle or certain health-care decisions, or carry out any other function that can be lawfully delegated by one person to another.

A power of attorney can give the attorney the right to legally bind the principal in some, many or all circumstances as if the principal had made the decision themselves.

General powers of attorney

Chapter 2 of the *Powers of Attorney Act 1998* (Qld) (Powers of Attorney Act) makes provision for general powers of attorney.

A general power of attorney is a document in which a principal authorises one or more attorneys to do anything that the principal can lawfully do and is capable of doing. A general power of attorney excludes personal matters (see Enduring Powers of Attorney). A general power of attorney document must also provide terms or information about exercising the power (s 8 Powers of Attorney Act).

In a general power of attorney, a principal may specify when and in what circumstances the power can be exercised. If the document does not specify a time when it is exercisable, it will begin immediately after it is made (s 9 Powers of Attorney Act).

A general power of attorney made under the Powers of Attorney Act must be in the approved form. It must be signed by the principal, or at the direction and in the presence of the principal (s 11 Powers of Attorney Act).

In a general power of attorney, the principal can appoint one or more attorneys to be either joint or several attorneys (s 13 Powers of Attorney Act).

Proof of an attorney's appointment

The power of attorney document must be produced whenever an attorney acts on a principal's behalf (s 14 Powers of Attorney Act).

When is a power of attorney used?

A power of attorney can be useful in many circumstances, including where a person:

- is planning an absence from Australia or Queensland
- has limited physical mobility
- is at an age when they believe someone else is better able to manage their affairs
- would like insurance against the possibility that one day that person may be incapable of making their own decision.

Who can grant a power of attorney?

Any person who is over the age of 18 and who can understand the nature of the document can appoint an attorney. Even people who cannot sign the document because of some physical disability can still make an appointment of an attorney.

People with impaired decision-making capacity

A person with impaired capacity can create a valid power of attorney if they can understand the nature and effect of the document.

Trustees

A trustee who is unable to perform their duties because of a temporary absence from Queensland or a temporary physical incapacity may appoint an attorney (s 56 *Trusts Act 1973* (Qld)).

Prisoners

A person serving a prison sentence of three years or more cannot give a valid power of attorney if control over their affairs has been vested in the Public Trustee, as set out in pt 7 of the *Public Trustee Act 1978* (Qld).

Revocation of a general power of attorney

A general power of attorney will be revoked:

- by a written document from the principal revoking it (s 17 Powers of Attorney Act)
- if the principal becomes a person who has impaired capacity (s 18 Powers of Attorney Act)
- at the death of the principal (s 19 Powers of Attorney Act)
- according to the terms of the power of attorney (i.e. if the power of attorney is expressed to operate for or during a specified period, the power of attorney is revoked at the end of that period; or if the power of attorney is expressed to operate for a specific purpose, it is revoked when the purpose is achieved) (s 20 Powers of Attorney Act).

Being of impaired capacity does not just mean that the person cannot communicate. In a case where the person is still capable but is not able to communicate their decisions, the Supreme Court is empowered to confirm that the power of attorney remains in full force and effect, if the court is satisfied that the continuation of the attorney is for the benefit of the principal.

When revoking a general power of attorney, the principal must take reasonable steps to advise each attorney affected by the revocation. In the event that the general power of attorney has been registered, it must be deregistered (s 16 Powers of Attorney Act).

A general power of attorney can also be revoked by the attorney for example if the attorney resigns, becomes a person who has impaired capacity, becomes bankrupt or dies (ch 2 pt 3 div 4 Powers of Attorney Act).

Enduring Powers of Attorney

An enduring power of attorney provides an authorisation to allow the attorney to continue to act and make decisions, even when the principal no longer has the capacity to manage their own affairs (s 32 Powers of Attorney Act). For example, enduring powers of attorney would be useful for a couple running a business, because if either person became incapable of managing their own affairs, the capable person could act on behalf of their partner with the disability, and the business could continue without too much inconvenience.

Protective measures

The principal can exercise some control over the way the attorney acts. One of these is that the principal may limit the types of financial power that an attorney can exercise. For example, the principal can include in the document that the attorney does not have the power to sell the family home. Another way to place a check on the attorney's power is to nominate two (or more) attorneys for certain types of decisions. This means that even if one attorney turns out to be unscrupulous, their power to abuse their position is reduced by the other attorney.

Who can be appointed?

To be eligible to be appointed an enduring power of attorney (s 29 Powers of Attorney Act) a person must:

- be 18 years of age or over
- not be a paid carer (within the previous three years) or health provider of the principal
- not be a bankrupt or have any arrangement in place under the *Bankruptcy Act 1966* (Cth) in relation to their financial affairs (s 57 Powers of Attorney Act) if being appointed as an attorney for financial matters.

The following can also be appointed as an enduring attorney:

- the Public Trustee for financial matters
- a trustee company
- the Public Guardian but only for personal matters.

Most importantly, a principal must be able to trust the person that they appoint as their attorney, as a person without legal capacity is highly vulnerable to abuse from an unscrupulous attorney.

Eligible witness

To be effective, an enduring power of attorney must not only be signed by the principal, but also witnessed by an eligible witness.

An eligible witness is a person who is:

- a justice of the peace, a commissioner for declarations, a notary public or a lawyer
- not a person signing the document for the principal (namely the eligible signer)
- not an attorney of the principal
- not a relation of the principal or a relation of the attorney of the principal

- not a paid carer or health provider of the principal if a document gives power for a personal matter
- not a beneficiary under the principal's will (s 31 Powers of Attorney Act).

The word 'relation' is defined in sch 3 to the Powers of Attorney Act to refer to a spouse, a person related to the principal by blood, marriage, adoption, de facto or foster relationship, a person upon whom the principal is dependent, a person who is dependent on the principal and a person who is a member of the principal's household.

The eligible witness must also complete a certificate in the document that the principal appeared to have the capacity to make the enduring power of attorney (s 44 Powers of Attorney Act). Section 41 of the Powers of Attorney Act provides some assistance to the eligible witness in determining whether the principal has the necessary capacity, and specifically that the principal needs to understand when the power begins and that:

- they may specify or limit the power being given
- they can specify when the power begins for financial matters
- once the power begins, the attorney will have full control over the matters, subject to express
- limitations in the power
- the principal may revoke the power at any time while capable
- after the principal has lost decision-making capacity, the power continues and the principal will be unable to revoke the power or effectively oversee the use of the power.

What powers can be given

In an enduring power of attorney, a person can authorise one or more persons to do anything in relation to one or more financial, personal or health matters for the principal.

Financial matters relate to the principal's financial, property and legal affairs. Personal matters relate to the principal's care or welfare and are defined as:

- where the principal may live
- with whom the principal may live
- whether the principal works and, if so, the kind and place of work and the employer with whom the person should work
- what educational training the principal should take
- whether the principal applies for a licence or permit

- day-to-day issues such as diet and dress
- whether to consent to a forensic examination of the principal
- the health care of the principal
- a legal matter not relating to the principal's financial or property matters.

Health matters relate to the health care of the principal and are also defined in sch 2 pt 2 of the Powers of Attorney Act as the care, treatment, service or procedure for the health of the principal:

- to diagnose, maintain or treat the principal's physical or mental condition
- to be carried out by, or under the supervision of, a health care provider.

Healthcare includes withholding or withdrawal of a life-sustaining measure for the principal if the continuation or commencement of the measure would be inconsistent with good medical practice. Life-sustaining measure and good medical practice are defined in the schedule.

However, health care does not include:

- first-aid treatment
- a non-intrusive examination made for diagnostic purposes
- the administration of a pharmaceutical drug in certain circumstances.

What powers cannot be given

The Powers of Attorney Act specifically excludes certain powers that may never be exercised by an enduring power of attorney (s 32 Powers of Attorney Act). They are defined as special personal matters (sch 2 s 3 Powers of Attorney Act) and special health care matters (sch 2 s 7 Powers of Attorney Act).

A special personal matter is:

- making or revoking the principal's will
- making or revoking a power of attorney, an enduring power of attorney or advance health directive
- exercising the right to vote
- consenting to the adoption of a child
- consenting to the marriage of the principal
- entering into a surrogacy arrangement or consenting to the making or discharging of a parentage order under the *Surrogacy Act 2010* (Qld).

Special health care matters are:

- removal of tissue from the principal while alive for donation
- sterilisation of the principal
- termination of pregnancy of the principal
- participation of the principal in special medical research or experimental health care
- electroconvulsive therapy or psychosurgery for the principal
- other special health care of the principal prescribed by regulations.

Other powers

An attorney is required to comply with the general and health care principles (outlined above) in the exercise of their powers.

There are some other provisions in the Powers of Attorney Act that an attorney for financial matters also needs to be aware of:

- In certain situations, an attorney can make a gift as part of the exercise of their power on behalf of the principal. The Powers of Attorney Act allows the attorney to make a gift to a relation or close friend of the principal. Also, an attorney can make charitable donations that the principal might reasonably be expected to make (s 88 Powers of Attorney Act).
- Subject to the terms of the enduring power of attorney, the attorney is authorised to provide for the reasonable needs of the principal's dependants (s 89 Powers of Attorney Act).
- An attorney has the right to all information that the principal would be entitled to about themselves in order to make informed decisions which the attorney is authorised to make (s 81 Powers of Attorney Act).

How many attorneys can be appointed?

There are now a significant number of options available to a person in the appointment of an attorney:

- one or more attorneys
- different attorneys for different purposes
- attorneys in succession, namely on the death or loss of capacity of a prior attorney
- alternative attorneys in circumstances stated in the powers of attorney

- joint and several attorneys
- two or more attorneys being able to make a majority decision (s 43 Powers of Attorney Act).

The form of the enduring power of attorney

Section 44 of the Powers of Attorney Act provides that the enduring powers of attorney must be in the approved form and sets out the requirements of the document.

There are two forms for an enduring power of attorney—a short form and a long form.

The short version is for those people wishing to appoint the same attorney or attorneys for both financial and personal matters. The long form is used for the appointment of different attorneys for different purposes.

When does an enduring power of attorney start?

For financial matters, an enduring power of attorney may come into effect on a date or event as specified by the principal in the document namely:

- immediately
- on an event (e.g. incapacity)
- on a specified date.

If the principal does not specify when the power begins, it will begin immediately.

For personal matters, an enduring power of attorney will only come into effect once the principal has lost capacity to make personal decisions.

Revoking an enduring power of attorney

A principal must have the same level of capacity to revoke an enduring power of attorney as they had to make it. An enduring power of attorney may be revoked by signing a revocation of the power of attorney (s 47 Powers of Attorney Act).

An enduring power of attorney is automatically revoked by:

- the death of the principal or an attorney (to the extent that it gives power to the deceased attorney)
- the marriage of the principal to someone other than the attorney (unless a contrary intention is
- expressed in the enduring power of attorney)

- the divorce of the principal, in so far as it gives any power to the divorced spouse
- a later power of attorney to the extent of any inconsistency
- the resignation or death of the attorney
- the incapacity of the attorney
- bankruptcy or insolvency of an attorney for financial matters
- an attorney for personal matters becoming a paid carer or health provider for the principal or a service provider for a residential service where the principal is a resident.

The document may also specify when it will end. This is called revocation according to terms (ss 50–59 Powers of Attorney Act).

Advance Health Directive

Under s 35 of the Powers of Attorney Act, an adult can appoint an attorney to make health decisions. An adult can also convey their wishes about specific health care decisions through an advance health directive.

An advance health directive is a document by which an adult can state their wishes or give directions about future health care for various medical conditions. The document only takes effect when the adult has impaired capacity to make decisions regarding matters covered by the advance health directive (s 36 Powers of Attorney Act).

Under an advance health directive, an adult can give directions about consent to certain future health care, indicate the circumstances under which life support is to be withheld or withdrawn and authorise the restraint, movement or management of the adult for the purposes of health care.

Directives in an advance health directive that would result in the principal's end of life will not come into operation unless the adult has a terminal illness and is not expected to live for more than one year, in a persistent 'vegetative' state or coma (s 36 Powers of Attorney Act).

Section 37 of the Powers of Attorney Act makes it clear that this document cannot be used to authorise euthanasia, which is an offence under the *Criminal Code Act 1899* (Qld). For more information on voluntary assisted dying laws in Queensland see the *Voluntary Assisted Dying Act 2021* (Qld).

A direction in an advance health directive has priority over a general or a specific power for health matters given to any attorney (s 35(3) Powers of Attorney Act).

The adult principal, a doctor and an eligible witness (i.e. a justice of the peace, commissioner for declarations, notary public or lawyer) must sign the document (s 44 Powers of Attorney Act sets out

the requirements of the document). The document can be revoked by advising all attorneys under the document of its revocation in writing or by making a new directive that is inconsistent with the first. Revocation is only possible while the principal has capacity (s 42 Powers of Attorney Act). An adult is presumed to have capacity until it is proven otherwise.

Statutory Health Attorney

In cases where an adult with impaired capacity has neither appointed an attorney nor made an advance health directive, nor had a guardian appointed for health matters, a statutory health attorney can be automatically authorised to make health care decisions, only (s 62 Powers of Attorney Act).

Therefore, in the circumstances where there are no valid documents in place and a requirement to make health care decisions, there is a mechanism to ensure there is always someone who can make your health care decisions for you.

It is commonly assumed that next of kin or relatives have the right to make these decisions, but the Powers of Attorney Act provides categories of people that are authorised (s 63 Powers of Attorney Act) in order of priority:

- a spouse or de facto partner, if the relationship is close and continuing
- the person's primary carer (but not a paid carer) who is over the age of 18
- the person's close friend or relative, who is not a paid carer of the person but is over the age of 18.

A relative can also include a person who under Aboriginal tradition or Torres Strait Islander custom is regarded as a relative.

A paid carer is someone who is paid a fee or wage to care for the person but not someone receiving a carer's pension or benefit.

The statutory health attorney is someone who is culturally appropriate and readily available. 'Readily available' means that if the first category of person on the list is not available, then the next category will be contacted (s 63 Powers of Attorney Act).

If there is no one who falls within any of these categories, then the Public Guardian is able to make the decision. The Public Guardian can also mediate disputes between more than one equally eligible statutory health attorneys. If the disagreement cannot be resolved by mediation the public guardian may make the decision (s 42 Guardianship Act). If a statutory health attorney does not consent to treatment in circumstances where a doctor has requested consent, or makes a decision contrary to the health care principles, the matter will be referred to the Public Guardian and the Public Guardian is then able to make the health care decision (s 43 Guardianship Act).

A statutory health attorney has authority to consent to all health care except tissue donation, sterilisation, pregnancy termination and withdrawing or withholding life-sustaining treatment. They have the responsibility of selecting the least intrusive medical care and considering the adult's wishes and medical advice.

There is no formal procedure or form to complete in becoming a statutory health attorney, as eligibility is determined by a person's relationship with the adult with impaired capacity at the time a decision is required. As people's availability to act as a statutory health attorney can vary, a person may have a range of statutory health attorneys over a period of time

Duties of the Attorney

As well as complying with the terms of the general or enduring powers of attorney (and in the case of enduring powers of attorney, the general and health care principles), the attorney has the following duties to:

- act honestly and with reasonable diligence
- act according to the terms of the document
- support the principal to exercise their human rights
- keep money and property of the principal separate from that of the attorney
- preserve the confidentiality of the principal's affairs
- support the principal to make and communicate their own decisions where possible
- exercise the power in a way that safeguards the principal’s rights, interests and opportunities
- support the principal’s cultural and linguistic environment and values.

If more than one attorney is appointed, an attorney should exercise their power in consultation with any other attorneys or decision makers or in any way the document directs (e.g. jointly, severally or by majority) to ensure the interests of the principal are not prejudiced by a breakdown in communication.

Conflict transactions

Conflict transactions are also a significant concern when an attorney exercises a power of attorney, particularly under an enduring power of attorney. A conflict of interest arises where the best interests of the principal are at odds with the interests of the attorney. This might be the case, for

example, where a person who has lost capacity has appointed their spouse under an enduring power of attorney.

A conflict transaction is defined as one that may conflict or result in a conflict between the duty of an attorney towards the principal and the interests of the attorney or a relation, business associate or close friend of the attorney, or another duty of the attorney (s 73(6) Powers of Attorney Act)

An attorney may only enter into a conflict transaction if:

- the principal has authorised specific conflict transaction in the power document or
- a court or tribunal authorised the conflict transaction.

Resignation of attorney

The Powers of Attorney Act provides that an attorney may resign by giving signed notice to the principal (s 72). However, under an enduring power of attorney, if the principal has no capacity at the time of the attorney's resignation, the attorney's resignation is not effective unless the approval of the court or tribunal is obtained (s 82 Powers of Attorney Act). The court may then appoint a new attorney.

Breach of obligations

Attorneys can be required to compensate the principal or the principal's estate for any loss caused by the attorney's failure to comply with their obligations under the power of attorney or under the provisions of the Powers of Attorney Act.

It is important to bear in mind that if the principal or the attorney has died, any application for compensation must be made to a court within six months of the death of either, whichever first occurs.

Consistent with this right to compensation, the Powers of Attorney Act also permits a person, whose benefit under a principal's estate may have been lost because of the actions of an attorney, to apply to a court for compensation out of the principal's estate (ss 106–107 Powers of Attorney Act).

Signing documents under a power of attorney

The document must be signed in such a way to show that the person does so in their role as the attorney for the principal. The easiest way to do this is for the document to be signed 'X (the principal) by their attorney Y (the attorney)'.

When a person is acting as an attorney on behalf of a principal, the attorney should always disclose this before a transaction is entered into. Otherwise, the attorney could be held personally liable for any contract made on the principal's behalf.

Registration of Powers of Attorney

Powers of attorney and enduring powers of attorney can be registered at Titles Queensland although it is not compulsory to do so.

However, for any dealing in land (including sales and leases of more than three years), the powers of attorney or enduring powers of attorney must be registered with Titles Queensland (pt 7 div 3 *Land Title Act 1994* (Qld). If, for example, a vendor appoints an attorney to act in selling land, the transfer to the purchaser will not be registrable (i.e. the sale will not be completed) unless the power of attorney has also been registered. Therefore, it is imperative that all powers of attorney that are designed to allow the attorney to deal with land are registered.

When a power of attorney has been lodged at Titles Queensland for registration, it becomes part of a public register and can be searched by any person proposing to enter into some land transaction with a person who claims to be acting under a power of attorney.

When a power of attorney is to be registered, a solicitor should prepare it as further requirements as to its form and registration must be satisfied.

Supreme Court and Tribunal Powers

The Queensland Civil and Administrative Tribunal (QCAT) has exclusive power to appoint guardians and administrators for adults with impaired capacity. The Supreme Court and QCAT both have the power to deal with matters in relation to enduring documents and attorneys appointed under enduring documents, including the supervision of attorneys (s 82 Guardianship Act).

If an attorney for a person wishes to resign as an enduring power of attorney and the person has lost capacity, the attorney needs to make an application to the Supreme Court or to QCAT to allow this to happen and to validate the attorney's resignation (QCAT Form 12, Application for Miscellaneous Matters).

The Supreme Court and QCAT have general powers to hear applications for declarations, directions, recommendations or advice about anything under the Powers of Attorney Act or to provide consent to a special health matter (s 82 Guardianship Act).

An extended range of people may apply to the Supreme Court or QCAT including the person themselves, a member of the person's family, an attorney, the Public Guardian or another interested person (s 115 Guardianship Act). The tribunal is required, at least seven days before the hearing of an application, to give notice of the hearing to the person concerned in the matter and as far as practicable, and among other persons, to the applicant (if it is not the person concerned), a spouse, child, parent or sibling of the person concerned (s 118 Guardianship Act).

The tribunal has the power to make a declaration about a person's capacity (whether they do or do not have capacity). QCAT may do this on its own initiative or on an application of the person or another interested person (s 146 Guardianship Act).

The Supreme Court or QCAT may order that an attorney be replaced or removed, or it can change the terms of a power of attorney and revoke any documents or transactions entered into by any attorney invalidly.

Guardianship and Administration for People with Impaired Decision-making Capacity

In Queensland it is presumed a person over the age of 18 has the capacity to make their own decisions. There are three elements to making a decision:

- understanding the nature and effect of the decision
- making decisions freely and voluntarily
- communicating the decision in some way.

If a person needs to make a decision, and is unable to carry out any part of this decision-making process, they have what is referred to as impaired decision-making capacity. Many people with impaired decision-making capacity may not need to have a substitute decision maker, as they have family or an informal support network who can help them with their decision making.

However, there may be times where family and informal networks are inadequate and a more formal process to ensure the protection of the person's interests is required.

A person may require the appointment of a guardian or administrator to assist them with financial decisions or personal and health decisions. They may also require a guardian or administrator if they are suffering abuse or exploitation, or if an agreement such as a sale of property needs to be signed by the person and no one else is authorised to sign on their behalf.

What are guardians and administrators?

A guardian is someone who is appointed to assist the person with their personal and health matters. These matters include decisions about medical treatment, accommodation and contact with friends, family and support services. Guardians can be family members or friends of the person, or they may be a delegate from the Office of Public Guardian. If the person is able to communicate their views in some way, the guardians should take these into account when making any decisions.

An administrator is someone appointed to assist the person to help manage their financial matters (s 12 Guardianship Act. An administrator can be a family member, close friend, a professional or any person who has a genuine interest in the person's welfare. An administrator must be over the age of 18, not bankrupt and cannot be the person's paid carer or health provider. It may be a delegate of the Public Trustee of Queensland.

The Queensland Civil and Administrative Tribunal

The Queensland Civil and Administrative Tribunal (QCAT) generally has the authority to appoint guardians and administrators for a person with impaired capacity, with the exception of when the Supreme Court appoints guardians or administrators in a settlement of damage awards (s 245 Guardianship Act).

The tribunal also has the ability to:

- make declarations about the capacity of a person guardian, administrator or attorney for a matter
- review the appointment of an administrator or guardian
- ratify decisions by informal decision makers
- give directions to guardians or administrators
- make declarations or orders about guardians, administrators and enduring powers of attorney
- consent to special health care for the person with impaired decision-making capacity (s 82 Guardianship Act)
- make orders regarding use of restrictive practices.

Applications can be made to QCAT by anyone who has a genuine interest in the welfare of the person with impaired decision-making capacity. These include family members, close friends and the adult guardian (s 115 Guardianship Act).

The notice period for hearings is seven days and, in some circumstances, QCAT may not give notice of the hearing to the person in question (s 118 Guardianship Act). The tribunal usually consists of a single member, and leave (permission) of QCAT is required for a person to be represented by a lawyer. In certain circumstances, QCAT may appoint a representative to represent the person's views, wishes and preferences. Tribunal hearings are conducted in a less formal manner than court hearings and the tribunal is not bound by the rules of evidence (meaning QCAT is permitted to inform itself in a way it considers appropriate).

The tribunal can make what is called 'interim orders', but only if it is satisfied the person has or may have impaired decision making and there is an immediate risk of harm to the health, welfare or property of the person including because of the risk of abuse, exploitation, neglect or self-neglect. The interim orders may be made without a hearing and deciding the proceeding. Interim orders can be in effect for a period of time specified in the order, but the maximum period of time that may be specified is three months (s 129 Guardianship Act).

An order of QCAT to appoint a guardian or administrator may be reviewed by QCAT on its own initiative or upon an application by the person concerned, an interested person for the person concerned, a Public Trustee or certain trustee companies. The review may be requested at any time during the term of the order if there is new information that may affect the order or if circumstances have changed (s 29 Guardianship Act).

When QCAT is conducting an appointment review process, it must revoke the order making the appointment unless it is satisfied it would make the appointment if a new application for an appointment were to be made. If QCAT is satisfied there are appropriate reasons for the appointment to continue, it may either continue the order making the appointment or changing the order including by changing the terms of the appointment, removing an appointee or making a new appointment (s 31 Guardianship Act). An eligible person can appeal against a decision made by QCAT (except for a limitation order discussed below) (s 163 Guardianship Act).

In order to promote accountability and transparency in QCAT hearings, information about proceedings are generally available to the public. However, in the interest of protecting the privacy of persons with impaired capacity, QCAT may make limitation orders where QCAT can demonstrate that such an order is necessary to prevent serious harm or injustice to an adult with impaired capacity (ss 100–113 Guardianship Act).

Limitation orders can:

- prevent the disclosure or publication of certain information
- close a hearing to members of the public
- limit an active party's access to evidence given in the hearing.

Public Guardian

The functions and powers of the Public Guardian are established under the *Public Guardian Act 2014* (Qld) (Public Guardian Act). The Public Guardian is able to:

- be appointed as a guardian by QCAT
- investigate complaints about the use of a power of attorney

- investigate physical and financial abuse or neglect of an adult
- mediate disputes between attorneys or others
- act as an attorney or guardian for personal and health matters
- provide legal advocacy and representation on behalf of a person with impaired capacity by instructing a solicitor to act
- provide consent to medical treatment when no statutory health attorney is available.

The Public Guardian Act gives the Public Guardian substantial investigative powers. These investigative powers include:

- gaining access to any relevant information necessary to carry out the investigation including medical and financial information
- require people to produce records/accounts.
- issue a written notice for a person to attend at a stated time and place, give information, answer questions and produce documents.

The Public Guardian also has protective powers. These powers include suspending an attorney's power, starting legal proceedings to claim or recover property and obtaining a warrant to enter and remove a person from an immediate risk of harm.

Public Trustee

The Public Trustee can be appointed as an administrator and must act in line with the Guardianship Act. It must also act in line with the directions of QCAT or a court order. The Guardianship Act sets out general principles that an administrator must apply when it is making decisions for a person (s 11B Guardianship Act). The Public Trustee must ensure they act in a way that promotes and safeguards and is the least restrictive of the person's rights, interests and opportunities.

The Guardianship Act also sets out the obligations for administrators such as to acting honestly and with reasonable diligence (s 35), keeping accurate records (s 49) (QCAT may ask for the records to be audited) and to work with others appointed to make decisions for the person (ss 39, 40).

If the Public Trustee is appointed as a person's financial attorney (rather than as an administrator) under an Enduring Power of Attorney document, their actions will be governed by the Powers of Attorney Act.

When making financial decisions for the person, the Public Trustee should:

- support the person to the greatest extent practicable to make their own decisions

- support the person to express their views, wishes and preferences, and take these into account to the greatest extent practicable
- use the principles of substitute judgement to try and work out what the person's views wishes and preferences would be if the person's views, wishes and preferences cannot be communicated.

More information about the Public Trustee can be found on their website.

Public Advocate

The Public Advocate is an independent statutory officer appointed under s 208 of the Guardianship Act. The function of the public advocate is to provide systems advocacy. This involves speaking, acting or writing in order to improve the systems that support and provide services to people with impaired capacity and address the gaps and failures in those systems.

The Public Advocate promotes and protects the rights of persons with impaired capacity from neglect, exploitation and abuse; encourages programs that assist the adult to reach the greatest practical degree of autonomy; and monitors and reviews the delivery of services and facilities to adults.

The Public Advocate has the power to intervene in court or tribunal proceedings involving the protection of the rights or interests of an adult, providing the court has granted leave to do so (s 210 Guardianship Act).

The Office of the Public Advocate publishes material on a range of these matters.

Community Visitor Program

Community visitors are within the Office of the Public Guardian and independently monitor accommodation known as 'visitable sites'. These visitable sites are defined under s 39 of the Public Guardian Act as a place other than a private dwelling house, where an adult or adults with impairment or with impaired capacity lives. These include:

- an authorised mental health service that provides inpatient services
- the forensic disability service
- residential services with a level 3 accreditation
- premises where a funded adult participant lives and receives services or supports that are
    - paid for wholly or partly from funding under the National Disability Insurance Scheme (NDIS)

- provided under the adult participants plan
- provided by a registered NDIS provider that is registered under s 73E of the National Disability Insurance Scheme Act 2013 (Cth) to provide a relevant class of supports
- are within the relevant class of supports.

Community visitors ensure the interests of adults with impaired capacity are being safeguarded. A community visitor can enquire into and report on the adequacy of services for the assessment, treatment and support of adults at the visitable site. Under s 44 of the Public Guardian Act, the community visitor has the authority to:

- access all areas of the visitable site
- require staff to answer questions
- request documents related to the support of the adults
- make copies of relevant documents
- talk in private with the adults or staff.

The community visitor measures the appropriateness and standard of services for the accommodation, health and wellbeing of adults at the visitable site. They can view the extent of services provided to the adults as well as the adequacy of information given to them, and the accessibility and effectiveness of procedures for complaints about the services. They may enquire into and seek to resolve complaints, or identify and make referrals of complaints to an appropriate external agency for further investigation or resolution (s 41 Public Guardian Act).

More information about community visitors can be found on the Office of Public Guardian's website.

Legal Notices

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