

Office of the Public Advocate Systems Advocacy

Decision-making support for Queenslanders with impaired capacity

A conceptual framework

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Introduction

The Office of the Public Advocate is examining the provision of decision-making support to adults with impaired decision-making capacity who interact with the Queensland guardianship system. More specifically, the Office is undertaking research to identify the systemic barriers and enablers in relation to protecting and supporting the right of a person to make their own decisions.

A suite of four documents form the foundation of the research: the conceptual framework (this document), a literature review, a synopsis of the legislation underpinning Queensland's guardianship system, and a targeted overview of guardianship legislation in other Australian jurisdictions.

This conceptual framework presents the ideas that underpin the research. It articulates the 'lens' through which the Office of the Public Advocate will view and analyse the aspects of the system that enable or constrain the extent to which the philosophy and principles of the decision-making regime are practiced.

Impaired decision-making capacity

Impaired decision-making capacity is a term used to describe a state of being in which a person experiences difficulty in following through the process of reaching a decision and putting the decision into effect. According to the *Guardianship and Administration Act 2000*, there are three elements to making a decision: understanding the nature and effect of the decision; freely and voluntarily making the decision; and communicating the decision in some way.¹

Impaired decision-making capacity may arise as a result of a number of conditions including but not limited to dementia, intellectual disability, acquired brain injury, mental illness or substance misuse. A person's decision-making capacity can differ according to the nature and extent of their impairment; the type and complexity of the decision to be made; the context in which the decision is to be made (e.g. the level of urgency, available alternatives); and the level of assistance available from their support network.² A person's need for decision-making support may be temporary or could fluctuate over time. A person's decision-making capacity can also be developed over time with support and assistance.

Under Queensland's guardianship legislation, a person's capacity is assessed in relation to decisions about specific matters. A person may therefore be deemed to have capacity for some matters and not for other matters. For example, some adults may be found to have the capacity to make decisions about personal or health care matters but not financial matters.³ The legislation also acknowledges that a person's decision-making capacity for a matter is impacted by the support available to a person and therefore this should be considered when assessing a person's capacity for a matter.⁴

Human rights and equality

Queensland has a responsibility to uphold the United Nations *Convention on the Rights of Persons with Disabilities* (the Convention), to which Australia is a signatory. This means that Queensland is obligated to take appropriate measures to ensure that the principles of the Convention are supported and applied.

Everyone should be equally recognised before the law

Everyone has the right to autonomy

Everyone should be free to make their own decisions

Article 3 outlines the general principles that underpin the Convention. These principles, in particular those pertaining to autonomy and respect for the person, are pivotal to the full participation and social inclusion of people with disability.⁵

¹ *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'capacity').

² *Ibid* s 5(c).

³ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 1, 11.

⁴ *Guardianship and Administration Act 2000* (Qld) s 5(c).

⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) arts 1-3 ('*Convention on the Rights of Persons with Disabilities*').

Inherent in the formulation of the Convention is the way in which the articles interact with each other. Together, the articles impose obligations upon the State to take action by providing ‘reasonable accommodation’ in the way that legislative and other systems operate in practice.

Article 12 of the Convention establishes that people with disability should be equally recognised before the law and retain legal capacity on an equal basis to those without disability. This reflects the Preamble of the Convention, which affirms that disability arises from a person’s interactions with their surrounding environment, not just their impairment.⁶ Read with article 5 of the Convention, an overarching principle of equality and non-discrimination, there is an obligation on the State to ensure support is provided to people with disability to enable them to exercise their legal capacity.⁷

Further to this, article 21 provides for the right to freedom of expression and opinion. Notably, this article provides people with disability with the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication. Arguably this article charges the State with the responsibility to ensure people with disability have sufficient information in appropriate and accessible formats; and the opportunity to be involved in, and have the freedom to make, decisions affecting their own lives.⁸

These provisions also align with principle 1 of the United Nations *Resolution for the Protection of Persons with Mental Illness and Improvement of Mental Health Care*, which protects fundamental freedoms and basic rights of people with mental illness. This principle stipulates that any person with mental illness has the right to exercise all civil, political, economic, social and cultural rights.⁹

The State is obligated to support people to exercise their right of legal capacity

Taking account of the obligations arising from these human rights instruments, the State of Queensland has a duty to provide access to adequate and appropriate support to people with impaired decision-making capacity so they can exercise their right of legal capacity.

Support for decision-making

The way in which people make decisions, and the degree of guidance or support that they seek from others in doing so, differs from person to person, and from situation to situation, regardless of whether a person is deemed to have impaired decision-making capacity or not. It is not unusual for someone to seek information from, and/or the views of, other people when faced with a decision that they have not encountered before or where the situation in which they need to make the decision includes variables that have not been present in the past. The reality is that everyone, to a more or lesser degree, seeks support or assistance from others to make decisions.

Everyone should be provided with support to make their own decisions where required

Obtaining decision-making support is an everyday process that enables a person to make their own decisions

Contemporary discourse uses the term ‘supported decision-making’ to refer to a process by which a range of supports may be used to enable a person to make their own decisions. Ensuring that the person who is affected by the decision remains at the centre of the decision-making process is intrinsic to the provision of decision-making support.

Some people, however, may experience more difficulty with making a decision than others. The Convention imposes obligations on the State to, where required, provide support to people with disability in a way that allows the person to express their will and preferences, thereby enabling them to make decisions about their own lives.

⁶ Ibid art 12.

⁷ Ibid art 5.

⁸ Ibid art 21.

⁹ *The Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, GA Res 46/119, UN GOAR, 75th plen mtg, UN Doc A/RES/46/119 (17 December 1991) principle 1(5).

This support may involve helping the person to understand that a decision needs to be made and what their options and choices are, and/or by communicating the person's intentions to others. A decision-making supporter may also assist by helping other people understand that a person with disability has rights, a history, aspirations and goals, and is a person who is capable of exercising their legal decision-making capacity with or without support.¹⁰

As with all people, the type of support required by a person with disability, mental illness or any other condition impacting their decision-making capacity is likely to differ depending on the nature of the decision to be made. Similarly, the frequency with which decision-making support is provided will differ from person to person. A person may gain decision-making experience through being supported and may require less support as they become more experienced and confident with making decisions.

The practice of supporting a person to make their own decision/s occurs everyday, often in an informal way. This is not to say, however, that these practices occur without issues or challenges. Despite the challenges, which we need to better understand and address, people have the right to make their own decisions wherever possible, and to be provided with support to do so if required.

Support networks should be fostered and developed for people who do not have a 'natural' support network

Ideally, decision-making support is provided freely and voluntarily by a trusted person/s. For some people, particularly those who are not able to identify a trusted family member, friend or carer, decision-making support may be provided by a support worker or other similar person. The absence of a 'natural' support network does not preclude a person's right to decision-making support. Establishing a support network for a person who is unable to identify a trusted person or people may require time, effort and resources. The United Nations suggest that the provision of decision-making support should be viewed as a redistribution of existing resources, rather than a process requiring additional expense.¹¹

Substitute decision-making

In contrast to providing support to a person to make their own decisions, substitute decision-making typically refers to situations where a decision for a person is made by another person or entity such as a tribunal (i.e. a person does not make their own decision). This practice can occur informally or may involve an attorney or an appointed guardian or administrator.

Two criteria for substitute decision-making are often applied. These are 'best interests' where substitute decision-makers make decisions that, in their view, provide the maximum possible benefit to the person for whom the decision is being made,¹² and the 'substituted judgement' principle where substitute decision-makers take into account what a person would have done if they had capacity. The best interests approach can incorporate the substituted judgement principle so that the ascertainable past and present wishes and preferences of a person are taken into account.¹³

Ongoing debate surrounds the issue of whether substitute decision-making is in conflict with the intent of article 12 of the Convention. This is because substitute decision-making typically involves a determination that a person's capacity to make their own decision for a matter is impaired and another person making the decision on their behalf. This debate also mirrors concerns that substitute decision-making reflects a traditional paternalistic model towards decision-making rather than supporting the participation and autonomy of people with disability.

People can be supported to maximise their autonomy and legal capacity, and develop/maintain decision-making ability when subject to formal substitute decision-making

¹⁰ United Nations, *Handbook for Parliamentarians – From Exclusion to Equality: Realising the Rights of Persons with Disabilities* (United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and Inter-Parliamentary Union, 2007) ch 6.

¹¹ Ibid.

¹² I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 189 in Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 1, 76.

¹³ Law Commission (England and Wales), *Mental Incapacity*, Law Com No 231 (1995) 42.

Regardless of views about the compatibility of guardianship laws with the Convention, there is now general recognition, underpinned by the paradigm shift that the Convention heralds, that the focus must move from the challenges facing a person with disability to the supports that should be provided to enable them to make decisions and exercise their legal capacity. This means that the appointment of a substitute decision-maker should not preclude efforts to support a person to make their own decisions.

Article 12(4) of the Convention provides for ‘safeguards’ for decision-making interventions, whether formal or informal, supportive or substitute. Any intervention must uphold the rights, will and preferences of the person; be free of conflict of interest and undue influence; be proportional and tailored to the person’s needs and circumstances; apply for the shortest time possible; and be subject to regular review.¹⁴

Substitute decision-making should be an intervention of last resort

The assumption should always be that a person is able to make their own decisions, and for those who require support there should be a focus on building and maintaining a network of support. Any period of substitute decision-making should be kept to a minimum, be undertaken at the lowest level of formality and maximise the person’s autonomy.

The *Guardianship and Administration Act 2000* and *Powers of Attorney Act 1998*

Together, the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* provide a regime for decision-making for people who are deemed to have impaired capacity

The *Powers of Attorney Act 1998* enables people, while they retain decision-making capacity, to plan ahead by making an enduring document. Using such an instrument, people can nominate a person/s in advance to act as their attorney and can include terms and information about the exercise of power. Where a person is considered to have impaired decision-making capacity and has not made arrangements under the *Powers of Attorney Act 1998*, the *Guardianship and Administration Act 2000* provides a system by which people can, either formally or informally, be appointed to act as a substitute decision-maker for that person.

The *Guardianship and Administration Act 2000* attempts to balance the right of a person to exercise autonomy with their right to adequate and appropriate support for decision-making when required.¹⁵ It acknowledges that a person’s right to make decisions is fundamental to their inherent dignity and reflects the common law position that a person is presumed to have capacity to make their own decisions.

The *Guardianship and Administration Act 2000* and *Powers of Attorney Act 1998* are underpinned by general principles that must be applied by any person who performs a function or exercises a power under these Acts. The *Guardianship and Administration Act 2000* also encourages broader application of the general principles.¹⁶

Queenslanders are presumed to have decision-making capacity for matters that relate to them

The general principles align with the United Nations *Convention on the Rights of Persons with Disabilities*

Of particular note is *Principle 2: Same human rights*, which requires that all adults, regardless of capacity, are accorded the same basic human rights. The importance of empowering an adult to exercise these rights must also be recognised and taken into account.¹⁷

¹⁴ *Convention on the Rights of Persons with Disabilities* art 12.

¹⁵ *Guardianship and Administration Act 2000* (Qld) s 6.

¹⁶ *Ibid* sch 1 pt 1.

¹⁷ *Ibid*.

Principle 7: Maximum participation, minimal limitations and substituted judgement builds on the above principle by preserving the right of people to be involved in decisions about their own lives to the greatest extent possible, and specifies that ‘any necessary support’ must be provided to enable a person to be involved in their own decision-making.¹⁸

More broadly, while people or entities exercising a function or power under these Acts must utilise their powers and conduct their duties in a manner that is consistent with the proper care and protection of the person (i.e. in the person’s best interests),¹⁹ the *Guardianship and Administration Act 2000* also imposes obligations to: act in a manner that is the least restrictive of a person’s autonomy; provide decision-making support to allow a person’s views and wishes to be sought and given effect; and endeavour to involve members of a person’s existing support network in decision-making processes.²⁰

The obligation to act in a protective manner may limit the extent to which a person can exercise autonomy and self-determination

Where there is tension or conflict between acting in the best interests of a person and giving expression to a person’s views and wishes, precedence is given to the person’s best interests.²¹ Given that this may limit the extent to which a person can exercise autonomy, guardianship should only ever be used as a decision-making intervention of last resort.

Research rationale

The principles that underpin the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*, in particular principles 2 and 7, align with the paradigm shift declared by the Convention. It is increasingly recognised that the focus must shift from what a person cannot do to the supports that should be provided to enable people to make decisions and exercise their legal capacity.

Given this paradigm shift and the contemporary discussion in relation to the provision of decision-making support for people deemed to have impaired decision-making capacity, it is timely to explore the systemic barriers and enablers to protecting and supporting the right of a person to make their own decisions. The research will explore this within the context of Queensland’s public guardianship system, with a view to identifying opportunities to enhance Queensland’s decision-making regime for people deemed to have impaired capacity.

The research will inform discussion about how to strengthen the decision-making support provided to people who are deemed to have impaired capacity and may also identify issues requiring further investigation.

¹⁸ Ibid.

¹⁹ Ibid sch 1, pt 1, principle 7(5); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(5); *Re JD* [2003] QGAAT 14, [35]; *Re SD* [2005] QGAAT 71, [39].

²⁰ *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1. ss 5, 7.

²¹ Ibid sch 1, pt 1, principle 7(5); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(5); *Re JD* [2003] QGAAT 14, [35]; *Re SD* [2005] QGAAT 71, [39].

