

Office of the Public Advocate Systems Advocacy

Autonomy and decision-making support in Queensland

A targeted overview of guardianship legislation

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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, a literature review, a synopsis of the legislation underpinning Queensland’s guardianship system (this document), and a targeted overview of guardianship legislation in other Australian jurisdictions. Together, these documents will inform the subsequent phases of the research.

Part 1 of this document discusses, in broad terms, those provisions of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* that relate to supporting the decision-making of adults who interact with the guardianship and administration system. Neither of these Acts provides detailed guidance about how to support a person to make their own decisions and maximise their autonomy. The Acts do, however, include legislative requirements and principles that uphold a presumption of capacity and the right of an adult with impaired decision-making capacity to exercise the greatest possible degree of autonomy. They also encourage the maintenance of an adult’s natural support networks and oblige those exercising powers under the Acts to seek the views and wishes of an adult, and support their participation in decisions affecting their life. Many of these requirements, arguably, reflect practices that are aligned with the way that supported decision-making has been defined in contemporary discourse.

Parts 2, 3 and 4 present specific extracts from the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*, which have been selected due to their relevance to the autonomy of people with impaired capacity in decision-making, including the provision of decision-making support. These extracts have been annotated to provide an interpretation of the included provisions and the degree to which they preserve autonomy and promote the right of a person to make their own decisions. The expressed opinions are designed to facilitate an enhanced understanding of the Act and are not legal opinions.

Appendices 1 and 2 present selected definitions, as they appear in the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*, to assist with understanding and interpreting the extracts of these Acts.

The *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* are to be read in the context of, and with due regard to, the preliminary sections of the respective Acts and the application of the general principles and the health care principle. In particular, the general principles “articulate the overall philosophy underpinning the guardianship legislation”¹ and must be given careful consideration by a decision-maker. In some instances, there are specific mentions of how the preliminary sections or principles could inform the interpretation of a particular section. However, even where such an interpretation is not specifically mentioned, the application and effect of the preliminary sections and principles must still be borne in mind.

¹ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010) vol 1, 61.

Part 1: Discussion

The guardianship system in Queensland

Legislation

In Queensland, guardianship legislation comprises the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*. Together, these Acts provide a regime for decision-making for adults with impaired capacity.

The *Powers of Attorney Act 1998* allows adults to make decisions and/or arrangements for decision-making that can be implemented in the future. Primarily, such arrangements are made through an advance health directive or an enduring power of attorney. To validly execute these documents, an adult must understand the nature and effect of the document.²

Where an adult has impaired capacity for a matter 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, act as a decision-maker for that adult.

Impaired capacity

According to Queensland guardianship legislation, an adult has capacity for a matter if he or she is capable of: understanding the nature and effect of decisions about the matter; freely and voluntarily making decisions about the matter; and communicating their decisions in some way. If an adult is not capable of one or more of these criteria, they may have impaired capacity for that matter. Under the *Guardianship and Administration Act 2000*, impaired capacity means an adult does not have capacity for a matter.³

Impaired 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 capacity can differ according to the nature and extent of their impairment; the type and complexity of the decision to be made; and the level of assistance available from their support network.⁴ All these factors should be considered when assessing an adult's capacity for a matter.

Under Queensland's guardianship legislation, an adult's capacity is assessed in relation to decisions about specific matters. It is therefore possible for an adult to have capacity for some matters and impaired capacity for other matters. For example, some adults may have the capacity to make decisions about simple financial matters but have impaired capacity for complex financial matters.⁵

² *Powers of Attorney Act 1998* (Qld) s 41.

³ *Guardianship and Administration Act 2000* (Qld) sch 4 (definitions of 'capacity' and 'impaired capacity').

⁴ *Ibid* s 5(c).

⁵ Queensland Law Reform Commission, above n 1, 11.

Legal mechanisms in response to impaired decision-making capacity

When an adult has impaired capacity for a matter, a substitute decision-maker may be appointed to make decisions about that matter on behalf of the adult. Broadly speaking, a substitute decision-maker may make decisions regarding the personal, financial and/or health matters for which an adult has impaired capacity. Under Queensland's guardianship legislation, several types of decision-makers are recognised.

Informal decision-makers

The *Guardianship and Administration Act 2000* recognises that decisions for an adult can be made informally by the adult's existing support network,⁶ which may include members of the adult's family, close friends of the adult, and other people recognised by the Queensland Civil and Administrative Tribunal (the Tribunal) as providers of support to the adult.⁷ There is provision for the Tribunal to ratify or approve a decision of an informal decision-maker, which may be of value in situations where there is doubt about the appropriateness of a decision or if ratification is required by a third party.⁸

Statutory health attorneys

A statutory health attorney can make decisions about a health matter only where, in relation to that matter, an adult has impaired capacity and where there is no direction in an advance health directive, the Tribunal has not appointed a guardian or made an order, and the adult has not made an enduring document nominating an attorney.⁹

People who are eligible to be a statutory health attorney are (in descending order of priority) an adult's spouse (including a *de facto* or registered partner) with a close and continuing relationship, an unpaid carer, or a close friend or relation who is not the adult's paid carer. The first of these people who is readily available and culturally appropriate to make decisions will be the adult's statutory health attorney. The Adult Guardian is the default statutory health attorney if no-one else is appropriate and available.¹⁰

A statutory health attorney may make decisions about a health matter only while an adult has impaired capacity for that matter.¹¹ A statutory health attorney may make any decision about the health matter that the adult could have lawfully made if they had capacity for the matter.¹²

Attorney appointed in advance under an enduring document

The *Powers of Attorney Act 1998* allows an adult to make arrangements for future substitute decision-making on their behalf in the event that they have impaired capacity at a future point. An adult (the principal) may appoint another person of their choosing (the attorney) as their decision-maker if the principal has sufficient capacity to make an enduring power of attorney.¹³

⁶ *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

⁷ *Ibid* sch 4 (definition of 'support network').

⁸ *Ibid* s 154.

⁹ *Guardianship and Administration Act 2000* (Qld) ss 66(1)-(5); *Powers of Attorney Act 1998* (Qld) s 62(1).

¹⁰ *Powers of Attorney Act 1998* (Qld) ss 63(1)-(2).

¹¹ *Ibid* s 62(2).

¹² *Ibid* s 62(1).

¹³ *Ibid* ss 32(1)(a), 41.

Two instruments may be used to appoint an attorney: an enduring power of attorney or an advance health directive. In making an enduring power of attorney, the principal may authorise an attorney to make decisions regarding financial matters or personal matters (including health matters).¹⁴ The attorney may be authorised to do anything for the principal in relation to those matters that the principal could lawfully do by an attorney if the principal had capacity for the matter when the power is exercised.¹⁵ The principal may provide terms or information about the exercise of the power in the enduring document.¹⁶ To the extent that an enduring document does not state otherwise, an attorney is taken to have the maximum power that could be given by that document.¹⁷

In relation to a personal matter, an attorney under an enduring power of attorney may only exercise power while the principal has impaired capacity for that matter.¹⁸ The point at which powers in relation to a financial matter become exercisable is contingent on a number of factors. The principal may specify the time, circumstance or occasion on which power for a financial matter becomes exercisable. If the principal does not specify when a power becomes exercisable, the power becomes exercisable once the enduring power of attorney is made. If the principal specifies when power for a financial matter is exercisable but their capacity for the matter becomes impaired prior to the specified time, then power for the matter becomes exercisable at that point. However, it is only exercisable while the principal has impaired capacity for the matter and if the principal regains capacity in relation to the matter, the terms of the enduring power of attorney are reactivated.¹⁹

By making an advance health directive, a principal may appoint an attorney to exercise power for a health matter (but not special health matters) in the event that the directions in the advance health directive prove to be inadequate.²⁰ The attorney may only exercise power while the principal has impaired capacity for that matter.²¹ In exercising the power, the attorney may do anything in relation to the matter that the principal could lawfully do if the principal had capacity for the matter.²² That power, however, is subject to the terms of the advance health directive.²³

Attorneys (including statutory health attorneys) are subject to a range of obligations under the *Powers of Attorney 1998*. Most importantly, they must act honestly and with reasonable diligence to protect the principal's interests²⁴ and they must apply the general principles and the health care principle.²⁵

An attorney is not subject to oversight or review. However, if there is any need for consideration, advice or review then there is capacity to have the matter brought before the Tribunal for consideration.²⁶

¹⁴ Ibid s 32(1)(a).

¹⁵ Ibid s 32(1)(a).

¹⁶ Ibid s 32(1)(b).

¹⁷ Ibid s 77.

¹⁸ Ibid s 33(4).

¹⁹ Ibid s 33(1)-(3).

²⁰ Ibid s 35(1)(c).

²¹ Ibid s 36(3).

²² Ibid s 36(4).

²³ Ibid s 36(5).

²⁴ Ibid s 66.

²⁵ Ibid s 76.

²⁶ Ibid s 110.

Guardians and administrators

The *Guardianship and Administration Act 2000* allows the Queensland Civil and Administrative Tribunal (the Tribunal) to appoint a guardian for personal matters and/or an administrator for financial matters where an adult is found by the Tribunal to have impaired capacity in relation to one or more matters.

A person may be appointed as an adult's guardian or administrator if the adult is found to have impaired decision-making capacity for a matter; if there is a need for a decision to be made or a likelihood that the adult's health, welfare or property is at risk; and if, without the appointment, the adult's needs would not be adequately met or the adult's interests would not be adequately protected.²⁷

When making an appointment, the Tribunal will consider the breadth of the appointment and the matters for which the adult has impaired capacity. In most instances, the appointment will not be plenary but will be restricted to the matter/s for which the adult has impaired capacity and where there is a need for a decision in relation to a matter. When making an appointment, the Tribunal may impose other terms or requirements as it sees fit.²⁸

When an appointment is made, consideration is given to who is the most appropriate person for the role.²⁹ The potential appointee's competence, conflicts, compatibility with the adult and ability to apply both the general and health care principles are important considerations.³⁰ These appropriateness considerations may, in some instances, restrict the appointees available to the person with impaired decision-making capacity.

A guardian or administrator may, in accordance with the terms of their appointment and subject to orders of the Tribunal, do anything in relation to those matters for which they are appointed that the adult could have done if the adult had capacity for the matter.³¹

Guardians and administrators are subject to a range of obligations under the *Guardianship and Administrations Act 2000*. Most importantly, they must act honestly and with reasonable diligence to protect the adult's interests³² and they must apply the general principles and the health care principle.³³

Guardianship and administration orders are subject to regular review.³⁴

The Queensland Civil and Administrative Tribunal

The Tribunal may make a decision regarding a matter for which an adult has impaired capacity. In some circumstances, the Tribunal may consent to special health care and the withholding or withdrawal of life sustaining-measures.³⁵

²⁷ *Guardianship and Administration Act 2000* (Qld) s12(1).

²⁸ *Ibid* ss12(2), 19.

²⁹ *Ibid* s 14(1)(c).

³⁰ *Ibid* s 15(1).

³¹ *Ibid* ss 33(1)-(2).

³² *Ibid* s 35.

³³ *Ibid* ss 11(1), 34.

³⁴ *Ibid* s 28(1).

³⁵ *Ibid* ss 68-74, 81.

Interpretation of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*

The general principles and the health care principle

Both the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* contain eleven general principles and the health care principle (collectively, ‘the principles’).³⁶ The principles must be applied³⁷ or complied with³⁸ by any person or entity who performs a function or exercises a power under the guardianship legislation for a matter in relation to an adult who has impaired capacity.³⁹ The community is also encouraged to apply and promote the general principles.⁴⁰

The general principles include:

- a presumption that an adult has the capacity to make decisions;
- the need to recognise and take into account that all adults have the same basic human rights and must be empowered to exercise them;
- the need to recognise and take into account an adult’s right to respect for his or her human worth and dignity;
- the need to recognise and take into account an adult’s right to be a valued member of society and the importance of encouraging and supporting the adult to perform valued social roles;
- the need to take into account the importance of encouraging and supporting an adult to participate in community life;
- the need to take into account the importance of encouraging and supporting an adult to reach their full potential and become as self-reliant as possible;
- the need to recognise and take into account an adult’s right to participate in decision-making and the importance of preserving, as far as is possible, the adult’s right to make their own decisions, for example, by supporting the adult and taking into account their views and wishes and exercising power in the way least restrictive of the adult’s rights;
- a requirement to utilise the principle of substituted judgement, but an ultimate requirement to exercise power in a way consistent with the adult’s proper care and protection;
- the need to take into account the importance of maintaining an adult’s supportive relationships;
- the need to take into account the importance of maintaining an adult’s cultural, linguistic and religious environments and values;
- a requirement that power is exercised in a way that is appropriate to an adult’s characteristics and needs; and
- the need to recognise and take into account an adult’s right to confidentiality of information that pertains to them.

³⁶ Ibid sch 1, pt 1; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1.

³⁷ *Guardianship and Administration Act 2000* (Qld) s 11.

³⁸ *Powers of Attorney Act 1998* (Qld) s 76.

³⁹ *Guardianship and Administration Act 2000* (Qld) s 11; *Powers of Attorney Act 1998* (Qld) s 76.

⁴⁰ *Guardianship and Administration Act 2000* (Qld) s 11(3).

The health care principle requires that power for a health matter should be exercised:

- in a way that is the least restrictive of the adult’s rights;
- only if the exercise of power is necessary and appropriate to maintain or promote the adult’s health and wellbeing;
- only if the exercise of power is, in all the circumstances, in the adult’s best interests; and
- with due account given to the adult’s views and wishes and information provided by the adult’s health provider.

In addition to the general requirement that a person or entity performing a function or exercising a power must apply the principles,⁴¹ there is also a specific obligation for guardians or administrators to apply these principles.⁴² The collective effect of these provisions is that decision-makers (inclusive of statutory health attorneys, attorneys, guardians, administrators and the Tribunal) must apply the principles.

It is unclear whether an informal decision-maker is subject to these principles as the legislation does not expressly require that they apply the general principles.⁴³ However, it is arguable that by virtue of section 9, an informal decision-maker is performing a function or exercising a power and would therefore be bound to apply the general principles.⁴⁴

Broad application of the principles

Given the broad requirement for decision-makers to apply or comply with the principles, and given that the community is encouraged to apply and promote the general principles,⁴⁵ the principles and their potential effects must be considered when analysing possible applications or interpretations of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*.

Further to this, the general principles are understood to “articulate the overall philosophy underpinning the guardianship legislation”.⁴⁶ For example, and with particular reference to general principles 1 to 6, the general principles affirm that adults with impaired decision-making capacity hold a number of basic human rights.⁴⁷ The principles articulate an overall philosophy for the guardianship system, and therefore they must be considered at all times and in relation to any analysis or interpretation of the legislation.

⁴¹ *Guardianship and Administration Act 2000* (Qld) s 11; *Powers of Attorney Act 1998* (Qld) s 76.

⁴² *Guardianship and Administration Act 2000* (Qld) s 34.

⁴³ Queensland Law Reform Commission, above n 1, 62.

⁴⁴ Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 37, n 161.

⁴⁵ *Guardianship and Administration Act 2000* (Qld) s 11(3).

⁴⁶ Queensland Law Reform Commission, above n 1, 61. See also page 56, where the majority of submission to the QLRC were of the view that the general principles should continue to underpin the operation of the guardianship regime. The general principles were described variously as being the ‘cornerstone’ of the system and the ‘backbone, ribcage and heart of the legislation’.

⁴⁷ Queensland Law Reform Commission, above n 1, 61.

Acknowledgements and purposes of the Acts

The provisions of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* must both be read within the context of the principles but also taking into account the acknowledgments made by, and purposes of, the Acts.⁴⁸

The *Guardianship and Administration Act 2000* acknowledges that:

- an adult's right to make decisions, including those with which others do not agree, is fundamental to their inherent dignity;
- an adult's capacity may differ according to the nature and extent of their impairment, the type of decision to be made and the support available to them;
- an adult's right to make decisions should be restricted and interfered with to the least possible extent; and
- an adult has a right to adequate and appropriate support for decision-making.⁴⁹

The purpose of the *Guardianship and Administration Act 2000* is to strike an appropriate balance between the rights of an adult to the greatest possible degree of autonomy in decision-making and to adequate and appropriate support for decision-making.⁵⁰ This Act seeks to achieve this purpose by (amongst other things) presuming that adults have capacity for a matter, stating the principles to be observed by those performing a function or exercising a power under the *Guardianship and Administration Act 2000* or the *Powers of Attorney Act 1998*, and encouraging an adult's support network to be involved in decision-making for the adult.⁵¹

The *Powers of Attorney Act 1998* does not include any equivalent sections regarding acknowledgments made by or purposes of that Act. However, it does note that the Act is to be read in conjunction with the *Guardianship and Administration Act 2000*.⁵² In the event of an inconsistency, the *Guardianship and Administration Act 2000* is to prevail.⁵³

⁴⁸ *Guardianship and Administration Act 2000* (Qld) ch 2; *Powers of Attorney Act 1998* (Qld) ch 1.

⁴⁹ *Guardianship and Administration Act 2000* (Qld) s 5.

⁵⁰ *Ibid* s 6.

⁵¹ *Ibid* s 7.

⁵² *Powers of Attorney Act 1998* (Qld) s 6A(1); see also *Guardianship and Administration Act 2000* (Qld) s 8.

⁵³ *Powers of Attorney Act 1998* (Qld) s 6A(1); see also *Guardianship and Administration Act 2000* (Qld) s 8.

Support for decision-making

The general principles

The *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* reflect the common law position that a person is presumed to have capacity to make their own decisions.⁵⁴ They also acknowledge that a person has the right to make their own decisions.⁵⁵

As noted previously, the Acts are underpinned by general principles that must be applied⁵⁶ or complied with⁵⁷ by any person who performs a function or exercises a power under them. Principle 7 is of particular relevance as it preserves the right of people to be involved in decisions affecting their life 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.⁵⁸

The general principles promote autonomy and respect for an adult and support their full participation and social inclusion. They align with a number of human rights instruments and national frameworks including the United Nations *Convention on the Rights of Persons with Disabilities*,⁵⁹ the United Nations *Resolution on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*,⁶⁰ Australia’s Human Rights Framework⁶¹ and the National Disability Strategy 2010-2020.⁶²

Rather than providing open authority for decision-makers to exercise their powers and duties in a way that they believe to be the most appropriate, the general principles impose obligations to act in a manner that is the least restrictive of the adult’s autonomy, to provide the adult with decision-making support and to seek and take into account the adult’s views and wishes.⁶³ However, decision-makers must ultimately act in a way that is consistent with the proper care and protection of the adult (i.e. in the adult’s best interests).⁶⁴ Where there is tension or conflict between acting in the best interests of an adult and giving expression to an adult’s views and wishes, precedence is given to the adult’s best interests.⁶⁵ Therefore, an appointed decision-maker can only implement a decision that an adult has been supported to make when the decision-maker believes that decision is in the adult’s best interests.

⁵⁴ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 1; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 1.

⁵⁵ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7(2); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(2).

⁵⁶ *Guardianship and Administration Act 2000* (Qld) s 11.

⁵⁷ *Powers of Attorney Act 1998* (Qld) s 76.

⁵⁸ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7.

⁵⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008).

⁶⁰ United Nations General Assembly, *Resolution on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, 75th plenary mtg, UN Doc A/Res/46/119 (17 December 1991).

⁶¹ Commonwealth of Australia, Attorney-General’s Department, Human Rights Branch, *Australia’s Human Rights Framework* (April 2010).

⁶² Commonwealth of Australia, Department of Social Services, *National Disability Strategy 2010-2020* (2011).

⁶³ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7(3); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(3).

⁶⁴ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7(5); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(5).

⁶⁵ *Re JD* [2003] QGAAT 14 (19 September 2003) [35]; *Re SD* [2005] QGAAT 71 (29 November 2005) [39].

The Guardianship and Administration Act 2000

The *Guardianship and Administration Act 2000* recognises the importance of decision-making support. Importantly, the preliminary sections of this Act acknowledge that an adult's decision-making capacity may be affected by the support available to them from their support network and that an adult with impaired capacity has a right to adequate and appropriate support for decision-making.⁶⁶ The *Guardianship and Administration Act 2000* seeks to balance an adult's autonomy with the provision of decision-making support⁶⁷ and encourages members of an adult's support network to be involved in decision-making concerning the adult.⁶⁸ Underpinning this Act are the general principles, which recognise the importance of decision-making support.⁶⁹

Applying a purposive approach, the explanatory sections and general principles⁷⁰ operate as a guide to the implementation and interpretation of the later substantive provisions of the *Guardianship and Administration Act 2000*, including the decision-making regime that is established by this Act and the *Powers of Attorney Act 1998*. It is therefore arguable that the *Guardianship and Administration Act 2000* and the decision-making regime as a whole are to be approached in a way that recognises and promotes an adult's autonomy and the provision of appropriate decision-making support.

The *Guardianship and Administration Act 2000* does not include detailed guidance about how to support a person to make their own decision, however it does contain elements that contemporary discourse suggests to be representative of supported decision-making practices. For example, the Act includes provisions that restrict the circumstances in which a decision-maker may be appointed. It recognises that an adult's right to make decisions should be restricted and interfered with to the least possible extent⁷¹ and acknowledges that informal decision-making by members of the adult's support network may be sufficient.⁷² Further, a decision-maker will only be appointed for an adult with impaired capacity if there is a need for a decision or a likelihood that the adult will subject their health, welfare or property to unreasonable risk and if, without an appointment, the adult's needs would not be adequately met or their interests would not be adequately protected.⁷³ Finally, where a decision-maker is appointed, that appointment will be limited to those matters for which an appointment is necessary, thereby ensuring that an adult retains their capacity in other areas.⁷⁴

It should be noted, however, that once a substitute decision-maker has been appointed for a matter, an adult does not have the power to make and execute a decision in relation to that matter. For example, in the decision of *Bergmann v DAW*, Justice Muir stated that "an administrator for all financial matters... assumes the powers in respect of financial matters of the adult..., to the exclusion of the adult, except to the extent that the Tribunal orders otherwise".⁷⁵ The Court concluded that during the term of the administration order, only the administrator had the power to deal with the adult's assets. Regardless, the general principles hold that an adult should still be supported to participate in the decision-making process to the greatest possible extent.⁷⁶

⁶⁶ *Guardianship and Administration Act 2000* (Qld) ss 5(c)(iii), 5(e).

⁶⁷ *Ibid* s 6.

⁶⁸ *Ibid* s 7(d).

⁶⁹ Queensland Law Reform Commission, above n 1, 61; *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1.

⁷⁰ *Guardianship and Administration Act 2000* (Qld) ch 2, sch 1, pt 1.

⁷¹ *Ibid* s 5(d).

⁷² *Ibid* s 9(2)(a).

⁷³ *Ibid* s 12(1).

⁷⁴ *Ibid* s 12(1).

⁷⁵ [2010] QCA 143 (11 June 2010) [35].

⁷⁶ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 1, principle 7.

Where a decision-maker is to be appointed, the *Guardianship and Administration Act 2000* imposes a number of considerations regarding the appropriateness of a proposed appointee.⁷⁷ Importantly, these considerations include whether the proposed appointee will apply the general principles, and the compatibility of the proposed appointee with the adult.⁷⁸ The application of the general principles therefore brings into consideration whether the proposed appointee will be supportive of the adult and enable their participation in decision-making. In order to be supportive and inclusive, compatibility is necessary. It is arguable therefore that, through application of these provisions, the Act provides the opportunity for an appointed decision-maker and an adult to utilise practices that reflect contemporary thinking in relation to supported decision-making.

A decision-maker appointed by the Tribunal has an obligation to apply the general principles and the health care principle,⁷⁹ and an obligation to act honestly and with reasonable diligence to protect the adult's interests.⁸⁰ This effectively imposes upon decision-makers an obligation to honestly and diligently apply the principles, including the principles that support an adult to participate in decision-making and have their views and wishes taken into account.⁸¹

The *Guardianship and Administration Act 2000* does not provide a detailed guide that can be used by decision-makers or members of the adult's support network to properly and adequately support an adult to make their own decisions, so far as it is possible to do so. Additionally, the Act does not, outside of the obligation to apply the general principles, place a specific onus on an appointed decision-maker to provide an adult with support in relation to decision-making.

The *Guardianship and Administration Act 2000* provides for regular review of the appointment of a substitute decision-maker.⁸² A review enables a re-examination of the need for and scope of an appointment, and provides an opportunity to amend the order to reflect the changing needs of the adult. Where experience has shown that an adult can be supported to make their own decisions, a review may provide an opportunity to demonstrate that, with the ongoing provision of support, an appointment for a particular matter/s is unnecessary.

⁷⁷ Ibid s 14(1)(c).

⁷⁸ Ibid s 15(1).

⁷⁹ Ibid ss 11(1), 34.

⁸⁰ Ibid s 35.

⁸¹ Ibid sch 1, pt 1.

⁸² Ibid s 28.

The Powers of Attorney Act 1998

The *Powers of Attorney Act 1998* does not, outside of the general principles, make any notable references to providing support to a person to make their own decisions.

An attorney may only exercise their powers in relation to a personal matter and, unless the terms of an enduring document provide otherwise, to a financial matter when the principal has impaired capacity for that matter.⁸³ In those situations, because the attorney's power is limited to the matter for which the principal has impaired capacity, the principal's decision-making authority is otherwise preserved.

In relation to a matter for which an attorney under an enduring document has power, that attorney may be authorised to do anything for the principal in relation to the matter that the principal could lawfully do by an attorney if the principal had capacity for the matter when the power is exercised.⁸⁴ This will be subject to terms or information provided by the principal about exercising the power⁸⁵ but to the extent that an enduring document does not state otherwise, an attorney will be taken to have the maximum power that could be given by that document.⁸⁶ An attorney's power may therefore be very broad.

When exercising power, all attorneys (whether appointed under an enduring document or an advance health directive, or a person assuming the role of statutory health attorney) have an obligation to comply with the general principles and the health care principle,⁸⁷ and an obligation to act honestly and with reasonable diligence to protect the principal's interests.⁸⁸ This effectively imposes upon decision-makers an obligation to honestly and diligently apply the principles, including supporting an adult to participate in decision-making and to take into account their views and wishes.⁸⁹

The *Powers of Attorney Act 1998* does not contain preliminary sections similar to those in the *Guardianship and Administration Act 2000* and therefore does not acknowledge the fundamental concepts underpinning the guardianship system as clearly. However, the *Powers of Attorney Act 1998* is nonetheless informed by the general principles and therefore does have regard to similar concepts of autonomy and the need for decision-making support.⁹⁰

⁸³ *Powers of Attorney Act 1998* (Qld) ss 33(3)-(4).

⁸⁴ *Ibid* s 32(1)(a).

⁸⁵ *Ibid* s 32(1)(b).

⁸⁶ *Ibid* s 77.

⁸⁷ *Ibid* s 76.

⁸⁸ *Ibid* s 66.

⁸⁹ *Ibid* sch 1, pt 1, principle 7.

⁹⁰ Queensland Law Reform Commission, above n 1, 61; *Powers of Attorney Act 1998* (Qld) sch 1, pt 1.

Part 2: The principles

The principles, purpose and explanatory sections of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* articulate the underlying philosophy of the Acts and should provide guidance to the interpretation and implementation of the Acts for any person or entity exercising a power, duty or function under them.

The general principles

Principle 1: Presumption of capacity

An adult is presumed to have capacity for a matter.

Principle 2: Same human rights

- (1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.
- (2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.

Principle 3: Individual value

An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

Principle 4: Valued role as member of society

- (1) An adult's right to be a valued member of society must be recognised and taken into account.
- (2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

Principle 5: Participation in community life

The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.

Principle 1: This reflects the position at common law that until proven otherwise, all adults are presumed to have capacity to make decisions about matters that relate to them. Without proof to the contrary, decisions should not be made on behalf of an adult and a substitute decision-maker should not be appointed. Arguably, a person's capacity can be impacted by the absence or provision of adequate and appropriate decision-making support. This should be considered in the application of this Act.

Principles 2 and 3: These principles recognise an adult's worth, dignity and basic human rights, which they must be empowered to exercise. Supporting and empowering adults to exercise their legal capacity, includes supporting them to make their own decisions.

Principles 4 and 5: These principles reflect the concepts of inclusion and normalisation. There is an obligation to encourage and support an adult to be engaged in valued social roles and participate in community life.

Principle 6: Encouragement of self-reliance

The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.

Principle 7: Maximum participation, minimal limitations and substituted judgment

- (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.
- (2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.
- (3) So, for example—
 - (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and
 - (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
 - (c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.
- (4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.
- (5) However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.
- (6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

Principle 6: This principle recognises that without appropriate support and assistance, an adult may not be empowered to achieve their full potential. Providing support to an adult to make their own decisions would arguably assist the adult to reach their potential and increase self-reliance.

Principle 7: This principle preserves an adult's right to be involved in decision-making about matters that relate to them, and to make their own decisions whenever possible. The provision of decision-making support is a requirement of this principle.

This principle also provides guidance to inform the way in which substituted decisions for an adult with impaired capacity are made.

Importantly, this principle imposes an obligation to seek the adult's views and wishes and to take them into account when exercising any power under the Act.

The substituted judgement principle provides that substitute decision-makers must, when making a decision, take into account what the adult would have done if they had capacity.

Ultimately however, a substitute decision-maker must make decisions that are consistent with the adult's care and protection (i.e. are in the best interests of the adult).

Principle 8: Maintenance of existing supportive relationships

The importance of maintaining an adult's existing supportive relationships must be taken into account.

Principle 9: Maintenance of environment and values

- (1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs) must be taken into account.
- (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.

Notes -

1 Aboriginal tradition has the meaning given by the *Acts Interpretation Act 1954*, section 36.

2 Island custom has the meaning given by the *Acts Interpretation Act 1954*, section 36.

Principle 10: Appropriate to circumstances

Power for a matter should be exercised by an attorney for an adult in a way that is appropriate to the adult's characteristics and needs.

Principle 11: Confidentiality

An adult's right to confidentiality of information about the adult must be recognised and taken into account.

Principle 8: This principle emphasises the importance of maintaining an adult's existing supportive relationships, which may include consulting with and maintaining the involvement of members of the adult's natural support network in decision-making for the adult.

Principle 9: There is an obligation to maintain an adult's environment and values, including those related to religious or cultural backgrounds. The maintenance of these factors is also pivotal to appropriately supporting the decision-making of an adult.

Principle 10: This principle provides that a substitute decision-maker must exercise power in a way that considers the adult's characteristics and needs and may include for example, giving effect to their lifestyle choices.

The health care principle

- (1) The *health care principle* means power for a health matter, or special health matter, for an adult should be exercised by a guardian, the adult guardian, the tribunal, or for a matter relating to prescribed special health care, another entity—
 - (a) in the way least restrictive of the adult's rights; and
 - (b) only if the exercise of power—
 - (i) is necessary and appropriate to maintain or promote the adult's health or wellbeing; or
 - (ii) is, in all the circumstances, in the adult's best interests.

Example of exercising power in the way least restrictive of the adult's rights - If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

- (2) In deciding whether the exercise of a power is appropriate, the guardian, the adult guardian, tribunal or other entity must, to the greatest extent practicable—
 - (a) seek the adult's views and wishes and take them into account; and
 - (b) take the information given by the adult's health provider into account.

Note - See section 76 (Health providers to give information).

- (3) The adult's views and wishes may be expressed—
 - (a) orally; or
 - (b) in writing, for example, in an advance health directive; or
 - (c) in another way, including, for example, by conduct.
- (4) The health care principle does not affect any right an adult has to refuse health care.
- (5) In deciding whether to consent to special health care for an adult, the tribunal or other entity must, to the greatest extent practicable, seek the views of the following person and take them into account—
 - (a) a guardian appointed by the tribunal for the adult;
 - (b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult;
 - (c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the statutory health attorney for the adult.

Health care principle: This principle requires that power is exercised in the way that is the least restrictive of the adult's rights and only if the exercise of power is, in all the circumstances, in the adult's best interests. When deciding whether an exercise of power is appropriate, the decision-maker must seek and take into account the adult's views and wishes.

Guardianship and Administration Act 2000

11 Principles for adults with impaired capacity

- (1) A person or other entity who performs a function or exercises a power under this Act for a matter in relation to an adult with impaired capacity for the matter must apply the principles stated in schedule 1 (the general principles and, for a health matter or a special health matter, the health care principle).

Example 1 - If an adult has impaired capacity for a matter, a guardian or administrator who may exercise power for the matter must—

- (a) apply the general principles; and
- (b) if the matter is a health matter, also apply the health care principle.

Example 2 - The tribunal in deciding whether to consent to special health care for an adult with impaired capacity for the special health matter concerned, must apply the general principles and the health care principle.

Note- Function includes duty and power includes authority—see the *Acts Interpretation Act 1954*, section 36.

- (2) An entity authorised by an Act to make a decision for an adult about prescribed special health care must apply the general principles and the health care principle.
- (3) The community is encouraged to apply and promote the general principles.

Powers of Attorney Act 1998

76 General principles for adults with impaired capacity

The principles set out in schedule 1 (the general principles and, for a health matter, the health care principle) must be complied with by a person or other entity who performs a function or exercises a power under this Act, or an enduring document, for a matter in relation to an adult who has impaired capacity.

Example - If a principal of an enduring power of attorney or advance health directive has impaired capacity for a matter, an attorney who may exercise power for the matter must—

- (a) comply with the general principles; and
- (b) if the matter is a health matter, also comply with the health care principle.

Editor's note - function includes duty and power includes authority - see the *Acts Interpretation Act 1954*, section 36.

Section 11: This section activates the general principles and instructs anyone exercising a function or power under the Act to apply the principles. The community is also encouraged to apply and promote the general principles.

It is unclear whether an informal decision-maker is subject to the general principles set out in the Act, including the provision of decision-making support. Informal decision-makers are not expressly required to apply the general principles.⁹¹ However, it is arguable that by virtue of section 9, an informal decision-maker is performing a function or exercising a power under the Act and is therefore bound by section 11 to apply the general principles.⁹²

Section 76: This section activates the general principles and instructs anyone exercising a function or power under the Act, including attorneys, to apply the principles.

⁹¹ Queensland Law Reform Commission, above n 1, 62.

⁹² Queensland Law Reform Commission, above n 44, n 161.

Part 3: The *Guardianship and Administration Act 2000*

Preliminary sections

5 Acknowledgements

This Act acknowledges the following—

- (a) an adult's right to make decisions is fundamental to the adult's inherent dignity;
- (b) the right to make decisions includes the right to make decisions with which others may not agree;
- (c) the capacity of an adult with impaired capacity to make decisions may differ according to—
 - (i) the nature and extent of the impairment; and
 - (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
 - (iii) the support available from members of the adult's existing support network;
- (d) the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;
- (e) an adult with impaired capacity has a right to adequate and appropriate support for decision-making.

Section 5: It is recognised that an adult's right to make their own decisions is fundamental to their dignity as a person. This philosophy underpins the Act and removing this right should only ever be considered as a last resort.

It is also recognised that an adult's ability to make and implement a decision is dynamic and may be affected by the nature and extent of their impairment, the type of decision to be made and the support that they receive.

This section reinforces that substituted decision-making should be an intervention of last resort and that an adult's participation in decision-making should be preserved to the maximum extent possible.

Finally, this section is directly relevant to protecting and supporting the right of a person to make their own decisions, outlining the ongoing right of adults with impaired capacity to receive adequate and appropriate support to enable their involvement in making decisions.

6 Purpose to achieve balance

This Act seeks to strike an appropriate balance between—

- (a) the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making; and
- (b) the adult’s right to adequate and appropriate support for decision-making.

7 Way purpose achieved

This Act—

- (a) provides that an adult is presumed to have capacity for a matter; and
- (b) together with the *Powers of Attorney Act 1998*, provides a comprehensive scheme to facilitate the exercise of power for financial matters and personal matters by or for an adult who needs, or may need, another person to exercise power for the adult; and
- (c) states principles to be observed by anyone performing a function or exercising a power under the scheme; and
- (d) encourages involvement in decision-making of the members of the adult’s existing support network; and
- (e) confers jurisdiction on the tribunal to administer particular aspects of the scheme; and
- (f) continues the office of adult guardian and provides for the adult guardian to be available as a possible guardian for an adult with impaired capacity, and for other purposes; and
- (g) recognises the public trustee is available as a possible administrator for an adult with impaired capacity; and
- (h) provides for the appointment of the public advocate for systemic advocacy; and
- (i) provides for the appointment of community visitors.

Section 6: The term ‘support for decision-making’ is informed by the general principles and may include a range of decision-making supports and interventions, ranging from the provision of minimal support to make a decision, to being subject to substitute decision-making.

This section sets out the two rights that must be balanced in achieving the purpose of the Act. Supporting an adult to make their own decisions would arguably assist to achieve this balance.

*In the **Second Reading Speech** the purpose of the Act was expressed in the following terms: “For the first time in this State, Queensland will have a legislative system by which the most vulnerable members of our society will be able to be supported in achieving autonomy in their decision making and in their lives in general” (Queensland, Parliamentary Debates, Legislative Assembly, 8 December 1999, 6079 (Hon M.J. Foley M.P)).*

Section 7: This section establishes a number of principles and safeguards that provide a guide to achieving the purpose of the Act. In particular, subsection 7(a) restates the presumption that an adult has capacity for a matter and subsection 7(d) encourages members of an adult’s existing support network to be involved in decision-making.

Informal decision-making

9 Range of substitute decision-makers

- (1) This Act and the *Powers of Attorney Act 1998* authorise the exercise of power for a matter for an adult with impaired capacity for the matter.
- (2) Depending on the type of matter involved, this may be done—
 - (a) on an informal basis by members of the adult’s existing support network; or
Note - Although this Act deals primarily with formal substituted decision-making, a decision or proposed decision of an informal decision-maker may be ratified or approved under section 154.
 - (b) on a formal basis by 1 of the following—
 - (i) an attorney for personal matters appointed by the adult under an enduring power of attorney or advance health directive under the *Powers of Attorney Act 1998*;
 - (ii) an attorney for financial matters appointed by the adult under an enduring power of attorney under the *Powers of Attorney Act 1998*;
 - (iii) a statutory health attorney under the *Powers of Attorney Act 1998*;
 - (iv) a guardian appointed under this Act;
Note - A guardian may only be appointed for personal matters.
 - (v) an administrator appointed under this Act;
Note - An administrator may only be appointed for financial matters.
 - (vi) the tribunal;
 - (vii) the court.

Section 9: This section recognises that decisions for matters (other than special personal matters, health matters and special health matters) can be made informally by a member of the adult’s support network.

This section then recognises a variety of formal decision-makers, under this Act and the *Powers of Attorney Act 1998*, who comprise the formal decision-making system.

154 Ratification or approval of exercise of power by informal decision-maker

- (1) The tribunal may, by order, ratify an exercise of power, or approve a proposed exercise of power, for a matter by an informal decision-maker for an adult with impaired capacity for the matter.
- (2) The tribunal may only approve or ratify the exercise of power for a matter if—
 - (a) it considers the informal decision-maker proposes to act, or has acted, honestly and with reasonable diligence; and
 - (b) the matter is not a special personal matter, a health matter or a special health matter.
- (3) The tribunal may make the order on its own initiative or on the application of the adult or informal decision-maker.
- (4) If the tribunal approves or ratifies the exercise of power for an adult for a matter—
 - (a) the exercise of power is as effective as if the power were exercised by the adult and the adult had capacity for the matter when the power is or was exercised; and
 - (b) the informal decision-maker does not incur any liability, either to the adult or anyone else, for the exercise of power.
- (5) In this section—

informal decision-maker, for a matter for an adult, means a person who is—

 - (a) a member of the adult’s support network; and
 - (b) not an attorney under an enduring document, administrator or guardian for the adult for the matter.

Section 154: A decision made by an informal decision-maker can be ratified by the Tribunal. This provision may be of value when there is doubt about the appropriateness of a decision or where ratification is required by a third party.

Decision-making hierarchy for health matters

66 Adult with impaired capacity—order of priority in dealing with health matter

- (1) If an adult has impaired capacity for a health matter, the matter may only be dealt with under the first of the following subsections to apply.
- (2) If the adult has made an advance health directive giving a direction about the matter, the matter may only be dealt with under the direction.
- (3) If subsection (2) does not apply and the tribunal has appointed 1 or more guardians for the matter or made an order about the matter, the matter may only be dealt with by the guardian or guardians or under the order.
Note - If, when appointing the guardian or guardians, the tribunal was unaware of the existence of an enduring document giving power for the matter to an attorney, see section 23 (Appointment without knowledge of enduring document), particularly subsection (2).
- (4) If subsections (2) and (3) do not apply and the adult has made 1 or more enduring documents appointing 1 or more attorneys for the matter, the matter may only be dealt with by the attorney or attorneys for the matter appointed by the most recent enduring document.
- (5) If subsections (2) to (4) do not apply, the matter may only be dealt with by the statutory health attorney.
- (6) This section does not apply to a health matter relating to health care that may be carried out without consent under division 1.

Section 66: This section aims to enable the least restrictive option for adults with respect to decisions about health care.

A statutory health attorney can make decisions about a health matter only where, in relation to that matter, an adult has impaired capacity and there is no direction in an advance health directive, no appointed guardian, no order of the Tribunal, and no enduring document nominating an attorney.

This section maximises an adult's autonomy by giving priority, in the first instance, to decisions made by the adult. Further, by enabling a statutory health attorney to make decisions about a health matter, the appointment of a substitute decision-maker is avoided.

A statutory health attorney is subject to the same requirements and principles as other decision-makers.

Note: Section 66(5) is read in conjunction with sections 62 and 63 of the *Powers of Attorney Act 1998*.

Thresholds for appointment

12 Appointment

- (1) The tribunal may, by order, appoint a guardian for a personal matter, or an administrator for a financial matter, for an adult if the tribunal is satisfied—
 - (a) the adult has impaired capacity for the matter; and
 - (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult’s health, welfare or property; and
 - (c) without an appointment—
 - (i) the adult’s needs will not be adequately met; or
 - (ii) the adult’s interests will not be adequately protected.
- (2) The appointment may be on terms considered appropriate by the tribunal.
- (3) The tribunal may make the order on its own initiative or on the application of the adult, the adult guardian or an interested person.
- (4) This section does not apply for the appointment of a guardian for a restrictive practice matter under chapter 5B.
Note - Section 80ZD provides for the appointment of guardians for restrictive practice matters.

Section 12: This section sets out a three step process for the tribunal to follow to determine if a substitute decision-maker should be formally appointed.

First, the adult must have impaired capacity for a matter. This is an important threshold for the Act. Second, there must be a need for a decision or a likelihood that the adult will subject their health, welfare or property to unreasonable risk. Finally, it must be established that without the appointment of a substitute decision-maker, the adult’s needs will not be adequately met or their interests will not be adequately protected.

Regard must also be had to the purpose and principles of the Act. The Tribunal, therefore, must act in a way that is the least restrictive of the adult and keep the scope and period of an appointment to a minimum.

The appointment is subject to terms that are considered appropriate by the Tribunal.

Requirements of a proposed appointee

14 Appointment of 1 or more eligible guardians and administrators

- (1) The tribunal may appoint a person as guardian or administrator for a matter only if—
 - (a) for appointment as a guardian, the person is—
 - (i) a person who is at least 18 years and not a paid carer, or health provider, for the adult; or
 - (ii) the adult guardian; and
 - (b) for appointment as an administrator, the person is—
 - (i) a person who is at least 18 years, not a paid carer, or health provider, for the adult and not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or
 - (ii) the public trustee or a trustee company under the *Trustee Companies Act 1968*; and
 - (c) having regard to the matters mentioned in section 15(1), the tribunal considers the person appropriate for appointment.
- (2) Despite subsection (1)(a)(ii), the tribunal may appoint the adult guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter.
- (3) Subject to section 74, no-one may be appointed as a guardian for a special personal matter or special health matter.
Note - The tribunal may consent to particular special health care—see section 68 (Special health care).
- (4) The tribunal may appoint 1 or more of the following—
 - (a) a single appointee for a matter or all matters;
 - (b) different appointees for different matters;
 - (c) a person to act as appointee for a matter or all matters in a stated circumstance;
 - (d) alternative appointees for a matter or all matters so power is given to a particular appointee only in stated circumstances;
 - (e) successive appointees for a matter or all matters so power is given to a particular appointee only when power given to a previous appointee ends;
 - (f) joint or several, or joint and several, appointees for a matter or all matters;
 - (g) 2 or more joint appointees for a matter or all matters, being a number less than the total number of appointees for the matter or all matters.
- (5) If the tribunal makes an appointment because an adult has impaired capacity for a matter and the tribunal does not consider the impaired capacity is permanent, the tribunal must state in its order when it considers it appropriate for the appointment to be reviewed.

Note - Otherwise periodic reviews happen under section 28.

Section 14: This section sets out the requirements that a person must meet in order to be considered as an appropriate guardian or administrator. Joint appointments can be made.

The Adult Guardian may only be appointed as a last resort if there is no other appropriate person available for the appointment. The Adult Guardian could arguably be a more intrusive appointment than appointing, for example, a family member or close friend, hence why it is an appointment of last resort.

15 Appropriateness considerations

- (1) In deciding whether a person is appropriate for appointment as a guardian or administrator for an adult, the tribunal must consider the following matters (appropriateness considerations)—
 - (a) the general principles and whether the person is likely to apply them;
 - (b) if the appointment is for a health matter—the health care principle and whether the person is likely to apply it;
 - (c) the extent to which the adult’s and person’s interests are likely to conflict;
 - (d) whether the adult and person are compatible including, for example, whether the person has appropriate communication skills or appropriate cultural or social knowledge or experience, to be compatible with the adult;
 - (e) if more than 1 person is to be appointed—whether the persons are compatible;
 - (f) whether the person would be available and accessible to the adult;
 - (g) the person’s appropriateness and competence to perform functions and exercise powers under an appointment order.
- (2) The fact a person is a relation of the adult does not, of itself, mean the adult’s and person’s interests are likely to conflict.
- (3) Also, the fact a person may be a beneficiary of the adult’s estate on the adult’s death does not, of itself, mean the adult’s and person’s interests are likely to conflict.
- (4) In considering the person’s appropriateness and competence, the tribunal must have regard to the following—
 - (a) the nature and circumstances of any criminal history, whether in Queensland or elsewhere, of the person including the likelihood the commission of any offence in the criminal history may adversely affect the adult;
 - (b) the nature and circumstances of any refusal of, or removal from, appointment, whether in Queensland or elsewhere, as a guardian, administrator, attorney or other person making a decision for someone else;
 - (c) if the proposed appointment is of an administrator and the person is an individual—
 - (i) the nature and circumstances of the person having been a bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; and
 - (ii) the nature and circumstances of a proposed, current or previous arrangement with the person’s creditors under the *Bankruptcy Act 1966* (Cwlth), part 10 or a similar law of a foreign jurisdiction; and
 - (iii) the nature and circumstances of a proposed, current or previous external administration of a corporation, partnership or other entity of which the person is or was a director, secretary or partner or in whose management, direction or control the person is or was involved.

(continued next page)

Section 15: In deciding whether a person is appropriate for appointment as a guardian or an administrator, the Tribunal must have regard to the matters set out in this section. These include the likelihood of the proposed appointee applying the general principles and the compatibility of the adult and proposed appointee.

Subsection (1)(d) refers to the compatibility of the adult and proposed appointee. Considerations of compatibility include whether the adult and appointee are able to communicate effectively and whether the appointee has appropriate cultural or social knowledge or experience.

The compatibility of the appointee and the adult is important, given that the appointee is expected to provide support to enable the adult to participate in the decision-making process and to seek and give expression to the adult’s views and wishes (general principle 7).

(5) In this section—

attorney means—

- (a) an attorney under a power of attorney; or
- (b) an attorney under an advance health directive or similar document under the law of another jurisdiction.

power of attorney means—

- (a) a general power of attorney made under the *Powers of Attorney Act 1998*; or
- (b) an enduring power of attorney; or
- (c) a power of attorney made otherwise than under the *Powers of Attorney Act 1998*, whether before or after its commencement; or
- (d) a similar document under the law of another jurisdiction.

19 Comply with other tribunal requirement

- (1) The tribunal may impose a requirement, including a requirement about giving security, on a guardian or administrator or a person who is to become a guardian or administrator.
- (2) A guardian or administrator or person who is to become a guardian or administrator must comply with the requirement.
Maximum penalty—200 penalty units.

Section 19: The appointment of a guardian or administrator is subject to the requirements of the Tribunal. The appointee must comply with any specified requirements.

Obligations, duties and powers

11 Principles for adults with impaired capacity

- (1) A person or other entity who performs a function or exercises a power under this Act for a matter in relation to an adult with impaired capacity for the matter must apply the principles stated in schedule 1 (the general principles and, for a health matter or a special health matter, the health care principle).

Example 1 - If an adult has impaired capacity for a matter, a guardian or administrator who may exercise power for the matter must—

- (a) apply the general principles; and
- (b) if the matter is a health matter, also apply the health care principle.

Example 2 - The tribunal in deciding whether to consent to special health care for an adult with impaired capacity for the special health matter concerned, must apply the general principles and the health care principle.

Note- Function includes duty and power includes authority—see the *Acts Interpretation Act 1954*, section 36.

- (2) An entity authorised by an Act to make a decision for an adult about prescribed special health care must apply the general principles and the health care principle.
- (3) The community is encouraged to apply and promote the general principles.

33 Power of guardian or administrator

- (1) Unless the tribunal orders otherwise, a guardian is authorised to do, in accordance with the terms of the guardian's appointment, anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power is exercised.
- (2) Unless the tribunal orders otherwise, an administrator is authorised to do, in accordance with the terms of the administrator's appointment, anything in relation to a financial matter that the adult could have done if the adult had capacity for the matter when the power is exercised.
- (3) For a guardian for a restrictive practice matter under chapter 5B, this section applies subject to sections 80ZE and 80ZF.

34 Apply principles

- (1) A guardian or administrator must apply the general principles.
Note - See schedule 1 (Principles).
- (2) In making a health care decision, a guardian must also apply the health care principle

Section 11: This section activates the general principles and instructs anyone exercising a function or power under the Act, including guardians and administrators, to apply the principles.

Sections 33 and 34: Although these sections provide guardians and administrators with the power to do anything in relation to a personal or financial matter that the adult could have done if they had capacity, a guardian's power is restricted to the terms of the appointment. The Tribunal does not automatically make plenary appointments and the terms of the appointment will detail the matters for which the guardian may exercise decision-making power.

Further, the guardian must act in accordance with the general principles. In particular general principle 7 provides guidance to inform decision-making, including an obligation to support the adult's participation and to seek and take into account the adult's views and wishes.

35 Act honestly and with reasonable diligence

A guardian or administrator who may exercise power for an adult must exercise the power honestly and with reasonable diligence to protect the adult's interests.

Maximum penalty—200 penalty units.

36 Act as required by terms of tribunal order

A guardian or administrator who may exercise power for an adult must, when exercising the power, exercise it as required by the terms of any order of the tribunal.

Maximum penalty—200 penalty units.

40 Consult with adult's other appointees or attorneys

- (1) If there are 2 or more persons who are guardian, administrator or attorney for an adult, the persons must consult with one another on a regular basis to ensure the adult's interests are not prejudiced by a breakdown in communication between them.
- (2) However, failure to comply with subsection (1) does not affect the validity of an exercise of power by a guardian, administrator or attorney.
- (3) In this section—

attorney means an attorney under an enduring document or a statutory health attorney.

Section 35: There is no specific penalty provision for a failure to comply with the general principles. However, a guardian or administrator is required to act honestly and with reasonable diligence to protect the adult's interests, which arguably includes acting in accordance with the general principles. There is a penalty for failure to act honestly and with reasonable diligence.

Section 36: This section provides that a guardian or administrator must exercise power in accordance with the terms of any order made by the Tribunal.

Section 40: This section imposes an obligation on joint appointees to consult with one another and maintain a positive relationship. The absence of such a relationship could jeopardise an adult's interests, particularly in relation to being supported by their natural support network.

If the requirement for consultation is not complied with, this does not affect the validity of an exercise of power. This gives rise to a risk that any single appointee could make and implement a decision without consultation.

Part 4: The Powers of Attorney Act 1998

Preliminary sections

5 General overview

- (1) An attorney is a person who is authorised to make particular decisions and do particular other things for another person (the principal).
- (2) After the commencement of this Act, principals may authorise attorneys by—
 - (a) general powers of attorney, enduring powers of attorney or advance health directives; or
 - (b) powers of attorney under the common law.

- (3) In addition to replacing the statutory provisions for powers of attorney and enduring powers of attorney, this Act introduces advance health directives and statutory health attorneys.

Editor's note - The *Property Law Act 1974*, part 9 (Powers of attorney) was repealed by section 182. However, see section 163 (Powers of attorney under *Property Law Act 1974*) for a transitional provision.

- (4) An advance health directive is a document containing directions for a principal's future health care and special health care and may authorise an attorney to do particular things for the principal in relation to health care.

Editor's note - Advance health directives are dealt with in chapter 3.

- (5) A statutory health attorney is the person authorised by this Act to do particular things for a principal in particular circumstances in relation to health care.

Editor's note - See section 62 (Statutory health attorney). Also, see the *Guardianship and Administration Act 2000*, section 66(5) (Adult with impaired capacity—order of priority in dealing with health matter).

Section 5: This section makes no references to, or acknowledgements of, the rights of adults with impaired capacity or the provision of decision-making support to those adults. It indicates that an attorney is authorised to make decisions on behalf of another person. Having said that, the Act is underpinned by obligations imposed by the general principles.

*During the **Parliamentary debate** about introduction of the Act, it was stated that there was a "... need to ensure that the law moves away from the outdated, paternalistic approach to people with a decision-making disability and gives recognition to their right to participate to the greatest possible extent in the decisions which affect their lives" (Queensland, Parliamentary Debates, Legislative Assembly, 22 April 1998, 837 (Hon M.J. Foley M.P)).*

6A Relationship with *Guardianship and Administration Act 2000*

- (1) This Act is to be read in conjunction with the *Guardianship and Administration Act 2000* which provides a scheme by which—
 - (a) the tribunal may appoint a guardian for an adult with impaired capacity for personal matters to make particular decisions and do particular other things for the adult in relation to the matters; and
Editor's note - Personal matters do not include special personal matters or special health matters - schedule 2, section 2.
 - (b) the tribunal may appoint an administrator for an adult with impaired capacity for financial matters to make particular decisions and do particular other things for the adult in relation to the matters; and
 - (c) the tribunal may consent to the withholding or withdrawal of a life-sustaining measure and to particular special health care.
Editor's note - However, the tribunal may not consent to electroconvulsive therapy or psychosurgery—*Guardianship and Administration Act 2000*, section 68(1).
- (2) The *Guardianship and Administration Act 2000* also provides a scheme for health care and special health care for adults with impaired capacity for the matter concerned, including an order of priority for dealing with health care and special health care.
Editor's note - See the *Guardianship and Administration Act 2000*, sections 65 and 66.
- (3) The *Guardianship and Administration Act 2000* also provides for the adult guardian, the public advocate and community visitors.
- (4) If there is an inconsistency between this Act and the *Guardianship and Administration Act 2000*, the *Guardianship and Administration Act 2000* prevails.

Section 6A: The *Powers of Attorney Act 1998* is to be read in conjunction with the *Guardianship and Administration Act 2000* and where there is a conflict between them, the latter will prevail.

Statutory health attorneys

62 Statutory health attorney

- (1) This Act authorises a statutory health attorney for an adult's health matter to make any decision about the health matter that the adult could lawfully make if the adult had capacity for the matter.

Editor's note - Note this does not include a special health matter.

- (2) A statutory health attorney's power for a health matter is exercisable during any or every period the adult has impaired capacity for the matter.

Editor's note - However, the priority of an attorney's power is decided by the *Guardianship and Administration Act 2000*, section 66 (Adult with impaired capacity—order of priority in dealing with health matter). See, in particular, section 66(5).

63 Who is the statutory health attorney

- (1) For a health matter, an adult's statutory health attorney is the first, in listed order, of the following people who is readily available and culturally appropriate to exercise power for the matter—

- (a) a spouse of the adult if the relationship between the adult and the spouse is close and continuing;
- (b) a person who is 18 years or more and who has the care of the adult and is not a paid carer for the adult;
- (c) a person who is 18 years or more and who is a close friend or relation of the adult and is not a paid carer for the adult.

Editor's note - If there is a disagreement about which of 2 or more eligible people should be the statutory health attorney or how the power should be exercised, see the *Guardianship and Administration Act 2000*, section 42 (Disagreement about health matter).

- (2) If no-one listed in subsection (1) is readily available and culturally appropriate to exercise power for a matter, the adult guardian is the adult's statutory health attorney for the matter.
- (3) Without limiting who is a person who has the care of the adult, for this section, a person has the care of an adult if the person—
 - (a) provides domestic services and support to the adult; or
 - (b) arranges for the adult to be provided with domestic services and support.
- (4) If an adult resides in an institution (for example, a hospital, nursing home, group home, boarding-house or hostel) at which the adult is cared for by another person, the adult—
 - (a) is not, merely because of this fact, to be regarded as being in the care of the other person; and
 - (b) remains in the care of the person in whose care the adult was immediately before residing in the institution.

Sections 62-63: Where a matter is to be dealt with by a statutory health attorney, these sections authorise the statutory attorney to make decisions and provide a means of determining who will act as the attorney.

A statutory health attorney may make decisions about a health matter only while an adult has impaired capacity for that matter. A statutory health attorney may make any decision about the health matter that the adult could have lawfully made if they had capacity for the matter. A statutory health attorney is subject to the same requirements and principles as other decision-makers.

The means of determining who will act as an adult's statutory health attorney considers only the relationship between the person and the adult, and whether the person is readily available and culturally appropriate. It does not consider any other factors that may be relevant to the determination.

In some instances, the person who is given power to make a decision as a statutory health attorney may not be the 'most appropriate' decision-maker. This is because section 63 gives power to the first available and culturally appropriate person, without considering who of several available people may be most appropriate overall. In light of this, there is potential for the loss of opportunities to support a person to make their own decision, and decisions may not be made in accordance with the adult's wishes or best interests.

Unless another potential attorney disagrees with a decision and raises that disagreement, these decisions will likely stand.

*It was stated in the **Parliamentary Debate** that, “For those people who are unable to make decisions, the Bill provides for a hierarchy of statutory health attorneys. Under the Bill, a person's health attorney is the first person on the list established who is available, beginning with a person's spouse, adult children, parents, siblings and finally close friends. In prescribing such a one-list-fits-all approach, the government ignores the complex reality of many people's lives. The first person in this hierarchy may simply not be the most appropriate person to exercise the responsibility for taking health care decisions... (T)his hierarchy may be nothing more than an artificial construct for many people. It fails to recognise, for example, the complexity of family relationships for indigenous people” (Queensland, Parliamentary Debates, Legislative Assembly, 22 April 1998, 842 (Anna Bligh, M.P)).*

Thresholds for appointment

32 Enduring powers of attorney

- (1) By an enduring power of attorney, an adult (principal) may—
 - (a) authorise 1 or more other persons who are eligible attorneys (attorneys) to do anything in relation to 1 or more financial matters or personal matters for the principal that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised; and
Editor's note - Personal matters includes health matters but does not include special personal matters or special health matters—schedule 2, section 2.
 - (b) provide terms or information about exercising the power.
- (2) An enduring power of attorney giving power for a matter is not revoked by the principal becoming a person with impaired capacity for the matter.

Editor's note - An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

Section 32: In making an enduring power of attorney an adult can: choose their preferred substitute decision maker/s to act on their behalf if, at a future point, they no longer have capacity (which is consistent with the principles of autonomy and the least restrictive alternative); and may authorise the attorney to do anything in relation to specified financial or personal matters that the adult could have done themselves, if they had capacity. The principal may also provide terms or information to the attorney about exercising the power.

An enduring power of attorney authorises a person to make decisions on behalf of the principal (substitute decision-making). This section does not explicitly require an attorney to consult with, or be supportive of, the principal. However, an attorney is required to comply with the general principles, which include requirements to support the adult to participate in decision-making and to take account of the adult's view and wishes.

The Attorney-General, in his second reading speech stated that, "while a power of attorney lapses once the principal has lost decision making capacity, an enduring power of attorney does not. Although this is of great advantage for the planning of one's future, it also means that the attorney will be acting without the supervision or direct instructions of the principal and consequently the principal can be in a most vulnerable position" (Hon D.E. Beanland MP). The speech continued to explain a number of protective provisions regarding eligibility of attorneys and witnessing of documents.

33 When attorney's power exercisable

- (1) A principal may specify in an enduring power of attorney a time when, circumstance in which, or occasion on which, a power for a financial matter is exercisable.
- (2) However, if the enduring power of attorney does not specify a time when, circumstance in which, or occasion on which, power for a financial matter becomes exercisable, the power becomes exercisable once the enduring power of attorney is made.
- (3) Also, if—
 - (a) a time when, circumstance in which, or occasion on which, power for a financial matter is exercisable is specified; and
 - (b) before the specified time, circumstance or occasion, the principal has impaired capacity for the matter;power for the matter is exercisable during any or every period the principal has the impaired capacity.
- (4) Power for a personal matter under the enduring power of attorney is exercisable during any or every period the principal has impaired capacity for the matter and not otherwise.

Editor's note - However, the priority of an attorney's power for a health matter is decided by the *Guardianship and Administration Act 2000*, section 66 (Adult with impaired capacity—order of priority in dealing with health matter). See, in particular, section 66(4).

- (5) If an attorney's power for a matter depends on the principal having impaired capacity for a matter, a person dealing with the attorney may ask for evidence, for example, a medical certificate, to establish that the principal has the impaired capacity.

Section 33: A principal may specify in an enduring power of attorney the time, circumstance or occasion on which power for a financial matter becomes exercisable. If not specified, it is exercisable once the enduring power of attorney is made. If a principal specifies when power for a financial matter is exercisable but their capacity for the matter becomes impaired prior to the specified time, then power for the matter becomes exercisable whilst the principal has impaired capacity for the matter. If the principal regains capacity in relation to the matter, the terms of the enduring power of attorney will be reactivated.

An enduring power of attorney may also provide powers for personal matters; however, power for a personal matter is only exercisable whilst the principal has impaired capacity for the matter.

41 Principal's capacity to make an enduring power of attorney

- (1) A principal may make an enduring power of attorney only if the principal understands the nature and effect of the enduring power of attorney.

Editor's note - However, under the general principles, a person is presumed to have capacity - schedule 1, section 1.

- (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters—

- (a) the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
- (b) when the power begins;
- (c) once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;
- (d) the principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power;
- (e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;
- (f) at any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the use of the power.

Editor's note - If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.

Section 41: This section requires that a principal must understand the nature and effect of an enduring power of attorney before establishing the instrument. In particular, the principal must understand that the attorney will have full control over matters once power begins, subject to any terms or information contained in the instrument. The principal must also understand that, whilst their capacity is impaired, they cannot monitor or dictate the use of the power.

These requirements do not explicitly recognise that an adult may have some capacity for, or ability to participate in, decision-making. However an attorney, when making substituted decisions, must comply with the general principles. The general principles include the presumption of capacity and the requirements to maximise an adult's participation in decision-making and minimise substituted decision-making.

Requirements of a proposed appointee

29 Meaning of eligible attorney

- (1) An eligible attorney, for a matter under an enduring power of attorney, means—
 - (a) a person who is—
 - (i) at least 18 years; and
 - (ii) not a paid carer, or health provider, for the principal; and
Editor's note - Paid carer and health provider are defined in schedule 3 (Dictionary).
 - (iii) not a service provider for a residential service where the principal is a resident; and
 - (iv) if the person would be given power for a financial matter—not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or
 - (b) the public trustee; or
 - (c) a trustee company under the *Trustee Companies Act 1968*; or
 - (d) for a personal matter only—the adult guardian.
- (2) An eligible attorney, for a matter under an advance health directive, means—
 - (a) a person who has capacity for the matter who is—
 - (i) at least 18 years; and
 - (ii) not a paid carer, or health provider, for the principal; or
Editor's note - Paid carer and health provider are defined in schedule 3 (Dictionary).
 - (b) the public trustee; or
 - (c) the adult guardian.

Section 29: There are no appropriateness considerations attached to the appointment of an enduring power of attorney, unlike those applied to a proposed guardian or administrator.

Obligations, duties and powers

66 Act honestly and with reasonable diligence

- (1) An attorney must exercise power honestly and with reasonable diligence to protect the principal's interests.
Maximum penalty—200 penalty units.
- (2) In addition to any other liability the attorney may incur, the court may order the attorney to compensate the principal for a loss caused by the attorney's failure to comply with subsection (1).

67 Subject to terms of document

An attorney who may exercise a power under a document must, when exercising the power, exercise it subject to the terms of the document.

76 General principles for adults with impaired capacity

The principles set out in schedule 1 (the general principles and, for a health matter, the health care principle) must be complied with by a person or other entity who performs a function or exercises a power under this Act, or an enduring document, for a matter in relation to an adult who has impaired capacity.

Example - If a principal of an enduring power of attorney or advance health directive has impaired capacity for a matter, an attorney who may exercise power for the matter must—

- (a) comply with the general principles; and
- (b) if the matter is a health matter, also comply with the health care principle.

Editor's note - function includes duty and power includes authority - see the *Acts Interpretation Act 1954*, section 36.

77 Attorney has maximum power if not otherwise stated

To the extent an enduring document does not state otherwise, an attorney is taken to have the maximum power that could be given to the attorney by the enduring document.

Example - If an adult's enduring power of attorney merely states that 'I appoint [full name] as my attorney', the appointee is taken to have power for all financial matters and all personal matters for the adult.

Section 66: An attorney is required to act honestly and with reasonable diligence. This arguably includes applying the general principles.

Section 67: This section provides that an attorney must exercise any power subject to the terms of the document.

Sections 76 and 77: Section 77 provides that an attorney appointed by an enduring document is taken to have the maximum power that could be given to them by the enduring document, unless the document states otherwise. The section does not recognise that a principal may have decision-making capacity for some matters or be able to make their own decisions with support.

However, section 76 instructs an attorney to apply the general principles. It provides that any person or entity, including an attorney, who performs a function or exercises a power under the Act, must comply with the general principles and the health care principle. This requirement qualifies the extensive powers that section 77 enables an attorney to hold.

While an attorney appointed under an enduring power of attorney makes 'best interests' decisions, they are subject to the same requirements and principles as other decision-makers, so should support the adult to make their own decisions whenever possible.

79 Consult with principal's other appointees or attorneys

- (1) If there are 2 or more persons who are guardian, administrator or attorney for a principal, the persons must consult with one another on a regular basis to ensure the principal's interests are not prejudiced by a breakdown in communication between them.

Editor's note - Note the *Guardianship and Administration Act 2000*, sections 41 (Disagreement about matter other than health matter), 42 (Disagreement about health matter) and 43 (Acting contrary to health care principle).

- (2) However, failure to comply with subsection (1) does not affect the validity of an exercise of power by a guardian, administrator or attorney.

Section 79: Joint appointees have an obligation to consult with one another and to maintain a positive and harmonious relationship. A failure to do so could have a significant impact upon an adult's interests, particularly in relation to being supported by their natural support network.

If the requirement for consultation is not complied with, this does not affect the validity of an exercise of power. This gives rise to a risk that any single appointee could make and implement a decision without consultation.

Appendix 1: Glossary for the *Guardianship and Administration Act 2000*

Administrator	Administrator means an administrator appointed under this Act.
Capacity	Capacity , for a person for a matter, means the person is capable of— <ul style="list-style-type: none">(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.
Close friend	Close friend , of a person, means another person who has a close personal relationship with the first person and a personal interest in the first person's welfare.
Enduring document	Enduring document means an enduring power of attorney or an advance health directive.
Enduring power of attorney	Enduring power of attorney means an enduring power of attorney under the <i>Powers of Attorney Act 1998</i> .
Financial matter	A financial matter , for an adult, is a matter relating to the adult's financial or property matters, including, for example, a matter relating to 1 or more of the following— <ul style="list-style-type: none">(a) paying maintenance and accommodation expenses for the adult and the adult's dependants, including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the adult or a dependant of the adult;(b) paying the adult's debts, including any fees and expenses to which an administrator is entitled under a document made by the adult or under a law;(c) receiving and recovering money payable to the adult;(d) carrying on a trade or business of the adult;(e) performing contracts entered into by the adult;(f) discharging a mortgage over the adult's property;(g) paying rates, taxes, insurance premiums or other outgoings for the adult's property;(h) insuring the adult or the adult's property;(i) otherwise preserving or improving the adult's estate;(j) investing for the adult in authorised investments;(k) continuing investments of the adult, including taking up rights to issues of new shares, or options for new shares, to which the adult becomes entitled by the adult's existing shareholding;(l) undertaking a real estate transaction for the adult;(m) dealing with land for the adult under the <i>Land Act 1994</i> or <i>Land Title Act 1994</i>;(n) undertaking a transaction for the adult involving the use of the adult's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the adult;(o) a legal matter relating to the adult's financial or property matters;(p) withdrawing money from, or depositing money into, the adult's account with a financial institution.

Guardian	Guardian means a guardian appointed under this Act.
Health care (except in relation to chapter 5A)	<p>(1) Health care, of an adult, is care or treatment of, or a service or a procedure for, the adult—</p> <ul style="list-style-type: none"> (a) to diagnose, maintain, or treat the adult’s physical or mental condition; and (b) carried out by, or under the direction or supervision of, a health provider. <p>(2) Health care, of an adult, includes withholding or withdrawal of a life-sustaining measure for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.</p> <p>(3) Health care, of an adult, does not include—</p> <ul style="list-style-type: none"> (a) first aid treatment; or (b) a non-intrusive examination made for diagnostic purposes; or (c) the administration of a pharmaceutical drug if— <ul style="list-style-type: none"> (i) a prescription is not needed to obtain the drug; and (ii) the drug is normally self-administered; and (iii) the administration is for a recommended purpose and at a recommended dosage level. <p><i>Example of paragraph (b)</i>- a visual examination of an adult’s mouth, throat, nasal cavity, eyes or ears</p>
Health matter	A health matter , for an adult, is a matter relating to health care, other than special health care, of the adult.
Impaired capacity	Impaired capacity , for a person for a matter, means the person does not have capacity for the matter.
Matter	Matter includes a type of matter.
Personal matter	<p>A personal matter, for an adult, is a matter, other than a special personal matter or special health matter, relating to the adult’s care, including the adult’s health care, or welfare, including, for example, a matter relating to 1 or more of the following—</p> <ul style="list-style-type: none"> (a) where the adult lives; (b) with whom the adult lives; (c) whether the adult works and, if so, the kind and place of work and the employer; (d) what education or training the adult undertakes; (e) whether the adult applies for a licence or permit; (f) day-to-day issues, including, for example, diet and dress; (g) health care of the adult; (h) whether to consent to a forensic examination of the adult; <p><i>Note</i>— See also section 248A (Protection for person carrying out forensic examination with consent).</p> <ul style="list-style-type: none"> (i) a legal matter not relating to the adult’s financial or property matter; (j) a restrictive practice matter under chapter 5B; (k) seeking help and making representations about the use of restrictive practices for an adult who is the subject of a containment or seclusion approval under chapter 5B.

Power	Power , for a matter, means power to make all decisions about the matter and otherwise exercise the power.
Power of attorney	<p>Power of attorney means—</p> <ul style="list-style-type: none"> (a) a general power of attorney made under the <i>Powers of Attorney Act 1998</i>; or (b) an enduring power of attorney; or (c) a power of attorney made otherwise than under the <i>Powers of Attorney Act 1998</i>, whether before or after its commencement.
Reasonably considers	Reasonably considers means considers on grounds that are reasonable in the circumstances.
Support network	<p>Support network, for an adult, consists of the following people—</p> <ul style="list-style-type: none"> (a) members of the adult’s family; (b) close friends of the adult; (c) other people the tribunal decides provide support to the adult
Term	Term includes condition, limitation and instruction.

Appendix 2: Glossary for the *Powers of Attorney Act 1998*

Administrator	Administrator means an administrator appointed under the <i>Guardianship and Administration Act 2000</i> .
Attorney	Attorney means— <ul style="list-style-type: none">(a) an attorney under a power of attorney, enduring power of attorney or advance health directive; or(b) a statutory health attorney.
Capacity	Capacity , for a person for a matter, means the person is capable of— <ul style="list-style-type: none">(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.
Close friend	Close friend , of a person, means another person who has a close personal relationship with the first person and a personal interest in the first person's welfare.
Enduring document	An enduring document is an enduring power of attorney or an advance health directive. <i>Editor's note</i> - An enduring power of attorney made under the <i>Property Law Act 1974</i> and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.
Enduring power of attorney	Enduring power of attorney is defined in section 32 of the <i>Powers of Attorney Act 1998</i> (page 34 of this document).
Financial matter	A financial matter , for a principal, is a matter relating to the principal's financial or property matters, including, for example, a matter relating to 1 or more of the following— <ul style="list-style-type: none">(a) paying maintenance and accommodation expenses for the principal and the principal's dependants, including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the principal or a dependant of the principal;(b) paying the principal's debts, including any fees and expenses to which an administrator is entitled under a document made by the principal or under a law;(c) receiving and recovering money payable to the principal;(d) carrying on a trade or business of the principal;(e) performing contracts entered into by the principal;(f) discharging a mortgage over the principal's property;(g) paying rates, taxes, insurance premiums or other outgoings for the principal's property;(h) insuring the principal or the principal's property;(i) otherwise preserving or improving the principal's estate;(j) investing for the principal in authorised investments;(k) continuing investments of the principal, including taking up rights to issues of new shares, or options for new shares, to which the principal becomes entitled by the principal's existing shareholding;

- (l) undertaking a real estate transaction for the principal;
- (m) dealing with land for the principal under the *Land Act 1994* or *Land Title Act 1994*;
- (n) undertaking a transaction for the principal involving the use of the principal's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the principal;
- (o) a legal matter relating to the principal's financial or property matters;
- (p) withdrawing money from, or depositing money into, the principal's account with a financial institution.

Guardian **Guardian** means a guardian appointed under the *Guardianship and Administration Act 2000*.

Health care (1) **Health care**, of a principal, is care or treatment of, or a service or a procedure for, the principal—

- (a) to diagnose, maintain, or treat the principal's physical or mental condition; and
- (b) carried out by, or under the direction or supervision of, a health provider.

(2) **Health care**, of a principal, includes withholding or withdrawal of a life-sustaining measure for the principal if the commencement or continuation of the measure for the principal would be inconsistent with good medical practice.

(3) **Health care**, of a principal, does not include—

- (a) first aid treatment; or
- (b) a non-intrusive examination made for diagnostic purposes; or
- (c) the administration of a pharmaceutical drug if—
 - (i) a prescription is not needed to obtain the drug; and
 - (ii) the drug is normally self-administered; and
 - (iii) the administration is for a recommended purpose and at a recommended dosage level.

Example of paragraph (b)- a visual examination of a principal's mouth, throat, nasal cavity, eyes or ears

Health matter A **health matter**, for a principal, is a matter relating to health care, other than special health care, of the principal.

Impaired capacity **Impaired capacity**, for a person for a matter, means the person does not have capacity for the matter.

Matter **Matter** includes a type of matter.

Example- A reference in section 10(1)(a) to a person appointing an attorney to exercise power for a matter includes a reference to a person appointing an attorney to exercise power for a type of matter (for example, particular, but not all, financial matters).

Personal matter A **personal matter**, for a principal, is a matter, other than a special personal matter or special health matter, relating to the principal's care, including the principal's health care, or welfare, including, for example, a matter relating to 1 or more of the following—

- (a) where the principal lives;
- (b) with whom the principal lives;
- (c) whether the principal works and, if so, the kind and place of work and the employer;
- (d) what education or training the principal undertakes;
- (e) whether the principal applies for a licence or permit;

- (f) day-to-day issues, including, for example, diet and dress;
- (g) whether to consent to a forensic examination of the principal;
Editor's note- See also section 104 (Protection for person carrying out forensic examination with consent).
- (h) health care of the principal;
- (i) a legal matter not relating to the principal's financial or property matters.

Power *Power*, for a matter, means power to make all decisions about the matter and otherwise exercise the power.

Principal *Principal* means—

- (a) in the context of a power of attorney, enduring power of attorney or advance health directive or an attorney under 1 of these documents—the person who made the document or appointed the attorney; or
- (b) in the context of a statutory health attorney—the person for whom the statutory health attorney is statutory health attorney.

Relation *Relation*, of a person, means—

- (a) a spouse of the first person; or
- (b) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship, foster relationship or a relationship arising because of a legal arrangement; or

Example of legal arrangement—

- (a) 1 court order for custody
- (b) 2 trust arrangement between trustee and beneficiary
- (c) a person on whom the first person is completely or mainly dependent; or
- (d) a person who is completely or mainly dependent on the first person; or
- (e) a person who is a member of the same household as the first person.

Term *Term* includes condition, limitation and instruction.

