Office of the Public Advocate
Systems Advocacy

Decision-making support for Queenslanders with impaired capacity

A conceptual framework

February 2014

Queensland Government

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Introduction

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

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

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

Impaired decision-making capacity

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

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

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

Human rights and equality

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

Everyone should be equally recognised before the law

Everyone has the right to autonomy

Everyone should be free to make their own decisions

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

[1] *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'capacity').
[2] Ibid s 5(c).
[3] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 1, 11.
[4] *Guardianship and Administration Act 2000* (Qld) s 5(c).
[5] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) arts 1-3 ('*Convention on the Rights of Persons with Disabilities*').

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

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

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

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

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

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

Support for decision-making

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

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

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

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

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

[6] Ibid art 12.
[7] Ibid art 5.
[8] Ibid art 21.
[9] *The Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, GA Res 46/119, UN GOAR, 75th plen mtg, UN Doc A/RES/46/119 (17 December 1991) principle 1(5).

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

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

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

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

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

Substitute decision-making

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

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

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

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

[10] United Nations, *Handbook for Parliamentarians – From Exclusion to Equality: Realising the Rights of Persons with Disabilities* (United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and Inter-Parliamentary Union, 2007) ch 6.
[11] Ibid.
[12] I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 189 in Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 1, 76.
[13] Law Commission (England and Wales), *Mental Incapacity*, Law Com No 231 (1995) 42.

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

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

Substitute decision-making should be an intervention of last resort

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

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

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

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

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

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

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

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

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

[14] *Convention on the Rights of Persons with Disabilities* art 12.
[15] *Guardianship and Administration Act 2000* (Qld) s 6.
[16] Ibid sch 1 pt 1.
[17] Ibid.

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

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

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

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

Research rationale

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

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

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

[18] Ibid.
[19] Ibid sch 1, pt 1, principle 7(5); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(5); *Re JD* [2003] QGAAT 14, [35]; *Re SD* [2005] QGAAT 71, [39].
[20] *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1. ss 5, 7.
[21] Ibid sch 1, pt 1, principle 7(5); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1, principle 7(5); *Re JD* [2003] QGAAT 14, [35]; *Re SD* [2005] QGAAT 71, [39].


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A journey towards autonomy? Supported decision-making in theory and practice

A review of literature

February 2014

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Introduction

Overview

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

This literature review explores recent debate in relation to current guardianship systems, in particular the degree to which contemporary guardianship recognises and protects the autonomy and self-determination of people with disability. As supported decision-making is central to many of these discussions, the literature review also explores the current ways in which supported decision-making is conceptualised and put into practice in Australia and selected overseas jurisdictions.

The first part of this review briefly explores the origin of guardianship in common law jurisdictions, culminating in the modern day legislative regimes in countries such as Australia and Canada. This is the backdrop against which the current call for further reforms is occurring. Contemporary appraisals of guardianship and substitute decision-making in light of the coming into force of the *Convention on the Rights of Persons with Disabilities* and implementation of the National Disability Insurance Scheme are also discussed.

The second part of this review examines supported decision-making as a concept and how it has been implemented to date with a focus on legislative frameworks in Canada and Europe. Current commentary and critique is presented in relation to the concept of supported decision-making and whether Australia's guardianship laws should be further reformed to incorporate this new model.

The terms used in this document should be considered as broadly inclusive, as opposed to limiting, with respect to their applicability. For example, references to people with intellectual disability or cognitive impairment are intended to include those whose cognition is impaired as a result of a broad range of conditions including but not limited to dementia, intellectual disability, acquired brain injury, mental illness or substance misuse. Further, the reference to 'people with disability' is often used in literature as an all-inclusive term. It should be noted that throughout this document, terms are generally used in a manner that aligns to the source being referenced.

Background

While it is recognised that we all, to some extent, seek support or assistance from others to make decisions, people with intellectual disability or cognitive impairment may require more assistance to make and communicate decisions about a variety of matters in their lives. In contemporary times, the legal response to this issue has focussed on substitute decision-making, which most often takes the form of guardianship and administration.

The development of guardianship laws in English law since the thirteenth century has traditionally focused on property or financial management. In recent times, and with the legislative reforms in most western countries, guardianship has expanded to cover both financial and personal matters. While guardianship has a long history of paternalistic decision-making, recently there has been a greater focus on maximising the autonomy of those subject to guardianship. Guardianship orders are now more likely to be limited to certain matters (rather than plenary appointments), and guardianship laws impose obligations on the relevant substitute decision-maker to ascertain the wishes and preferences of the person subject to guardianship to varying extents.

Corresponding with the growth of the disability rights movement and the coming into force of the United Nations *Convention on the Rights of Persons with Disabilities*, the concept of guardianship has been called further into question. Alternative models to substitute decision-making have emerged internationally. Collectively, these models are described as supported decision-making.

The concept of supported decision-making is central to many of the current discussions regarding the reform of guardianship legislation in Australia and internationally.[1] It covers a wide spectrum of decision-making models from informal support involving natural support networks to formally appointed co-decision-makers and representatives. Commonly, these models are united by a move away from an absolutist concept of capacity that deems a person to either be competent to make decisions or not. Supported decision-making recognises that many people with intellectual disability or cognitive impairment can make their own decisions with support and assistance. This may involve support and assistance to find and process the information needed to make the decision, express their will and preferences, and/or communicate their decision. Without such assistance, the same people may be deemed to have impaired decision-making capacity, particularly when applying traditional tests of capacity.

A number of Canadian provinces have been at the forefront of advocating for and implementing supported decision-making models, building on earlier developments in Scandinavian countries. These models have grown out of the same movement that advocated for community living for people with intellectual disability and the civil rights of people with disability.[2] In Australia, it also currently forms part of the suite of reforms associated with individual funding and person-centred planning.

Much has been written about the normative aspects of this concept, in particular the benefits of supported decision-making and its alignment with the principles underpinning the *Convention on the Rights of Persons with Disabilities*. However as a relatively new model, there is still little known about how supported decision-making processes work, and what works well in practice.[3]

Many commentators have therefore suggested a cautious approach and that further empirical research is undertaken about how supported decision-making does and should work. Concerns about expanding the reach of the current guardianship system and creating another system of substitute decision-making, or a *de facto* guardianship system have been expressed in relation to Australia formalising or legislating supported decision-making practices without proper consideration.

Guardianship

Origins of guardianship and *parens patriae* jurisdiction

In medieval England, the Lord of the Manor had responsibility for the property and person of people with disability. Around the thirteenth century, this role transferred to the crown, coinciding with the consolidation of power in the king, the enactment of the *De Praerogativa Regis*, which was seen as declaratory of the common law, and the development of the monarch as *pater patriae*, or 'father over his children'.[4] The monarch had both custody of persons with disability and responsibility for maintaining the person, their household and dependents out of the income from their lands.

[1] For example, Victorian Law Reform Commission, *Guardianship: Final Report 24*, Report No 24 (2012).
[2] Robert M Gordon, 'The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making' (2000) 31(1) *International Journal of Law and Psychiatry* 61, 63.
[3] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship?' (2013) 117 *Penn State Law Review* 1111, 1112.
[4] N O'Neil and C Peisah, *Capacity and the Law* (Sydney Law Book Company, 2011); J Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) 14(2) *Oxford Journal of Legal Studies* 159, 167.

Gradually this responsibility moved from the monarch to the Courts of Equity (Chancery), who developed arrangements enabling the court to appoint a guardian with a focus on managing the person's property and personal interests.[5] The jurisdiction was very broad and the powers plenary (all pervasive).[6] Upon settlement, the jurisdiction was eventually given to the superior courts of colonies, which in Australia meant the state Supreme Courts.

While the 'wardship of children' had quite a separate origin arising out of feudal system of tenures,[7] it became substantially and procedurally assimilated with the *parens patriae* jurisdiction and as it came to make up the bulk of the court's work in this jurisdiction it constituted "a solid guide to the exercise of the *parens patriae* power even in the case of adults".[8]

Ultimately therefore the *parens patriae* jurisdiction not only included those with impaired decision-making capacity (due to mental illness or disability), but also included children and was exercised generally "for the benefit of such who were incapable of protecting themselves".[9] The courts developed principles, such as acting in a person's best interests, for exercising this broad jurisdiction, which in relation to infants it is acknowledged "was the embodiment of a benevolent urge to protect children's welfare",[10] and also eventually coincided with a more interventionist role of both the state and the courts throughout the nineteenth century in respect of the welfare of children.[11]

While the early exercise of the jurisdiction in relation to those with impaired decision-making capacity was focused on protecting the property of the person, and maintaining his or her dependents, the jurisdiction gradually moved beyond property management and financial issues.

The twentieth century

When a medical model of disability predominated and many people with disability were institutionalised throughout the twentieth century, all decisions were made for them by the medical staff of institutions, with the exception of financial management which was often carried out by state agencies such as the public trustee.[12] As people with disability began to move out of institutions from the 1970s onwards, there were new demands, including the need to negotiate access to a complex system of social services. The "need was increasingly for brokers to negotiate access, advocates to demand services, and agents to provide legal approvals for decisions".[13] There was also a need for accessible mechanisms for legally binding decisions to be made for people with impaired decision-making capacity for issues such as accommodation, health care and finances, because in the absence of a legally appointed substitute decision-maker, decisions made by informal decision-makers could not be legally recognised.[14]

These changes coincided with a growing disability rights movement and the recognition of people with disability as citizens with rights. As a result, the later part of the twentieth century saw significant reforms with guardianship legislation being enacted in each state and territory throughout the 1980s and 1990s.

[5] T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997) 10; Shih-Ning Then, 'Evolution and Innovation in Guardianship Laws: Assisted Decision-Making' (2013) 35 *Sydney Law Review* 133, 136.
[6] T Carney and D Tait, above n 5, 16; Shih-Ning Then, above n 5, 139.
[7] *Re Eve* [1986] 2 SCR 388, [34] (Forest J).
[8] Ibid.
[9] *Butler v Freeman* (1756) 27 ER 204; Amb 301, [302] (Lord Hardwicke LC) in J Seymour, above n 4, 168.
[10] J Seymour, above n 4, 167.
[11] Ibid 159, 177.
[12] T Carney and D Tait, above n 5 15.
[13] Ibid 18.
[14] Shih-Ning Then, above n 5, 138.

While the *parens patriae* jurisdiction of the superior courts has been preserved in the state Supreme Courts, there is now legislation in each state and territory that makes it easier and more accessible to appoint a guardian for adults with impaired decision-making capacity. Prior to this legislation, the appointment of guardians was costly and time-consuming and therefore rarely accessed unless a person had substantial property to be managed. Further, appointing a substitute decision-maker meant completely depriving a person of the ability to make any decisions, as guardians were usually given plenary powers, that is the power to make all decisions for the person.[15]

In contrast, since recent legislative reforms (in countries such as Canada and Australia), a tribunal (or sometimes a lower court) is typically empowered to appoint a guardian or other substitute decision-maker. As a result, the procedures are less formal and the jurisdiction more accessible. Plenary appointments are not made automatically, and there is a much greater emphasis on consulting with and seeking the views of the person subject to guardianship.

Principles of best interest and substituted judgement

Consistent with the common law jurisdiction, all guardians appointed under the relevant legislation in each jurisdiction have a responsibility to act in the best interests of the persons under their guardianship. Some, but not all jurisdictions, require guardians to attempt to determine what the person subject to guardianship would have done if they had the capacity to make the decision; this is known as the substituted judgement principle. Some jurisdictions also place an onus on the substitute decision-maker to ascertain, and sometimes put into effect, the will and preferences of the person subject to guardianship and/or involve them in making a decision.

The exact nature of how guardians exercise their functions in each jurisdiction differs according to the duties and responsibilities of guardians, and the principles that apply in respective legislation. Appendix One summarises the relevant provisions in some provinces of Canada that lend support to the maintenance of a person's decision-making autonomy and the use of informal supporting mechanisms to make decisions instead of substitute decision-making through guardianship.

In New South Wales, Western Australia and the Northern Territory, legislation provides an obligation for guardians and administrators to consult with and take into account the views of the person they are responsible for, however the paramount consideration is a responsibility to act in the best interests of the person, that is, in a protective capacity rather than in accordance with the person's wishes or expressed opinions.[16] In Victoria and Tasmania, guardians and administrators are obliged to give equal consideration to the best interests of the person, the wishes of the person and the least restrictive alternative; however subsequent provisions give additional weight to the requirement to act in a person's best interests.[17] In Queensland and the Australian Capital Territory, guardians are obliged to the greatest extent possible to act in a way that, in Queensland, encourages the person to make their own decisions and to take into account the views and wishes of those under guardianship, and in the Australian Capital Territory, to give effect to the person's wishes so far as they can be determined.[18] In South Australia, a substituted judgement obligation is applied so that the paramount consideration for a guardian must be what, in the opinion of the guardian, would be the wishes of a person if they were not 'mentally incapacitated'.[19]

[15] Ibid 133, 139.
[16] *Guardianship Act 1987* (NSW); *Guardianship and Administration Act 1990* (WA); *Adult Guardianship Act* 1988.
[17] *Guardianship and Administration Act 1986* (Vic); *Guardianship and Administration Act 1995* (Tas).
[18] *Guardianship and Administration Act 2000* (Qld); *Guardianship and Management of Property Act 1991* (ACT).
[19] *Guardianship and Administration Act 1993* (SA).

Critiques of guardianship and calls for further reform

Disability rights movement and deinstitutionalisation

It is recognised that the changing view from people with disability being seen as limited rights-bearers to people with the potential for full legal capacity has been a paradigm shift brought about by decades of activism by the disability community.[20]

In the latter part of the twentieth century, coinciding with civil rights movements generally, there was a growing recognition and advocacy for the equal rights of people with disability as citizens. This movement was led by family members of people with disability and professionals as well as people with disability themselves.[21] There was a corresponding emphasis on the integration of people with disability into the community, underpinned by the principles of normalisation and social role valorisation, which in turn, had a profound effect on disability policy, programs and services.[22]

The movement of people with intellectual disability from large-scale residential facilities to community-based living, known as deinstitutionalisation, also began in the 1960s and 1970s,[23] and is recognised as one of the most significant changes in human services to occur in the twentieth century.[24]

Principles and theories of normalisation

Scandinavian countries led the way in relation to the deinstitutionalisation of people with intellectual disability and were at the forefront of the 'normalisation' movement. Guardianship reforms in Australia and Canada reflected the developments in Scandinavian countries.[25]

Normalisation emerged as a concept in Scandinavian countries in the 1960s[26] and was associated with assisting people with disability to lead as close to 'normal' lives as possible, including access to community living, education and employment. First conceived by Bank-Mikkelson,[27] and later further developed by Nirje,[28] normalisation was an expression of the ideological concept of inclusiveness.[29]

'Social role valorisation', developed by Wolfensberger, extended the concept of normalisation, by advocating that the highest goal of normalisation should be the creation, support and defence of valued social roles for those who have been, or are at risk of being, devalued, including those with disability.[30] The transition from institutions to community living for people with disability was consistent with both normalisation and social role valorisation.

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[20] Kristin Booth Glen, 'Changing paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond' (2012) 44(1) *Columbia Human Rights Law Review* 93, 123.
[21] M R Feigan, *the Victorian Office of the Public Advocate: A First History 1986-2007* (PHD thesis, School of Social Sciences, Latrobe University, 2011).
[22] Lesley Chenoweth 'Closing the Doors: Insights and Reflections on Deinstitutionalisation' (2000) 17(2) *Law in Context* 77, 82.
[23] L Young, A Ashman and P Grevell, 'Closure of the Challinor Centre II: An Extended Report on 95 Individuals after 12 Months of Community Living' (2001) 21(1) *Journal of Intellectual and Developmental Disability* 51, 52.
[24] Lesley Chenoweth above n 22, 80.
[25] Robert M Gordon, above n 2, 63.
[26] N E Bank-Mikkelsen, '*A Metropolitan Area in Denmark: Copenhagen in Implications*' (1969) in R Kugel and W Wolfensberger (eds), *Changing Patterns in Residential Services for the Mentally Retarded*, Presidential Committee on Mental Retardation, Washington D.C., 227–254.
[27] Ibid.
[28] B Nirje, '*The Normalisation Principle and its Human Management Implications*' (1969) in R Kugel and W Wolfensberger (eds), *Changing Patterns in Residential Services for the Mentally Retarded*, Presidential Committee on Mental Retardation, Washington D.C., 227–254.
[29] J A Nottestadt, '*Deinstitutionalization and Mental Health Changes Among People with Mental Retardation*' (Doctoral Thesis, Faculty of Medicine, Norwegian University of Science and Technology, 2004) 17.
[30] Wolfensberger, W. 2011, 'Social Role Valorisation: A Proposed New Term for the Principle of Normalization', Mental Retardation, 49(6):435.

The concept of 'dignity of risk', which is used by advocates of supported decision-making, can be defined as "the placement of greater value on respecting the individual's right to decide, even when a person's choices may seem foolish to others, than on protecting the 'best interests' of the individual".[31] It can also be traced back to Wolfensberger's thesis of social role valorisation.

The recognition of the interdependency of human beings

It is often argued that supported decision-making simply recognises the way in which most adults function in their daily lives, drawing on the advice, opinions and skills of family, friends and colleagues as well as professionals and experts to inform individual decision-making when needed.[32]

> "In complex, postindustrial and postmodern societies there is a high level of dependency upon the skills, acumen, ability, and knowledge of others when a variety of decisions are to be made. Many individuals use accountants and investment brokers, some purchase the services of lawyers, others seek the counsel of members of the clergy. Most use the services of health care professionals, who will often assist with complex health care decision-making."[33]

Many people with disability similarly depend upon social networks of family members, friends and others to assist them to make decisions at different times and to varying degrees.[34] When the human condition is viewed as one of interdependency and vulnerability, this leads to a different understanding of independence and autonomy.[35] The concept of 'relational autonomy' recognises that while we value self-determination, the reality is that we are dependent on others to varying extents to achieve this independence.[36]

Independence, particularly for people with disability, has often been defined in terms of self-care activities. It is generally equated with the ability to do things such as cooking, washing, dressing, toileting, making the bed, and writing and speaking without help or assistance.[37] People with disability, however, have redefined independence as the ability to obtain assistance when and how one requires it.[38]

Many have argued that the notion of independent decision-making is also highly ethnocentric and reflective of a western idea of autonomy.[39] Cross-cultural researchers and theorists have described societies, particularly Asian, African and some European cultures where there is an interdependent approach to agency and decision-making and where it is the norm to make decisions collectively within the context of families and communities.[40]

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[31] P A Hommel, '*The More Things Change: Principles and Practices of Reformed Guardianship*' (1996) in M Smyer et al (eds), *Older Adults Decision-Making and the Law* (Springer Publishing, 1996) 182-201 in Robert M Gordon, above n 2, 63.
[32] Terry Carney, *'Participation, Rights, Family-Decisionmaking and Service Access: A Role for Law?'* (Legal Studies Research Paper No 12, Sydney University Law School, 2012) 18.
[33] Robert M Gordon, above n 2, 65.
[34] Terry Carney, 'Participation and Service Access Rights for People with Intellectual Disability: A Role for Law?' (2013) 38(1) *Journal of Intellectual and Developmental Disability*, 59.
[35] Solveig Magnus Reindal, 'Independence, Dependence, Interdependence: Some Reflections on the Subject and Personal Autonomy' (1999) 14(3) *Disability and Society* 353.
[36] C H Kennedy, 'Social Interaction Interventions for Youth with Severe Disabilities Should Emphasize Interdependence' (2001) 7(2) *Mental Retardation and Developmental Disabilities Research Reviews* 122 in J Watson, 'Supported Decision Making for People with Severe or Profound Intellectual Disability: We're All in This Together Aren't We?' (2011) *Sixth Annual Roundtable on Intellectual Disability Policy*, 42.
[37] Solveig Magnus Reindal, above n 35.
[38] P J Rock, 'Independence: What it Means to Six Disabled People Living in the Community' (1988) 3 *Disability, Handicap and Society* 27; Solveig Magnus Reindal, above n 35.
[39] H Markus and S Kitayama, 'Models of Agency: Sociocultural Diversity in the Construction of Action' (paper presented at the Nebraska Symposium on Motivation: Cross-Cultural Differences on the Self, Lincoln Nebraska, 2003) in J Watson, above n 36, 41.
[40] C H Kennedy, above n 36 in J Watson, above n 36, 42.

However, some have argued that care must be taken in relation to the concept of relational autonomy so that the wishes of the individual are not overridden by the needs of the community.[41] There is therefore a delicate balance to be achieved between recognising and accepting the interdependency of people with disability or cognitive impairment in accessing support to make decisions, but being careful to ensure that the wishes and preferences of the individual are also recognised and given effect to.

Convention on the Rights of Persons with Disabilities

Supported decision-making has also been given impetus by the coming into force of the *Convention on the Rights of Persons with Disabilities* (the Convention) in 2008.[42] The Convention has been a significant influence in the movement away from what is seen as paternalistic substitute decision-making towards supporting people with disability to exercise their rights, including their legal capacity.

A general principle of the Convention includes "respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons".[43] Article 12 imposes an obligation on State parties to recognise that people with disability enjoy legal capacity on an equal basis with others. This further includes the right to be recognised as a person before the law and the right to have one's decisions and choices legally validated and recognised.[44] Read with article 5, an overarching principle of equality and non-discrimination, there is an obligation on State parties to ensure support is provided to people with disability to enable them to exercise their legal capacity, so as to avoid discrimination. Discrimination includes the failure to ensure the provision of reasonable accommodation.[45]

Commentators have differing opinions, however, on the interpretation of article 12. Some suggest that it requires the elimination of any determinations of incapacity and the abandonment of guardianship laws, and a subsequent move from substitute decision-making to supported decision-making for all people with disability.[46] Many have argued that the concept of guardianship is inconsistent with article 12.[47] There were complex negotiations that led to the adoption of the final text of article 12 that also addressed the issue of whether guardianship should be expressly permitted in some cases or not.[48] Following adoption by the United Nations General Assembly, the debates have continued into interpretation and implementation.

Upon the ratification of the Convention, Australia made an Interpretative Declaration in relation to article 12 that stated:

> "Australia declares its understanding that the CRPD allows for fully supported or substituted decision-making arrangements, which provides for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards".[49]

[41] Jonathan Herring, *Medical Law and Ethics* (Oxford University Press, 2012) 203.
[42] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008) ('*Convention on the Rights of Persons with Disabilities*').
[43] Ibid art 3.
[44] E Flynn and A Arstein-Kerlake, 'Legislation Personhood: Realising the Right to Support in Exercising Legal Capacity' (conference proceedings at the Australian Guardianship and Administration Council World Conference, Melbourne, 2012) 1.
[45] *Convention on the Rights of Persons with Disabilities* art 5.
[46] E Flynn and A Arstein-Kerlake, above n 44, 1; N O'Neil and C Peisah, above n 4, 2-3.
[47] Michael L Perlin, 'Striking for the Guardians and Protectors of the Mind: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law' (2013) 117 *Penn State Law Review* 1159, 1177.
[48] Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2007) 34 *Syracuse Journal of International Law and Commerce* 429, 449.
[49] *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

Australia appeared before the Committee on the Rights of Persons with Disability in September 2013. In its concluding observations, the Committee noted that it is "concerned about the possibility of maintaining the regime of substitute decision-making, and that there is still no detailed and viable framework for supported decision-making".[50] The Committee recommended that Australia "take immediate steps to replace substitute decision-making with supported decision-making and provide a wide range of measures which respect the person's autonomy, will and preferences and is in full conformity with Article 12 of the Convention".[51] The Committee also recommended that Australia review its Interpretative Declaration relating to article 12 with a view to withdraw it.[52]

Other commentators however have emphasised that the proper application of the principles in guardianship legislation in Australia allow for supported decision-making to be practiced,[53] and advocate for putting these principles into practice to ensure that maximum autonomy can be realised for people with disability.

Regardless of the lack of consensus with respect to the status of guardianship laws in relation to the Convention, there is a general acknowledgement, underpinned by the paradigm shift that the Convention heralds, that the focus must move from what a person with disability cannot do to the supports that should be provided to enable them to make decisions and exercise their legal capacity.

In exercising their legal capacity, article 12 emphasises the provision of safeguards that "respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body".[54] The focus is on the 'will and preferences' of a person as opposed to their 'best interests', the latter of which some commentators argue risks the continuation of a paternalistic approach.[55]

Critiques of substitute decision-making

Aside from the debates in relation to the status of guardianship and the Convention, the impetus for supported decision-making has grown out of a general challenge to the appropriateness and acceptability of guardianship for people with intellectual disability or cognitive impairment.[56] In particular, even though guardianship is supposed to be an intervention of last resort, there are concerns that it is overused and misapplied. This is worrying because of the significant impact on a person's civil rights as a result of a determination of a lack of capacity and an appointment of a substitute decision-maker.[57]

Concerns relate both to the excessive use of guardianship but also the excessive breadth of some guardianship orders.[58] Carney and Tait have highlighted that the accessibility and low cost of Australian guardianship systems have resulted in guardianship applications being sought in preference to other options that are less restrictive and do not infringe on people's rights.[59]

[50] Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10th session, CRPD/C/AUS/CO/1 (2–13 September 2013).
[51] Ibid.
[52] Ibid.
[53] N O'Neil and C Peisah, above n 4, 3-4.
[54] *Convention on the Rights of Persons with Disabilities* art 12(4).
[55] Centre for Disability Law and Policy, National University of Ireland Galway, Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence and Equality, *Mental Capacity Legislation*, August 2011.
[56] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1117.
[57] Ibid.
[58] Ibid 1118.
[59] D Tait and T Carney 'Too Much Access: The Case for Intermediate Options for Guardianship' (1995) 30(4) *Australian Journal of Social Issues* 445.

A related concern is that the process of guardianship disempowers people in that those subject to guardianship may not be involved in the process of making decisions about their lives. It is therefore argued that guardianship may have an anti-therapeutic effect, undermining a person's physical and psychological wellbeing by reducing their sense of control over their lives.[60]

Challenging absolutist concepts of capacity

Related to the discussion and debates about guardianship and substitute decision-making, is a questioning of deterministic approaches to capacity. Capacity has traditionally been viewed by the law as a deterministic and absolute concept. A person either has capacity or they don't, and if they do not have capacity then this disqualifies them from making any decisions or even engaging in a range of activities.[61]

Guardianship laws often operate on a threshold of capacity.[62] That is the appointment of a substitute decision-maker requires a determination that the person has impaired decision-making capacity, even if it is only for that matter for which the appointment is made. Such a determination can have a radical effect on the person's autonomy. They no longer hold the legal authority to make decisions that relate to the matters subject to the guardianship order. This association between lack of competence and autonomy is emphasised by medical ethicists Beauchamp and Childress who comment that although "'autonomy' and 'competence' differ in meaning (autonomy meaning self governance; competence meaning the ability to perform a task or range of tasks), the criteria of the autonomous person and of the competent person are strikingly similar".[63]

In the past, it was assumed that if a person has a disability, then they lacked capacity to make any decisions for themselves; this view sometimes prevails even in current times. But with changes in medical practice, psychology and the growth of the disability rights movement, such views have been challenged.[64] The dominant approach to assessing capacity for guardianship purposes is now predominately a functional one. This new approach has also intersected with reforms in guardianship laws including limited guardianship orders and legislative directions to consider the preferences of the person subject to guardianship.[65]

There is a growing emphasis on strength-based assessments for capacity, where capacity should be related less to the level of a person's cognitive capacity or functional ability, but more to the level of support available to a person or that could be built around the person to make the decision. Values in Action, a United Kingdom organisation states that:

> "the starting point is not a test of capacity, but the presumption that every human being is communicating all the time and that this communication will include preferences. Preferences can be built into the expressions of choice and these into formal decisions. From this perspective, where someone lands on a continuum of capacity is not half as important as the amount and type of support they get to build preferences into choice".[66]

[60] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1120.
[61] For example entering into a binding contract, disposing of property by will or gift, voting, becoming a member of parliament, holding various public offices, having sexual relations with another person, marrying, authorising many forms of medical treatment, engaging in various occupations as discussed in Victorian Law Reform Commission, above n 1, 100.
[62] Shih-Ning Then, above n 5, 144.
[63] Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (Oxford University Press, 6th ed, 2009) 111 in Victorian Law Reform Commission, above n 1, 99.
[64] Kristin Booth Glen, above n 20, 98.
[65] Ibid 93, 115.
[66] S Beamer and M Brookes, *Making Decisions: Best Practice and New Ideas for Supporting People with High Support Needs to Make Decisions* (Values into Action, London, 2001) in Jo Watson, Submission No 19 to the Victorian Law Reform Commission, *Review of the Guardianship and Administration Act 1986*, May 2010, 10.

Supported decision-making

The impetus for supported decision-making

Advocates for supported decision-making are supportive of the concept because of its potential to replace paternalistic substitute decision-making approaches, and its consistency with the principles of the *Convention on the Rights of Persons with Disabilities*.[67] The fact that supported decision-making has the potential to enable a person to retain their legal capacity also means that there is greater protection of a person's autonomy and capacity for self-determination.[68]

Supported decision-making is consistent with the 'social model of disability', which underpins the Convention and recognises that disability is a social construct; the result of a society that places physical, social and attitudinal barriers in the way of people with disability.

The potential to develop and enhance the overall physical and psychological wellbeing of people with disability is also recognised through the process of supported decision-making, which in turn could have positive health outcomes and improve the person's quality of life.[69]

At a symbolic level, Carney for example, discusses supported decision-making as "an opportunity to re-imagine the disabled legal subject".[70]

These normative aspects of supported decision-making are well articulated in literature, and are arguably a driving factor behind the current momentum as an alternative to guardianship.

The concept of supported decision-making

As a concept, supported decision-making embraces a wide range of models in theory, practice and legislation that have different degrees of alignment with the normative aspects discussed above in terms of maximising autonomy, retaining legal capacity, and exercising self-determination.

In general, the concept of supported decision-making differs from substitute decision-making in that a substitute decision-maker makes a decision on behalf of a person, whereas a supported decision involves the participation of, and ultimately decision by, the person concerned.[71] A handbook on the Convention produced by the United Nations describes supported decision-making in the following terms.

> "With supported decision-making, the presumption is always in favour of the person with a disability who will be affected by the decision. The individual is the decision-maker; the support person(s) explain(s) the issues, when necessary, and interpret(s) the signs and preferences of the individual. Even when the person with a disability requires total support, the support person(s) should enable the individual to exercise his/her legal capacity to the greatest extent possible, according to the wishes of the individual. This distinguishes supported decision-making from substituted decision-making, such as advance directives and legal mentors/friends, where the guardian or tutor has court authorized power to make decisions on behalf of the individual without necessarily having to demonstrate that those decisions are in the individual's best interests or according to his/her wishes".[72]

[67] Terry Carney, above n 34, 59.
[68] Ibid; Office of the Public Advocate (South Australia), *Annual Report 2012* (2013) 54.
[69] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1127.
[70] Terry Carney, above n 34, 62 in Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1127.
[71] Victorian Law Reform Commission, *Guardianship: Consultation Paper 10* (released March 2011) 117.
[72] United Nations, Handbook for Parliamentarians – From Exclusion to Equality: Realising the Rights of Persons with Disabilities (United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and Inter-Parliamentary Union, 2007) 89-90.

In contrast to substitute decision-making, supported decision-making usually involves the person retaining their legal powers of decision-making,[73] although a third party may provide assistance or support to make or communicate the decision. Sometimes this arrangement is authorised by law, but it can also be an informal arrangement. Importantly, it means that a person retains their autonomy and agency to make decisions.

It also reflects efforts to provide better ways of recognising and meeting the needs of adults who have difficulty with certain areas of decision-making but who could make their own decisions "with a little friendly help".[74] In the absence of appropriate support, these adults could be inappropriately subjected to guardianship.

Models of supported decision-making

The recognition and development of supported decision-making models commonly see them portrayed as part of a linear stairway leading downwards from autonomous decision-making to substitute decision-making. But as Carney and Beaupert have recognised, it is the middle of the stairway, between autonomous and substitute decision-making that attracts the most attention from policy makers.[75]

Supported decision-making models may be informal, formalised through agreements, or provided for by legislation. If reflected in legislation, they may sometimes involve the appointment of supporters or assistant decision-makers by a court.

Circles of support

While more reflective of collective or collaborative decision-making, 'circles of support' are often spoken about as one of the models of supported decision-making. "A circle of support is a group of people, typically family members and friends, who meet regularly with a person with a disability to help that person formulate and realize his or her hopes or desires."[76] This model is focused on invigorating a natural support network for people with disability.[77] Watson describes the role of the circle of support as being to "collectively represent the person's wishes and best interests, identify and weigh up the available range of choices, implement decisions and review the impact of decisions, both positive and negative, on the person and others".[78]

Circles of support can vary in their formality, but the common factor is the collective and collaborative nature of decision-making by a group of people representing the wishes of the person with disability.

It is recognised that this can be particularly challenging for those people with moderate to severe intellectual disability who are highly reliant on others for communication. While many people with intellectual disability have strong connections with family, friends and the community, this is not the case for everyone. Some people may have "small, highly restricted social networks limited to interactions with other people with intellectual disability, family members and paid workers".[79] Despite these challenges, many advocate for the importance of obtaining and interpreting the preferences, issues and wants of people with severe or profound intellectual disabilities utilising open, transparent and collaborative approaches.[80]

[73] Terry Carney, above n 34, 60.
[74] Robert M Gordon, above n 2, 71.
[75] Terry Carney and Fleur Beaupert, 'Public and Private Bricolage – Challenges Balancing Law, Services and Civil Society in Advancing CPRD Supported Decision-Making' (2013) 36(1) *University of New South Wales Law Journal* 175, 183.
[76] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1123.
[77] Ibid.
[78] J Watson, above n 66, 16.
[79] J Watson, above n 36, 39.
[80] C Fyffe et al 'The Next Steps: Adults with a Disability and Family Carers' (paper presented at National Disability Services Conference, Melbourne: Carers Association Victoria, 2010); J Watson, above n 36.

For example, Scope (a non-government service provider based in Victoria) suggests that consideration should be given to the provision of additional resources to establish, strengthen and extend the natural supports that might be present in vulnerable decision-maker's lives, rather than substituting them with professional services.[81]

The stepped model

The Office of the Public Advocate in South Australia has incorporated the many decision-making options into what they describe as a 'stepped model'. Previously, decision-making was often conceived as being binary in nature, that is either fully autonomous or, if this was not possible, as requiring substitute decision-making by another person or entity.

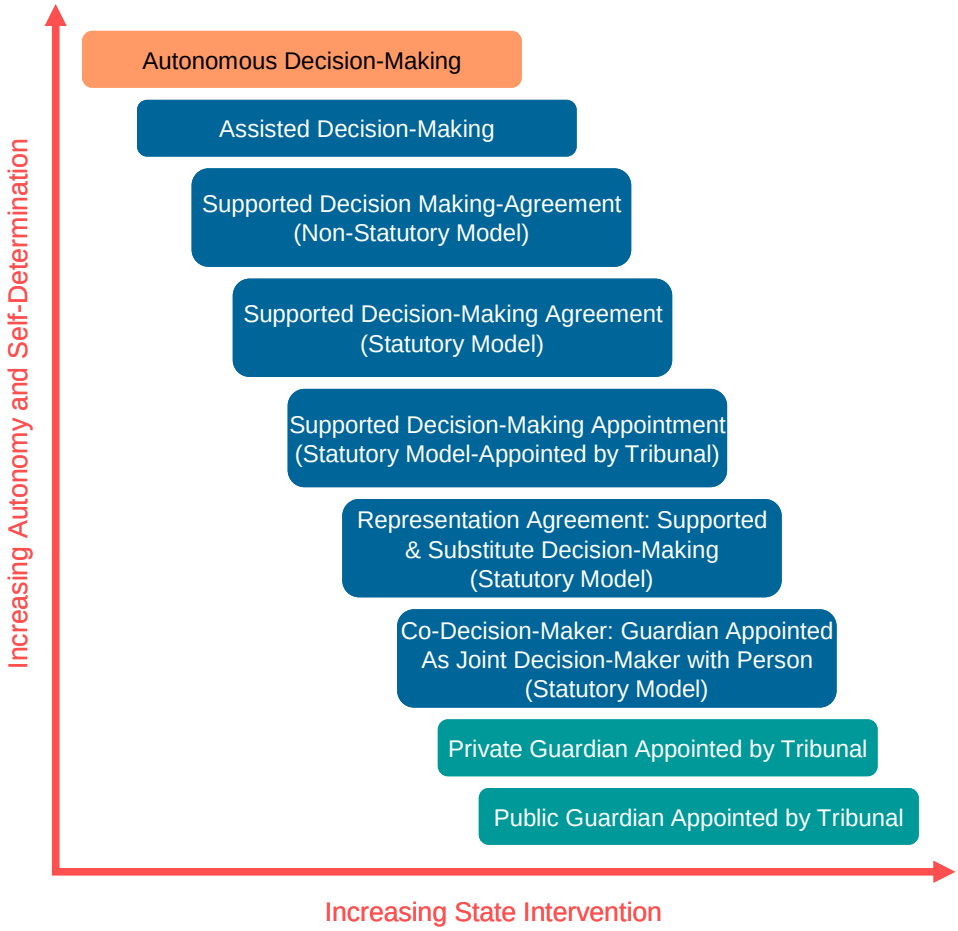
The stepped model presents the range of decision-making options as a continuum (as seen in Figure 1),[82] progressing from more to less autonomous decision-making by the person depending on the degree of third party intervention in the arrangement. As Carney noted, the model provides for "a more granular range of choices in place of the more binary one of making or denying guardianship…".[83]

The stepped model references a variety of supported decision-making mechanisms, as well as options such as representation agreements and co-decision-making, while still acknowledging substitute decision-making arrangements. The components of the model are briefly described below:

- Autonomous decision-making refers to situations where assistance or support is not necessarily required, although assistance, support and advice may be sought by a person.
- Assisted decision-making involves assistance with collecting information, explanation of alternatives or communication.
- A supported decision-making agreement may be entered into by a person where they want to document the involvement of another person in their decision-making arrangements. This may be informal or supported by legislation. Further along the continuum are arrangements whereby a tribunal or court may appoint a person to be a supporter.
- A representation agreement provides for an agreement between the individual and another person to support the person to make decisions or make decisions on their behalf. It may also be supported by legislation.
- A co-decision-maker may be appointed by a court or tribunal to make decisions with the person.
- Finally, substitute decision-making may involve the appointment of a private or public guardian.[84]

[81] J Watson, above n 66, 16.
[82] J Brayley 'Supported Decision-Making – A Case for Change' (presentation at the Supported Decision Making Seminar, hosted by Queensland Advocacy Incorporated, Brisbane, 28 June 2013).
[83] T Carney, 'Guardianship, 'Social' Citizenship, and Theorising Substitute Decision Making Law' in I Doren and A Soden '*Beyond Elder Law: New Directions in Law and Ageing*' (Springer, 2012), 17 in Office of the Public Advocate (South Australia), above n 68, 55.
[84] Office of the Public Advocate (South Australia), above n 68, 58.

Figure 1 The Stepped Model of Supported and Substituted Decision-Making



Source: Office of the Public Advocate (South Australia), Annual Report 2012 (2013) 58.

Legislative regimes

Legislative regimes for supported decision-making have been introduced in some provinces of Canada as well as various Scandinavian and European countries. This part of the literature review provides an overview of some of the international jurisdictions that have implemented supported decision-making legislation and the nature of those schemes. Appendix One provides a summary of the legislative models in some provinces of Canada.

Canada

Canada has been at the forefront of guardianship reform in terms of embedding alternatives to substitute decision-making in guardianship legislation. This process has sometimes been referred to as the 'third wave' of guardianship reform.[85]

The first wave of reform occurred in the 1970s and was associated with reviewing the laws dealing with 'committeeship' (court ordered guardianship and trusteeship) and focused on legislative models built around functional disability and partial guardianship as well as an avoidance of characterising adults as 'lunatics' or 'incapable'.[86] The second wave of reform was concentrated on adult protection, with many provinces introducing comprehensive adult protection schemes designed to deal with cases of abuse and neglect, particularly of the elderly.[87]

[85] Robert M Gordon, above n 2, 61.
[86] Sarah Burningham, 'Developments in Canadian Adult Guardianship and Co-decision Making Law' (2009) 18 *Dalhousie Journal of Legal Studies* 119, 123; Robert M Gordon, above n 2.
[87] Sarah Burningham, above n 86, 138; Robert M Gordon, above n 2.

The third wave focused on new concepts of decision-making and liberal tests for capacity,[88] culminating in the recognition of assisted or supported decision-making in the guardianship legislation of many provinces of Canada such as Alberta, Saskatchewan, the Yukon and British Columbia. These legislative models are explored below.

Alberta

The *Adult Guardianship and Trusteeship Act* became law in 2009. While it retained and modernised a system of adult guardianship and trusteeship in Alberta,[89] it also introduced two new decision-making options: supported decision-making authorisations and co-decision-makers.

Supported decision-making authorisations

Supported decision-making authorisations are personal appointments where an adult forms an agreement with one to three other people, known as supporters, to assist them when making a lifestyle decision.[90] The adults who might utilise these supported decision-making authorisations are described as having the capacity to make their own decisions but "would like to have someone they trust help them in the decision-making process".[91] The supporter does not have the power to make legally enforceable decisions on behalf of the person, but a decision made or communicated with the assistance of a supporter is considered to be a decision of the person.[92]

The legislative provisions authorise supporters to obtain personal information they need to assist the person to make a decision[93] and public authorities are authorised to disclose personal information about a supported adult to a supporter who is authorised to access it.[94] Supporters are also protected from liability if they act in good faith while exercising their authority or carrying out the duties of the supporter in accordance with the Act.[95]

Co-decision-makers

In contrast to supported decision-making authorisations, co-decision-making orders are court appointments for joint decision-making, however they must be made with the consent of the adult.[96] They are described as appropriate where an adult's capacity to make decisions is significantly impaired but they can still make decisions with appropriate support.[97]

Co-decision-making orders only apply to non-financial decisions and operate by requiring the appointed co-decision-maker and the person to work together and agree before proceeding with a decision.[98] The adult, however, has the final say and their view takes precedence.[99]

Like supporters, co-decision-makers are protected from liability if they act in good faith while exercising the responsibilities of the role.[100] They are also entitled to all personal information from public bodies, except financial information, about the assisted adult relevant to carrying out the duties and responsibilities of the co-decision-maker.[101]

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[88] Robert M Gordon, above n, 62.
[89] Victorian Law Reform Commission, above n 71, 120.
[90] *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 4.
[91] Alberta Human Services, *Supported Decision-Making: Adult Guardianship and Trusteeship Act* (5 September 2013) Government of Alberta <http://humanservices.alberta.ca/guardianship-trusteeship/opg-guardianship-supported-decision-making.html>.
[92] *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 6.
[93] Ibid s 9.
[94] Ibid.
[95] Ibid s 10.
[96] Ibid s 13.
[97] Alberta Human Services, above n 91.
[98] *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 12; Victorian Law Reform Commission, above n 71, 121.
[99] Victorian Law Reform Commission, above n 71, 121.
[100] *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 23.
[101] Ibid s 22.

British Columbia

The *Representation Agreement Act* (RSBC 1996, c405) was enacted in 2000 as part of a package of reforms to the guardianship laws in British Columbia.[102] Guardianship in British Columbia, called 'Committeeship', is governed by the *Patient's Property Act* (RSBC 1996, c349) and can occur via a court order or a Certificate of Incapability, signed by the director of a provincial mental health facility, which includes most public hospitals. Committeeship requires a finding that the adult is 'mentally incompetent' and results in the appointment of a substitute decision-maker (either a private party such as a family member or the Public Guardian and Trustee).[103]

Representation agreements

The stated purpose of the *Representation Agreement Act* (RSBC 1996, c405) is to provide a mechanism for adults to decide in advance how, when and by whom decisions about their health care, personal care or routine management of their financial affairs will be made if they become incapable of making decisions independently. It is also intended to avoid the court having to appoint a person to help the adult make decisions should they become 'incapable'.[104]

A representation agreement is therefore somewhat similar to a power of attorney,[105] except that there is a positive obligation on the representative to consult with the adult when helping the adult to make decisions or making decisions on behalf of the adult.[106]

Furthermore, an adult may make a representation agreement even if they do not have capacity for certain matters. For example, an adult can make a standard representation agreement even if the adult is incapable of making a contract; managing his or her own health care, personal care or legal matters; or attending to the routine management of his or her own financial affairs.[107] A representation agreement with standard provisions enables authorisation for the representative to make decisions about the adult's personal care, routine management of financial affairs, health care and legal services.[108]

An adult can only make a non-standard representation agreement if the adult is capable of understanding the nature and consequences of the agreement.[109]

Representatives must consult with the adult when helping them to make decisions, and must comply with the wishes of the adult to the extent it is reasonable to do so. However, they can also make decisions on behalf of the adult.[110]

A representative can access all information and records that relate to the incapability of the adult or an area of authority granted to the representative,[111] and is protected from liability if they act honestly and in good faith and in accordance with the scope of their duties set out in the Act.[112]

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[102] Nidus Personal Planning Resource Centre and Registry, *A Study of Personal Planning in British Columbia: Representation Agreements with Standard Powers* (2010) Nidus < http://www.nidus.ca/PDFs/Nidus_Research_RA7_InAction.pdf>; Nidus Personal Planning Resource Centre and Registry, *Experiences of adults living with Fetal Alcohol Spectrum Disorder and their personal supporters in making and using a Representation Agreement* (2009) Nidus <http://www.nidus.ca/PDFs/Nidus_Research_RA_FASD_Project.pdf>.

[103] Nidus Personal Planning Resource Centre and Registry, *A Study of Personal Planning in British Columbia*, above n 102; Nidus Personal Planning Resource Centre and Registry, *Experiences of adults living with Fetal Alcohol Spectrum Disorder*, above n 102.

[104] *Representation Agreement Act*, RSBC 1996, c 405, s 2.

[105] Victorian Law Reform Commission, above n 71, 122.

[106] *Representation Agreement Act*, RSBC 1996, c 405, s 16.

[107] Ibid s 8.

[108] Ibid s 7.

[109] Ibid s 10.

[110] Ibid s 16.

[111] Ibid s 18.

[112] Ibid s 23.

Where a representative is appointed to assist in making, or to make, decisions in relation to an adult's financial affairs, a monitor must also be appointed to ensure that a representative is acting in accordance with their duties.[113] Monitors may also be appointed for decision-making in relation to non-financial matters.[114]

A qualitative study of representation agreements in British Columbia

A qualitative study of 989 representation agreements with standard powers was undertaken between 2006 and 2009. This study found that:

- People of all ages (from 19 to 99 years old) made representation agreements suggesting that the agreements were an important planning tool for the transition from youth to adulthood;
- Monitors were appointed in over half of the cases, which was interpreted to reflect that people valued that safeguard;
- 84% of representation agreements named more than one person, which was interpreted to reflect that people valued a 'team approach' to support; and
- Friends were chosen as representatives as often as relatives, which was interpreted to reflect that people's support networks extended beyond their immediate family.[115]

Saskatchewan

The *Adult Guardianship and Co-decision Making Act* has been in force since 2001. It provides for both personal and property co-decision-makers. The Victorian Law Reform Commission noted that while co-decision-making appointments have been available for many years, only a handful have ever been made, which may be due to the cost involved in making an application to the Supreme Court.[116]

Personal co-decision-maker

Personal co-decision-makers are appointed by the court and do not require the consent of the adult.[117] They are considered to be appropriate when an adult does not have full capacity to make decisions, but can still participate in the decision-making process.[118] While a personal co-decision-maker may advise the adult and shares decision-making authority, the co-decision-maker must acquiesce in a decision made by an adult. A co-decision-maker cannot, for example, refuse to sign a contract to give effect to a decision if a reasonable person could have made the decision and no harm to the adult is likely to result from the decision.[119]

The appointment of a personal co-decision-maker requires a capacity assessment. The court must be satisfied that the adult's capacity is impaired to the extent that the adult requires assistance in decision-making in order to make reasonable decisions with respect to some or all of the matters listed in the Act.[120]

The personal co-decision-maker is protected from liability if acting in good faith and pursuant to the Act.[121]

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[113] Ibid s 20.
[114] Ibid s s12.
[115] Nidus Personal Planning Resource Centre and Registry, *A Study of Personal Planning in British Columbia: Representation Agreements with Standard Powers* (2010) Nidus < http://www.nidus.ca/PDFs/Nidus_Research_RA7_InAction.pdf>; Nidus Personal Planning Resource Centre and Registry, *Experiences of adults living with Fetal Alcohol Spectrum Disorder and their personal supporters in making and using a Representation Agreement* (2009) Nidus <http://www.nidus.ca/PDFs/Nidus_Research_RA_FASD_Project.pdf>.
[116] Victorian Law Reform Commission, above n 71, 122.
[117] *Adult Guardianship and Co-decision Making Act*, SS 2000, c A-5.3, s 14.
[118] Law Foundation of Saskatchewan, *Adult Guardianship in Saskatchewan: Application Manual* (2002) Government of Saskatchewan <http://www.publications.gov.sk.ca/details.cfm?p=9265>.
[119] *Adult Guardianship and Co-decision Making Act*, SS 2000, c A-5.3, s 17.
[120] Ibid s 14.
[121] Ibid s 70.

Property co-decision-maker

Property co-decision-makers are similar to personal co-decision-makers except that the co-decision-maker advises the adult in respect of matters relating to his or her estate. Decisions are made jointly, however a co-decision-maker must also acquiesce in a decision made by an adult. For example, the co-decision-maker must not refuse to sign a document to give effect to a decision if a reasonable person could have made the decision and no loss to the adult's estate is likely to result from the decision.[122] Further, any decision made, action taken, consent given or thing done by a property co-decision-maker in good faith respecting any matter within her or her authority with the adult is deemed for all purposes to have been made as though the adult had capacity in respect of the matter.[123]

Like personal co-decision-makers, property co-decision-makers are protected from liability if they act in good faith and pursuant to the Act.[124]

Yukon

The *Decision Making, Support and Protection to Adults Act* commenced in 2003. As well as containing a provision for the Supreme Court to appoint guardians, it also provides for supported decision-making agreements and representation agreements.

Supported decision-making agreements

A supported decision-making agreement is entered into voluntarily by an adult,[125] however must be in the prescribed form.[126]

The agreement authorises associate decision-makers to assist a person with making and communicating decisions. These agreements are for adults who can make their own decisions with some help. The associate assists the individual to make decisions. An adult must understand the nature and effect of the agreement to enter the agreement.[127]

The purpose of the supported decision-making agreement is to:

- Enable trusted friends and relatives to help adults who do not need guardianship and are substantially able to manage their own affairs, but whose ability to make or communicate decisions with respect to some or all of those affairs is impaired; and
- Give legal status to persons providing support to adults to enable them to participate in discussions with others when the adult is making decisions or attempting to obtain information.[128]

The role of the associate decision-maker under the agreement is to assist the adult to obtain and assess relevant information, to make and express a decision, to communicate the decision, and to endeavour to ensure that the adult's decision is implemented.[129] The agreement does not authorise the associate to make decisions on behalf of the adult.[130]

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[122] Ibid s 42.
[123] Ibid s 49.
[124] Ibid s 70.
[125] *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, schedule A, s 6.
[126] Ibid s 8.
[127] Ibid s 6.
[128] Ibid s 4.
[129] Ibid s 5.
[130] Yukon Health and Social Services, *Adult Protection and Decision Making Act- Supported Decision Making Agreements* (25 August 2010) Yukon Health and Social Services <http://www.hss.gov.yk.ca/supported_agreements.php>.

An associate decision-maker has a right to assist the adult to obtain any information to which the adult is entitled in relation to a decision that the associate decision-maker is assisting the adult to make.[131] An associate decision-maker is protected from liability if he or she acts honestly, in good faith and in the best interests of the adult; and exercises the care, diligence, and skill of a reasonably prudent person.[132]

Representation agreements

A representation agreement authorises a representative to make a limited range of daily living decisions regarding the adult's personal or financial affairs, as set out in the agreement. It is described as appropriate for adults who recognise that they experience difficulty when making some decisions.[133] However, an adult must understand the nature and effect of the agreement to enter into it.[134]

A representation agreement is entered into voluntarily by the adult,[135] and is not made by a court, but must be in a prescribed form.[136]

Although representatives are authorised to make decisions,[137] they must consult with the adult, comply with the adult's wishes if it is reasonable to do so, and encourage and assist the adult to make decisions or participate in decision-making.[138] A decision made with the assistance of, or by, a representative shall be recognised at law as a decision of the adult.[139]

A representative has the right to assist the adult to obtain any information related to the performance of the duties of the representative under the agreement,[140] and is protected from liability if they act within the limits of their authority in the agreement.[141]

Europe

Some unique models of alternatives to guardianship have also been developed in several European countries including Norway, Sweden, Denmark and the Netherlands. In these countries, there is a focus on alternative ways to provide support and assistance for decision-making for adults with disability, without removing their legal capacity. Unique to these approaches is the dependence (at least in Sweden) on an inclusive system of entitlement to support services for people with disability. This part will briefly discuss those models as well as developments in Ireland and the United Kingdom.

Sweden

In Sweden there are two forms of support: the *god man* (which translates to 'mentor' or 'good man'), which is the preferred and dominant model of support; and a trustee (*forvaltare*), which is an appointment of last resort, similar to a guardian.[142]

[131] *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, schedule A, s 10.
[132] Ibid s 13.
[133] Yukon Health and Social Services, above n 130.
[134] *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, schedule A, s 15.
[135] Ibid.
[136] Ibid s 17.
[137] Ibid s 15.
[138] Ibid s 23.
[139] Ibid s 25.
[140] Ibid s 24.
[141] Ibid s 26.
[142] Kristin Booth Glen, above n 20, 140; Stanley S Herr, *Self Determination, Autonomy and Alternatives for Guardianship* <http://ruralinstitute.umt.edu/transition/Handouts/Self-Determination.Herr.pdf>.

The *god man* (mentor) must act in consultation with, and with the consent of, the person and assists the person with personal, legal and financial decisions. The appointment of a *god man* does not involve a loss of legal capacity for the adult.[143] Procedures for appointment are relatively informal, and without cost to the person. While applications can be made to the district court, given most cases are based on consent, there is usually a review of the documents by the court, with no appearance or hearing necessary.[144] While most *god men* are close relatives or friends, every *god man* is paid a fee, the amount of the fee dependent on the complexity of the case. Professionals including lawyers, social workers and accountants can also be appointed.[145]

The *forvaltare* is the intervention of last resort and, unlike the *god man*, results in the loss of legal capacity for the person.[146] It is mainly used in situations involving financial interests such as funds above a certain value.[147]

In addition, Sweden has legislated for the right of every person with severe physical or mental disabilities to have an entitlement to support services. The Bill (*Lag om stod och service till vissa funktionshindrade*) came into effect in 1994 and gives people with functional disabilities the legal right to ten different kinds of support and services.[148] For example, the law makes a personal assistant a mandated support service for people with disability covered by the scope of the legislation, which can be provided directly by the government or by a cash allowance to the person with disability who can employ their own personal assistant.[149]

Each of Sweden's 270 municipalities has an office of public trusteeship administration that is charged with oversight of *god men* and *forvaltares*. Mentorship is by far predominant over *forvaltares*. Mentorship has been in existence since 1976, where at the time some 30,000 Swedes were under guardianship. But by 1985, the availability of the mentor option reduced the number of people subject to guardianship to 17,000.[150]

Advocates for the Swedish system argue that it provides for a range of least restrictive alternatives, from support services to mentorships, which do not result in the loss of legal decision-making capacity for the adult,[151] and suggest that it is a good model for other countries that are faced with similar challenges. These challenges include how to support people with disability to navigate the array of social services they need without disempowering or disenfranchising them; and how to provide assistance with medical, financial and other issues that were once taken care of by institutional staff who exerted a *de facto* guardianship.[152] Arguably, the entitlement to social support, including personal assistance also diminishes the need for guardianship.

Norway and Denmark

Since 1990, legislation in Norway and Denmark has made provision for two levels of intervention for adults who need assistance with decision-making: the 'assisting representative' (*hjelpeverge*); and the 'support person'. A support person assists the adult to manage their personal needs and with the expression of their interests,[153] and their involvement does not result in the adult losing their legal capacity. If an assisting representative is appointed, the adult's legal capacity is removed only when necessary and the representative's decision will prevail only under carefully defined circumstances.[154]

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[143] Kees Blankman, 'Guardianship Models in the Netherlands and Western Europe' (1997) 20(1) *International Journal of Law and Psychiatry* 47, 55.
[144] Stanley S Herr, above n 142.
[145] Ibid.
[146] Kristin Booth Glen, above n 20, 141.
[147] Kees Blankman, above n 143, 55.
[148] Ibid.
[149] Stanley S Herr, above n 142.
[150] Ibid.
[151] Kristin Booth Glen, above n 20, 142.
[152] Stanley S Herr, above n 142; Kristin Booth Glen, above n 20, 141.
[153] Kees Blankman, above n 143, 55.
[154] Robert M Gordon, above n 2, 63.

Ireland

The *Assisted Decision-Making (Capacity) Bill 2013* was introduced into the Irish parliament in July 2013, and introduces six mechanisms for supporting decision-making for a person including: assisted decision-making; co-decision-making; decision-making representatives; enduring powers of attorney; decision-making orders by the High Court or the Circuit Court; and informal decision-makers.

The explanatory memorandum explains that the Bill "changes the existing laws on capacity, shifting from the current all or nothing status approach to a flexible functional one, whereby capacity is assessed on an issue- and time-specific basis".[155]

Assisted decision-making

The Bill provides for a person who believes that their capacity is in question, or may shortly be in question, to appoint another person (such as a trusted friend or relative) to be a decision-making assistant. The appointment occurs by way of a decision-making assistance agreement.[156] While the decision-making authority stays with the appointer, the decision-making assistant helps the person to access and understand information and to make and express decisions.[157]

Co-decision-makers

A person who considers that their capacity is, or shortly will be, in question may appoint a suitable person to make joint decisions with them.[158] The co-decision-making agreement does not come into effect however until a court approves it. A court may approve a co-decision-making agreement for a person if satisfied that the person lacks capacity to make a decision or class of decisions on their own, but has decision-making capacity if assisted by a suitable person.[159] While the co-decision-maker and the person make joint decisions, the co-decision-maker must acquiesce in a decision made by the person and cannot, for example, refuse to sign a document required to implement the decision if a reasonable person could have made the decision and if no harm is likely to result to the person from the decision.[160]

The role of the co-decision-maker is to explain relevant information and considerations relating to a decision, ascertain the will and preferences of the person, and assist the person to communicate their preferences in making a decision.[161]

Decision-making representatives

A court may appoint a decision-making representative where the court is unable to make a co-decision-making order or has made a declaration that a person lacks capacity even with the assistance of a co-decision-maker.[162]

United Kingdom

The *Mental Capacity Act 2005* (United Kingdom) came into effect in England and Wales in 2007. It provides a legal framework for the care, treatment or support of people who are unable to make decisions for themselves. The Act allows for personal care, health care and treatment to be provided to people who lack decision-making capacity by health care professionals as long as it is in their best interests and the care providers abide by the principles of the Act.[163]

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[155] Explanatory Memorandum, *Assisted Decision-Making (Capacity) Bill 2013* (Ireland), 1.
[156] *Assisted Decision-Making (Capacity) Bill 2013* (Ireland), cl 10.
[157] Ibid cl 11.
[158] Ibid cl 18.
[159] Ibid cl 17.
[160] Ibid cl 19.
[161] Ibid cl 21.
[162] Ibid cl 23.
[163] *Mental Capacity Act 2005* (UK) c 9, s 5.

The Act emphasises supporting people to make their own decisions and/or participating in decisions. This is provided for in the principles of the Act which include, for example, that "(3) a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success; and (4) a person is not to be treated as unable to make a decision merely because he makes an unwise decision".[164]

The Act also provides for people to make a Lasting Power of Attorney.[165]

The Court of Protection may appoint deputies who are family members or friends, to manage the affairs of a person who does not have capacity when they have not planned ahead by making a Lasting Power of Attorney. Deputies may be for property and affairs or health and welfare. There is no public guardian of last resort, but there is a list of professional panel deputies who may be appointed if there is no one else to act as a deputy in the person's life.

Consistent with section 42 of the Act, a Code of Practice has been established under the Act that provides guidance and information about how the Act works in practice. The *Mental Capacity Act 2005* Code of Practice, which has statutory force, provides guidance to anyone working with, and/or caring for, an adult who may lack capacity to make certain decisions. For example, the Code provides guidance on how to implement the Act's five statutory principles, including how to assist a person to make a decision.[166]

Trials of supported decision-making in Australia

Government trials of supported decision-making have been conducted in South Australia and the Australian Capital Territory. Trials are underway in New South Wales and Victoria.

While these trials have contributed to the knowledge and evidence base relating to supported decision-making, they have been based on small numbers of people with particular characteristics, conditions or backgrounds. There have not been any Australian trials involving a large number of participants or featuring participants with diverse characteristics, circumstances and levels of preparedness for increasing decision-making ability.

South Australia

South Australia was the first Australian State to embark on a supported decision-making trial. The South Australian Office of the Public Advocate conducted a trial of supported decision-making from late December 2010 to October 2012.

It involved setting up an agreement between a person with disability and a family member or friend who would act as a decision supporter. In all, 26 people whose capacity for decision-making was impaired as a result of a brain injury, intellectual disability, autism or a neurological disease formed agreements with supporters. Recruitment of participants was initially through referrals from disability service providers and the Office of the Public Advocate. A range of adult participants were engaged, from younger adults who were studying to older people living in residential aged care. Supporters included friends and a range of immediate family members. This trial considered healthcare, accommodation and lifestyle decisions.[167] As a safeguard, a monitor role was established to provide oversight of the process and decisions made using it.[168]

[164] Ibid s 1.
[165] Ibid s 10.
[166] Department for Consitutional Affairs (United Kingdom), *Mental Capacity Act 2005 Code of Practice* (2007) 29.
[167] Office of the Public Advocate (South Australia), above n 68, 56-62.
[168] Margaret Wallace, *Evaluation of the Supported Decision-Making Project* (November 2012) Office of the Public Advocate (South Australia) <http://www.opa.sa.gov.au/resources/supported_decision_making>, 43.

An evaluation of the trial was conducted by Margaret Wallace. It found that the project demonstrated specific benefits to most of the participants involved in the trials. These benefits were seen in their increased confidence in themselves and in their decision-making. There was also evidence of improvement in decision-making skills and growth in their support networks. Increased engagement with the community, either through expanding their options or through making decisions that changed their circumstances, was also reported.[169] Some participants did experience difficulty accessing the money required to give effect to their goals and decisions, with two participants reporting a mismatch between their goals and the decisions of administrators who controlled the funds.[170]

The project infrastructure had two streams: Early Intervention (targeting young adults and people who had been recently diagnosed as having an acquired brain injury or neurological disease); and Alternatives to Guardianship (those adults who would be otherwise subject to guardianship). Limitations of the project were observed in the Alternatives to Guardianship stream.[171]

The target of 20 participants in the Alternative to Guardianship stream was not met. The evaluation cited that organisational constraints and the difficulty of guardians taking on a number of supported decision-making clients (in addition to those under their guardianship) were contributing factors to the discrepancy in successes between the two streams. It was also thought that the greater likelihood for clients of public guardianship to be isolated and not have family or friends who could act as supporters also contributed to the discrepancy.[172]

Carney commented that the pilot also excluded potentially more challenging participants such as those people with mental illness, dementia, or those experiencing abuse, neglect or conflict with family or friends.[173]

In 2013, the South Australian Public Advocate made recommendations to reform state guardianship law to recognise supported decision-making agreements. Recommendations were also made in relation to how supported decision-making may be implemented at a broader community level using a 'population-based model'.[174]

Legislative reform

The South Australian Public Advocate made a recommendation to the South Australian Attorney-General for two legislative changes in relation to supported decision-making. The first change was that the key principles in the *Guardianship and Administration Act 1993* require supported decision-making. The second change would involve the inclusion of new sections in the Act that recognise supported decision-making arrangements.[175]

In its most recent annual report, the Office of the Public Advocate highlighted that the inclusion of an additional principle requiring support should not be considered to be controversial or 'experimental law reform' due to the alignment of the principle with international human rights obligations. The need for more empirical research was acknowledged, however was not viewed as a barrier for this law reform.[176]

[169] Ibid 4-5.
[170] Office of the Public Advocate (South Australia), above n 68, 63.
[171] Margaret Wallace, above n 167, 43.
[172] Ibid 64.
[173] Terry Carney and Fleur Beaupert, above n 75, 92.
[174] Office of the Public Advocate (South Australia), above n 68, 15.
[175] Office of the Public Advocate (South Australia), *Annual Report 2013* (2013).
[176] Ibid 58.

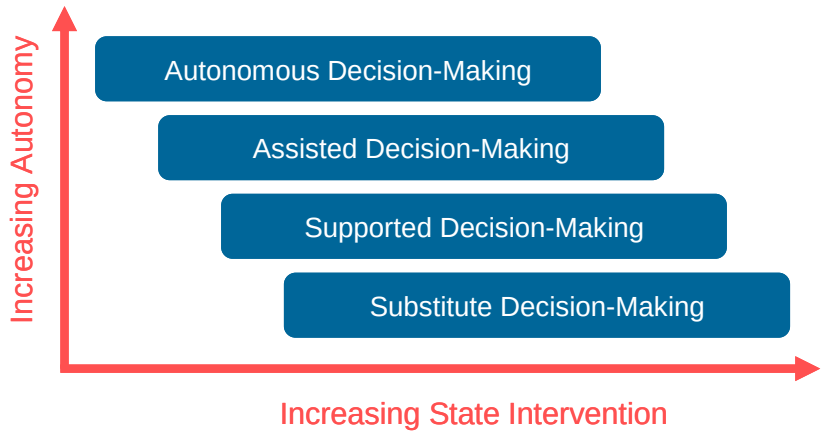
Population-based model of supported decision-making

Subsequent to their supported decision-making trial, the Office of the Public Advocate has adapted a 'population health model' to explore how supported decision-making might be used to uphold the rights of a larger and broader group of people than those involved in the trial.[177] The model is being used to examine the possibility of implementing The Stepped Model via a series of primary, secondary and tertiary interventions. The application of the population-based model is proposed in the context of a simplified version of The Stepped Model (Figure 2).[178]

The simplified model distinguishes assisted and supported decision-making. Assisted decision-making may be provided by a third party who is involved in a transaction with a person, for example, disability or mental health support workers, health workers, bank employees, retail employees or utilities employees.

Supported decision-making occurs when a person invites a third person to provide them with decision-making support and may include activities such as sourcing information, assistance in understanding the consequences of a decision, communicating decisions and other activies related to making and actioning a decision.[179]

Figure 2 A simplified version of the Stepped Model



Source: Office of the Public Advocate (South Australia), Annual Report 2013 (2013) 53.

The South Australian Public Advocate has argued that an effective decision-making regime must provide responses that are proportionate to need, and that the simplified version of The Stepped Model will ensure that the state provides appropriate support measures to protect people's rights, maximise people's autonomy, minimise the delivery and cost of disproportionate and intensive support responses by the state. The Public Advocate has suggested that there should be an expectation that assistance be provided wherever possible within the community. Assistance may take the form of longer discussions, second meetings, information available in plain English and communication assistance.[180]

[177] Ibid 52.
[178] Ibid.
[179] Ibid 53.
[180] Ibid.

The population-based model features three levels of intervention:

- Primary Universal Interventions such as awareness campaigns and stigma reduction targeted at the whole community;
- Secondary Interventions such as the provision of assistance and engaging a decision-making supporter targeted to specific sectors (e.g. disability, health, justice, education and training, finance); and
- Tertiary Interventions such as the facilitation of supported decision-making agreements targeted at specialist non-government providers and some individualised funding facilitators.[181]

Australian Capital Territory (ACT)

The ACT Supported Decision-Making Research Project was conducted by ADACAS (and funded by Disability ACT) to examine supported decision-making in the lead up to the launch of the National Disability Insurance Scheme. It further explored the application of the supported decision-making model developed by the Julia Farr Foundation in partnership with the South Australian Office of the Public Advocate.[182]

More specifically, the project inquired into how supported decision-making might be accessed by people with complex communication needs or those whose social isolation restricted their ability to identify natural decision-making supports. Participants either had a decision-making impairment, or their capacity to make decisions was either unrecognised or undervalued, which reflected a social model of disability.[183]

Six people with varying degrees of decision-making capacity were recruited between November 2012 and January 2013 and participated in the program until its completion in June 2013. They utilised supported decision-making agreements with two parts. The first part provided a brief description of the agreement and who had made it and could generally be shown to third parties. The second part contained a lot of detail about the supporters and the types of decisions they provided support in relation to. The monitor was a key role, providing oversight of the supported decision-making agreement in practice.[184]

A key finding from the trial was that, for each participant, their capacity for self-determination and autonomy was not limited by their ability to make a decision, but by the support they received to exercise their decision-making. Those who received support services experienced lower levels of self-determination as their lives can be governed by the decisions of other people, including family members and service providers.[185]

This is consistent with research into the safety strategies used by people with intellectual disability, which found that people with intellectual disability who also required significant personal support experienced lower level of choice and control in their lives. It was also found that the surrounding circumstances of a person, not their capacity, had the most effect on implementing their personal strategies. The research showed that people implemented their strategies more successfully in more supportive environments.[186]

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[181] Ibid 54-55.
[182] ADACAS Advocacy, *Spectrums of Support: A Report on a project Exploring Supported Decision Making for People with Disability in the ACT* (September 2013), ACT Disability, Aged Care and Carer Advocacy Service <http://www.adacas.org.au/decision-support/copy_of_SupportedDecisionMakingProjectFinalReport.pdf>.
[183] Ibid.
[184] Fiona May, 'ADACAS ACT Initiatives' (presentation at the Supported Decision Making Forum, hosted by Queensland Advocacy Incorporated, Brisbane, 28 June 2013).
[185] ADACAS Advocacy, above n 182.
[186] Sally Robinson, 'Safe at home? Factors influencing the safety strategies used by people with intellectual disability', (2013) *Scandinavian Journal of Disability Research* DOI:10.1080/15017419.2013.781958.

While only based on a small sample, the ACT trial demonstrated that decision-making support, whether informal or formal, can create positive change for individuals, families, service providers and the community more broadly. It also confirmed the need for a spectrum of decision-making supports, from informal to formal, to meet the varied needs and capabilities of individuals.[187]

New South Wales

The New South Wales Office of Ageing, Disability and Home Care, along with the Public Guardian and the NSW Trustee and Guardian have also commenced a supported decision-making pilot. The pilot will run for 12-18 months and will be subject to an independent evaluation.[188]

It will involve 30 participants who receive direct or indirect funded support from the Office of Ageing, Disability and Home Care. Ten of these participants will be subject to an administration order made to the New South Wales Trustee and Guardian, with a sub-group also being subject to a guardianship order.[189] Participants will have a range of circumstances (age, supports, life stage etc). Supporters may be friends, family members, guardians, advocates or carers.[190]

The initial set up of the pilot has found some issues with the availability of supporters for some people. However they have been careful not to exclude potential participants from the pilot if they do not have pre-existing trusted relationships, so that in some cases supporters will be volunteers who do not have to have a previous relationship with the person. The recruitment of pilot participants will be random and not just those who are ready and willing to make decisions with support.[191]

The pilot will not require the use of formal supported decision-making agreements, but they will be available if people want to use them. The pilot aims to find new ways to support people with a disability to make decisions. That is, to learn how participants make decisions, what supporters do, how participants used the available tools and resources and whether they were useful, and whether education sessions increased the knowledge of individuals and service providers. The expected outcomes of the pilot include a draft supported decision-making framework, decision-making tools and resources and other educational material.[192]

Victoria

The Office of the Public Advocate plans to commence a supported decision-making trial in early 2014. The trial will run for 12-18 months and will involve around 20 participants who have an intellectual disability, currently receive very little or no disability support, and are isolated within the community. The Office of the Public Advocate will collaborate with a disability advocacy agency to locate and recruit participants.[193]

Trial participants will have the ability to utilise supported decision-making agreements and will be supported by 20 volunteers, who will be recruited to provide assistance to the trial participants. The trial will be independently evaluated.[194]

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[187] ADACAS Advocacy, above n 182.
[188] Melanie Oxenham, 'Supported Decision Making Pilot in NSW-A Joint Pilot' (presentation at the Supported Decision Making Forum, hosted by Queensland Advocacy Incorporated, Brisbane, 28 June 2013).
[189] Ageing, Disability and Home Care, 'Supported Dcision Making Pilot - Participant Information' (Participant Fact Sheet, Department of Family and Community Services (NSW) February 2013).
[190] Melanie Oxenham, above n 188.
[191] Ibid.
[192] Ibid.
[193] Telephone discussion with Brenda Burgen, Supported Decision-Making Coordinator, Office of the Public Advocate, Victoria (14 October 2013). Final text was approved by the head of Agency.
[194] Ibid.

Critique of supported decision-making

An emerging, but ill-defined concept

Commentators have recognised that supported decision-making remains an ill-defined concept,[195] and that it has "been interpreted as spanning everything from targeted legal powers and authorities through to facilitation of the normal interactions of daily family or social intercourse".[196] Supported decision-making as a concept has been used to describe a wide variety of models ranging from those where the individual with impaired decision-making capacity is the ultimate decision-maker to those where a person appointed by a court or tribunal makes the decision on the basis of what they believe to be the expressed will and preferences of the person. Some would argue that the latter example is not supported decision-making in its true sense. The preference is to reserve the term supported decision-making for those situations where the person being supported has voluntarily entered the arrangement and is the ultimate decision-maker, and to use terms such as co-decision-maker to describe these other versions of supported decision-making.[197]

Shih-Ning Then has commented that literature on the topic has also confused quite distinct models of decision-making, for example it has not distinguished between supported decision-making and co-decision-making models, which are conceptually (and legally) very distinct decision-making regimes.[198]

Related to these concerns is a lack of clarity about how supported decision-making forms part of the systemic mix of services, laws and civil society,[199] and a corresponding acknowledgement that active participation by people with disability is dependent upon the success of supply side reforms (such as government and non-government responsiveness to consumer agency and choice) as well as demand side measures (such as informal supports, advocacy and other measures).[200]

Safeguards

One of the key concerns expressed about supported decision-making is that it may expose vulnerable people with impaired decision-making capacity to manipulation, coercion or abuse.[201]

A number of mechanisms have been introduced in both formal and informal models of supported decision-making in response to the concerns about the vulnerability of people to be subject to exploitation, duress and abuse as part of supported decision-making arrangements. The South Australian trial of supported decision-making introduced the concept of the third party 'monitor' to observe the informal supportive relationship.

In various Canadian models of statutory supported decision-making, safeguards include periodic reviews of the arrangements by courts, the ability for courts to remove supporters where they have acted inappropriately, as well as the appointment of monitors in some situations, particularly those involving property co-decision-making.[202] However as Then argues, outside these mechanisms the onus is really on co-decision-makers and third parties to notify the court of any concerns or changes in capacity that affect the arrangements.[203]

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[195] Terry Carney and Fleur Beaupert, above n 75.
[196] Ibid.
[197] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1120-1121.
[198] Shih-Ning Then, above n 5, 155.
[199] Terry Carney and Fleur Beaupert, above n 75.
[200] Ibid.
[201] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1114.
[202] For example the requirement in British Columbia to appoint a monitor where a representation agreement is made for financial matters under the *Representation Agreement Act*, RSBC 1996, c 405, s 12.
[203] Shih-Ning Then, above n 5, 161.

Some of the further safeguards suggested in Australia have included the registration of informal supported decision-making arrangements and a role for public guardians/advocates to investigate allegations of inappropriate behaviour by supporters.[204]

The discussion in relation to safeguards however opens up complex arguments about the 'dignity of risk' and the right of people with disabilities to take their own risks in decision-making and highlights tensions between autonomy and paternalism.

Many commentators agree that further research is necessary to realise proper safeguards for people with disability in these arrangements.[205] While the aim is empowerment, Kohn, Blumenthal and Campbell argue that without more evidence as to how it will work in practice "there is reason to be concerned that supported decision-making may allow largely unaccountable third parties to improperly influence the decisions of persons with disabilities, thereby disempowering persons with disabilities and undermining their rights".[206]

Can supported decision-making live up to its potential?

Kohn, Blumenthal and Campbell, in their recent review of supported decision-making, express concern about whether, despite its appeal, supported decision-making can achieve its 'lofty goals', empowering individuals with disability to make their own decisions, ensuring these decisions are truly voluntary, and minimising the risk of coercion.[207]

Similarly, Carney warns that there is potential for slippage between the aspirations of policy makers, "keen to expand personal autonomy of action and personalised decision-making, and the harsh realities of actual experience", which is illustrated by numerous jurisdictions that have implemented supported decision-making laws and programs.[208] However as Carney and others have commented, this slippage between goals and aspirations and the realities of putting models into action is not unique to supported decision-making, with issues also emerging with the operationalisation of 'best interests' decision-making in guardianship and the lack of recognition and understanding of enduring powers of attorney.[209]

Net-widening

A further key concern is that an unintended consequence of supported decision-making could be 'net widening', that is, supported decision-making orders may extend to a population broader than those who would have been subject to guardianship, and may inadvertently expand the reach of guardianship.[210] The potential for supported decision-making to turn into informal substitute decision-making is also concerning to many commentators.

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[204] Barbara Carter, *Supported Decision-Making: Background and Discussion Paper* (November 2009) Office of the Public Advocate, Victoria <http://www.publicadvocate.vic.gov.au/file/file/Research/Discussion/2009/0909_Supported_Decision_Making.pdf>, 22.

[205] Shih-Ning Then, above n 5, 133; Terry Carney and Fleur Beaupert, above n 75; Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3.

[206] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1157.

[207] Ibid 1128.

[208] Terry Carney and Fleur Beaupert, above n 75, 193.

[209] Ibid 175, 194.

[210] Ibid 175, 195; Terry Carney, *'Participation Rights, Family Decision-Making and Service Access: A Role for Law'* (2011) *Sixth Annual Roundtable on Intellectual Disability Policy*.

O'Neil and Pesiah express a related concern that legislating for supported decision-making may also lead to the formal court or tribunal appointment of supporters where either informal support for the decision-maker is sufficient or in fact there is no need for a support person.[211] This may occur because people with disability, whether or not they have lost the capacity to make their own decisions, may be under pressure by others to consent to supported decision-making.[212] O'Neil and Pesiah state that "we need to argue for the practical individualised approaches to the assessment of the needs, goals and strengths of people with disabilities to facilitate their decision-making".[213] They also advocate for careful, informed and individualised gatekeeping using current guardianship legislation. That is, ensuring that assessments of capacity are appropriate and task- and situation-specific, and incorporating a hierarchy of risk model, whereby decisions that incur a greater risk require a higher threshold for capacity, and thereby more rigid gatekeeping.[214]

Carney has cautioned that supported decision-making reforms may be misunderstood by stakeholders as being little different from its predecessor, guardianship. He comments, "it has been previously questioned whether the brokerage role of a modern decisional assistant under the supported decision-making model is actually just the functional equivalent to that of a traditional guardian or administrator discharging their statutory duty to first act as an advocate (or the 'eyes ears and voice') for the person they represent".[215]

However, Carney also argues that with the right educative and other measures, supported decision-making should ideally prevent informal substitute decision-making from occurring. He cites the lesson from the South Australian trial of supported decision-making where some participants sought informal decision-making support arrangements to prevent family and friends from taking over their life.[216]

Lack of empirical evidence

Much of the literature in relation to supported decision-making focuses on the normative aspects of the model, that is the alignment of supported decision-making as a concept with principles of autonomy and self-determination as well as the principles underpinning the *Convention on the Rights of Persons with Disabilities*.[217] Despite the existence of supported decision-making in practice, particularly in various Canadian jurisdictions for some time, there is little known about actual supported decision-making practices, how they work in practice, and what works well.[218]

Perhaps a notable exception is the report produced by Michelle Browning , a Churchill Fellow, who undertook an investigation into new models of guardianship and the emerging concept of supported decision-making in the United Kingdom and Canada.[219] Browning's investigation into the use of supported decision-making, in Canada in particular, found that there had not been a large uptake of new legislative agreements such as Representation Agreements in British Columbia and Yukon. Often this is because the people who would benefit from these agreements do not have close trusting relationships with a person who could perform this role.[220] Given there was no register of supported decision-making authorisations in Alberta, it was difficult for Browning to determine the prevalence and success of this tool.[221]

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[211] N O'Neil and C Peisah, above n 4, 5.
[212] Ibid 12.
[213] Ibid 5.
[214] Ibid 12.
[215] Terry Carney, 'Guardianship, "social" citizenship and theorising substitute decision-making law in I.Doron & A M Soden (eds), Beyond elder law: New directions in law and aging. (New York, NY Springer, 2012) in Terry Carney, above n 210, 59.
[216] Terry Carney, above n 210, 60.
[217] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1112; Terry Carney and Fleur Beaupert, above n 75, 190.
[218] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1112; Terry Carney and Fleur Beaupert, above n 75, 190.
[219] Michelle Browning, *To Investigate New Models of Guardianship and the Emerging Practice of Supported Decision Making* (2011) Winston Churchill Memorial Trust of Australia, Canberra <http://www.churchilltrust.com.au/media/fellows/Browning_Michelle_2010.pdf>, 29.
[220] Ibid.
[221] Ibid 23.

In 2013, Kohn, Blumenthal and Campbell concluded, following a review of the empirical literature in relation to supported decision-making in practice, that while supported decision-making presents an appealing alternative to guardianship and should therefore be given serious consideration by public policy makers, there is currently insufficient empirical evidence to know how and if it can remedy the problems posed by surrogate decision-making processes.[222]

However, Kohn et al also indicate that the dearth of empirical evidence about decision-making processes is not unique to supported decision-making and that there is also little evaluative empirical literature on guardianship.[223] They point to the need for further empirical evidence in two broad areas. First, evidence in relation to the utilisation of supported decision-making, including the demographic profile of those who participate (supporters and principles) and the commonality of such arrangements. Second, there needs to be further research on the outcomes of supported decision-making, including both process outcomes (how it works) and substantive outcomes (the actual outcomes for those who are supported).[224]

Legislating for supported decision-making

Should we legislate?

There have been mixed reactions to the idea of formalising supported decision-making through legislation.

Scope, in their submission to the Victorian Law Reform Commission's review of guardianship laws, cautioned against the over-formalisation of supported decision-making through legislation, concerned that it could undermine existing natural networks of support.[225]

O'Neil and Peisah are also concerned that a legislated model of supported decision-making may force the formal appointment of support persons where either informal support is sufficient or there is, in fact, no need for a support person. They argue that:

> "there is a substantial risk that the very existence of the regime will cause it to be used in circumstances in which the protections of those with decision-making disabilities that are currently in place are not seen as being needed. Consequently it is likely that a supported decision-making regime created by legislation will actually cut into and reduce the autonomy in decision-making that those with decision-making disabilities currently enjoy. As a result, people with disabilities may be forced to accept support they do not require when exercising their legal capacity to make decisions - an outcome diametrically opposed to the intent of Article 12(3)".[226]

The Victorian Law Reform Commission, in its review of Guardianship laws in Victoria, recommended that new guardianship laws should enable the appointment of supporters to assist people with the process of gathering information, making important decisions about their lives and implementing those decisions,[227] and co-decision-makers to make joint decisions with people with impaired decision-making capacity.[228]

[222] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3, 1114.
[223] Ibid 1129.
[224] Ibid.
[225] J Watson, above n 66, 16.
[226] N O'Neil and C Peisah, above n 4, 5-6.
[227] Victorian Law Reform Commission, above n 1, 136.
[228] Ibid 159.

While it would be possible for a person to appoint their own supporter/s, or for the Victorian Civil and Administrative Tribunal to appoint a supporter, the Victorian Law Reform Commission recommended that only the Victorian Civil and Administrative Tribunal be empowered to appoint a co-decision-maker. For the Victorian Law Reform Commission, formalising support relationships had the advantages of assisting other important people in the person's life to understand and recognise the significance of the support relationship, allowing the supporter to access information and be able to communicate decisions, and clarifying the supporter's role with third parties who interact with the person such as service providers, banks and others.[229]

Carney and Beaupert conceptualise supported decision-making as part of the suite of social or community services and civil society measures "aimed at advancing the rights of people with disability to participate in society as active citizens, with choice and control over the resources they need to maximise their participation in all aspects of social life, in accordance with the 'equality' of the CRPD".[230] While they recognise that legislative models have been introduced in some countries, most predominately in Canada, they argue that there is minimal available research on the practical implementation of supported decision-making in its different guises. They suggest that policy makers should be cautious and seek further empirical evidence about how supported decision-making should operate. "Supported decision-making, in its various social, quasi-legal and legal forms, warrants careful empirical research and pilot programs to guide legislative and social policy reform."[231]

Carney and Beaupart suggest that a number of critical issues need to be explored including what exactly is, or should be, meant by the term supported decision-making; the extent to which legal decision-making power resides with the supported person; whether statutory arrangements are necessary to incorporate protective measures or whether they will inherently change the nature of informal support arrangements that can be so empowering for people with disability; and finally whether formalising supported decision-making will lead to 'net widening', and at worst the creation of a *de facto* guardianship system.[232] They argue that the "realisation of the right to equality of participation on the part of people with cognitive and psychosocial disabilities is too fragile to be entrusted to experimental lawmaking or well-intentioned but ultimately mistaken application of normative principles."[233]

In response to Carney and Beaupart however, Brayley denies that more substantive law reform should be delayed while research is undertaken. Brayley, who has advocated for the inclusion of supported decision-making agreements in South Australia's *Guardianship and Administration Act 1993*, argues that new laws can be, and often are, evaluated after they are put into place.[234]

[229] Ibid 135.
[230] Terry Carney and Fleur Beaupert, above n 75, 199.
[231] Ibid 175, 200.
[232] Ibid.
[233] Ibid 175, 201.
[234] Office of the Public Advocate (South Australia), above n 175, 58-59.

Imperatives to legislate

Broadly, there seems to be two key imperatives to legislate, particularly in light of the models for supported decision-making introduced in some Canadian provinces and currently under consideration in Australia.

First, legislative recognition for supported decision-making arrangements provides authority for decision-making supporters to access information necessary to support the person with decision-making and/or to communicate the person's decision to a third party; and to protect them from liability. Third party (such as financial institutions, hospitals and accommodation services) recognition of the right for supporters to access information and communicate decisions is often identified as a barrier to putting supported decision-making into practice in an informal way. Statutory recognition of supported decision-making may also provide supporters or co-decision-makers with protection from civil or criminal liability if they act honestly and in good faith and in accordance with the respective legislation.

The second imperative for legislative recognition for supported decision-making is that it can provide important safeguards for the person seeking support. Mostly these are in the form of imposing positive duties on supporters and co-decision-makers or the inclusion of a monitoring role played by courts, tribunals, public guardians or specially appointed monitors.

A possible third imperative is the approach taken in some Scandanavian countries where legislation also provides for guaranteed access to social services and other types of assistance, recognising the interdependency of these systems and the importance of adequate support to keep people out of more restrictive forms of decision-making such as guardianship.

Gaps in the Literature

While there is significant discussion in the literature in relation to the philosophical (including rights-based) imperatives for supported decision-making, and the various legislative models of supported decision-making (in particular in the Canadian and Scandanavian jurisdictions), there is little empirical evidence in relation to the effectiveness of supported decision-making in practice nor whether and how it achieves its objectives of maximising autonomy and self-determination.[235]

There is also little information on the extent of the 'uptake' of the various supported decision-making mechanisms in Canadian jurisdictions such as representation and co-decision-making agreements, or details of how they work in practice.

Along with the small scope of trials to date in Australia, it is currently difficult to accurately assess how supported decision-making can and should be incorporated into the current mix of legislation, policy and support services.

[235] Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, above n 3.

Conclusion

There is no doubt that there is growing momentum for further reform to guardianship in its current form (either in law or practice) to make way for and enable less restrictive ways of assisting people with impaired decision-making capacity to make decisions. In particular, in light of the *Convention on the Rights of Persons with Disabilities*, these new approaches should enable people to exercise their legal capacity to the greatest extent possible.

The recent introduction of the National Disability Insurance Scheme in Australia provides an imperative for further consideration of supported decision-making policies and practices. The National Disability Insurance Scheme, when fully implemented, aims to empower and enable participants by placing them at the centre of decision-making about their lives, and give them more choice and control over the supports they receive.[236] People who experience difficulty with making decisions, including those who have previously had limited opportunity to participate in decision-making, may require support.

While as a concept, supported decision-making fits well with the values underpinning the Convention, commentators have emphasised that there is still much to learn about how it works and how it should work, as well as how to ensure that we do not inadvertently create another substitute decision-making system.

Regardless of whether models of supported decision-making are introduced into guardianship legislation, many have advocated for putting further resources into building the natural support networks of people with disability along with appropriate monitoring and safeguards. Careful, informed and individualised gatekeeping to guardianship that involves approaches to assessment of capacity that include the needs, goals and strengths of the person can also assist. This approach, which involves operationalising many of the existing principles of guardianship legislation can help to ensure that people are not inappropriately subject to guardianship and put at risk of losing their right to be involved in decision-making in relation to their own lives.

Given the interconnections between the various systems of support that are accessed by people with disability, the degree to which any reforms in relation to decision-making support for people with disability achieve the goals of maximising autonomy and increasing self-determination is likely to be contingent on many factors, not least of which being increasing recognition and support for upholding the rights of people with disability not just in legislation and policy, but most importantly in practice.

[236] DisabilityCare Australia, *One Big Difference to Lots of Lives: An Introduction to DisabilityCare Australia* (July 2013) National Disability Insurance Scheme, Commonwealth of Australia <http://www.disabilitycareaustralia.gov.au/sites/default/files/documents/An%20Introduction%20to%20DisabilityCare%20Australia.PDF>.

Appendix One: Supported decision-making in Canadian legislation

Alberta, Canada - *Adult Guardianship and Trusteeship Act SA 2008 CA-4.2*

Description	Appointment	Capacity	Prescribed form/order	Public Guardian	Authorised to make decisions	Personal information	Protection from liability
Supported decision-making authorisation For adults who have capacity to make their own decisions but would like some help. They sign a form to authorise a person to be their 'supporter'.[237]	Supporter/s are appointed by the adult.	The adult must understand the nature and effect of a supported decision-making authorisation.	Prescribed form.	Public Guardian or Public Trustee cannot be appointed as a supporter.	The supporter does not have the power to make legally enforceable decisions on behalf of the person, but a decision made or communicated with the assistance of a supporter is considered to be a decision of the person.	Supporters may be given authority to obtain personal information to assist the adult make a decision. Public authorities are given authority to disclose personal information about a supported adult to a supporter who is authorised to access it.	Supporters are protected from liability if they act in good faith while exercising the authority or carrying out the duties of the supporter in accordance with the Act.
Co-decision-making orders For adults whose capacity to make decisions is significantly impaired but they can still make decisions with support. The adult and their co-decision-maker jointly make decisions.[238]	Co-decision-making orders are made by a court and must be consented to by the adult.	The court must be satisfied that the adult's capacity to make certain decisions is significantly impaired, but the adult would be able to make these decisions if provided with appropriate guidance and support.	An order.	Public Guardian or Public Trustee cannot be appointed as a co-decision-maker.	Co-decision-making orders only apply to non-financial decisions and require the appointed co-decision-maker and the adult to work together and agree before proceeding with a decision that is covered by the order. The Adult has the final say.	A co-decision-maker is entitled to access all personal information (except financial information) about the assisted adult from public bodies as is relevant to carrying out the duties and responsibilities of the co-decision-maker.	Co-decision-makers are protected from liability if they act in good faith while exercising the authority or carrying out the duties of the supporter in accordance with the Act.

[237] Alberta Human Services, above n 91.
[238] Ibid.

British Columbia - *Representation Agreement Act, RSBC 1996, c405*

Description	Appointment	Capacity	Prescribed form/order	Public Guardian	Authorised to make decisions	Personal information	Protection from liability
Representation agreements Enable decisions to be made in advance of becoming incapable about when, how and by whom decisions about health care, personal care or routine management of their financial affairs should be made. [239]	Representation agreements are made by an adult.	An adult can make a standard representation agreement even if they are incapable of making a contract, managing their own health care, personal care or legal matters; or routinely managing their own financial affairs.	A representat-ion agreement must be in writing, and signed and witnessed in accordance with the Act, but there is no prescribed form.[240]	An adult can appoint the Public Guardian and Trustee as a representative.	Representatives must consult with the adult when helping them to make decisions, and must comply with the wishes of the adult to the extent it is reasonable to do so; but can also make decisions on behalf of the adult.	A representative can access all information and records that relate to the adult's incapacity or an area of authority granted to the representative.	A representative is protected from liability to the extent they act honestly and in good faith and within the scope of their duties under the Act.

[239] *Representation Agreement Act*, RSBC 1996, c 405, s 2.
[240] Alberta Human Services, above n 91, 13.

Saskatchewan - *Adult Guardianship and Co-decision- making Act SS 2000*

Description	Appointment	Capacity	Prescribed form/order	Public Guardian	Authorised to make decisions	Personal information	Protection from liability
Personal co-decision-makers For adults who do not have full capacity to make decisions, but can participate in the decision-making process. A co-decision-maker can be appointed to assist the adult and jointly make decisions with them.[241]	Personal co-decision-makers are appointed by the court and do not require the consent of the adult.	There must be a capacity assessment. The court must be satisfied that the adult's capacity is impaired to the extent that they require assistance in decision-making in order to make reasonable decisions with respect to some or all of the matters listed in the Act.	An order.	The Public Guardian or Trustee can be a personal co-decision-maker.	The co-decision-maker advises the adult, and shares the authority to make decisions with the adult. However, a co-decision-maker must acquiesce in a decision made by an adult and must sign a document to give effect to a decision if a reasonable person could have made the decision in question and no harm to the adult is likely to result from the decision. Any decision made, action taken, consent given or thing done by a personal co-decision-maker in good faith relating to any matter within the authority is taken to have been made by the adult (s 23).	No explicit provision, but may be implied by section 23.	No action lies or shall be instituted against any person who performs a duty, exercises a power or carries out a responsibility pursuant to the Act for any loss or damage suffered by any person by reason of anything in good faith in the exercise of the duty, power or responsibility.

[241] Law Foundation of Saskatchewan, above n 118.

Description	Appointment	Capacity	Prescribed form/order	Public Guardian	Authorised to make decisions	Personal information	Protection from liability
Property co-decision-makers For adults who do not have full capacity to make decisions, but can participate in the decision-making process. A co-decision-maker can be appointed to assist the adult and jointly make decisions with them.[242]	Property co-decision-makers are appointed by the court.	There must be a capacity assessment. The court must be satisfied that the adult's capacity is impaired to the extent that the adult requires assistance in decision-making in order to make reasonable decisions with respect to some or all of the matters relating to his or her estate.	An order.	The Public Guardian or Trustee can be a property co-decision-maker.	The co-decision-maker advises the adult and shares the authority to make decisions with them. However, a co-decision-maker must acquiesce in a decision made by an adult and must sign a document to give effect to a decision if a reasonable person could have made the decision and no loss to the adult's estate is likely to result from the decision. Any decision made, action taken, consent given or thing done by a personal co-decision-maker in good faith relating to any matter within the authority is taken to have been made by the adult (s 49).	No explicit provision, but may be implied by section 49.	No action lies or shall be instituted against any person who performs a duty, exercises a power or carries out a responsibility pursuant to the Act for any loss or damage suffered by any person by reason of anything in good faith in the exercise of the duty, power or responsibility.

[242] Ibid.

Yukon - *Decision Making, Support and Protection to Adults Act SY 2003*

Description	Appointment	Capacity	Prescribed form/order	Public Guardian	Authorised to make decisions	Personal information	Protection from liability
Supported decision-making agreements For adults who can make their own decisions with some help. The associate assists the adult to make decisions. The agreement does not authorise the associate to make decisions on behalf of the adult.[243]	Agreements are made between the adult and the associate decision-maker.	The adult must understand the nature and effect of the agreement.	Prescribed form.	An employer or employee of the adult, or a person against whom a family violence order has been made, is excluded from being an associate decision-maker. The stated purpose of the agreement is to 'allow trusted friends and relatives to help adults who do not need guardianship to manage their own affairs'.	The associate decision-maker assists the adult to make and express a decision which includes assisting the adult to obtain relevant information, explaining relevant information and considerations, and communicating the decision. The associate decision-maker is not authorised to make decisions on behalf of the adult.	An associate decision-maker has the right to assist the adult to obtain any information to which the adult is entitled in relation to a decision the associate decision-maker is assisting the adult to make.	An associate decision-maker is protected from liability for injury, death or financial damage or loss to the adult if he/she acts in good faith and in the best interests of the adult, and exercises the care, diligence and skill of a reasonably prudent person.

Representation agreements For adults who recognise that they have trouble making some decisions. An agreement gives one or more 'representatives' the authority to make day-to-day financial and personal decisions for the adult.[244]	Agreement between the adult and representative.	The adult must understand the nature and effect of the agreement to enter into it.	Prescribed form.	Employers or employees, a paid carer, or a person against whom a family violence order has been made cannot act as a representative.	Representatives are authorised to make decisions on the adult's behalf, however the representative must consult with the adult and comply with the adult's wishes if it is reasonable to do so.	A representative has a right to assist the adult to obtain any information related to the performance of the duties of the representatives under the agreement.	A representative is protected from liability if they act within the limits of their authority in the agreement.

[243] Yukon Health and Social Services, above n 130.
[244] Ibid.

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Queensland Government

Office of the Public Advocate
Systems Advocacy

Autonomy and decision-making support in Queensland

A targeted overview of guardianship legislation

February 2014

Queensland Government

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Table of Contents

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]

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[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 interests[24] 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]

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[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 interests[32] 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 applied[37] or complied with[38] 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 acknowledgements 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 applied[56] or complied with[57] 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 Framework[61] 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 support[67] 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 principles[70] 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 extent[71] 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]

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[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 power[85] 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.

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]

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 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 themself, 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—

(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 *Powers of Attorney Act 1998*.

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—

(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 *Land Act 1994* or *Land Title Act 1994*;

(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)

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

(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.

(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.

(3) ***Health care***, of an adult, 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 an adult's mouth, throat, nasal cavity, eyes or ears

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

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—

(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;

Note— See also section 248A (Protection for person carrying out forensic examination with consent).

(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	***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.
Reasonably considers	***Reasonably considers*** means considers on grounds that are reasonable in the circumstances.
Support network	***Support network***, for an adult, consists of the following people— (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 *Guardianship and Administration Act 2000*.

Attorney

Attorney means—

(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—

(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.

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.

Enduring power of attorney

Enduring power of attorney is defined in section 32 of the *Powers of Attorney Act 1998* (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—

(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.


Queensland Government

Office of the Public Advocate
Systems Advocacy

Autonomy and decision-making support in Australia

A targeted overview of guardianship legislation

February 2014

Queensland Government

The document is available online at www.publicadvocate.qld.gov.au or you may contact our Office for access to a hard copy.

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Table of contents

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, and a targeted overview of guardianship legislation in other Australian jurisdictions (this document). Together, these documents will inform the subsequent phases of the research.

Each Australian State and Territory has developed a legislative framework for guardianship and administration, which all feature different structures and inclusions. This document presents a synopsis of the provisions and considerations relating to the appointment of a guardian or administrator, including when an appointment is required, who should be appointed and the responsibilities of the appointed person. It is based on legislation as at 1 October 2013 and reflects the language used in the legislation of each jurisdiction.

This document is not a comprehensive audit of State and Territory guardianship legislation; it presents broad descriptions of key aspects of legislation. It does not include all aspects of legislation that relate to the provisions and considerations relating to the appointment of a guardian or administrator. For example, the report does not discuss emergency guardianship and administration provisions, review of appointments, making financial gifts, enduring powers of attorney and policies or activities of relevant agencies. Furthermore, the document does not include an overview of relevant case law or other interacting legislation.

The exact nature of how guardians and administrators exercise their functions in each jurisdiction differs according to the duties and responsibilities of guardians and administrators, and the principles that apply in respective legislation. The tables presented in this document summarise the relevant provisions in each jurisdiction that lend support to maximising a person's decision-making autonomy and the use of informal supporting mechanisms to assist people to make decisions instead of resorting to substitute decision-making through guardianship. The inconsistency of terminology across jurisdictions reflects the differing provisions in each jurisdiction.

Summary

In **New South Wales, Western Australia** and the **Northern Territory**, legislation provides an obligation for guardians and administrators, as far as possible, to consult with and take into account the views of the person they are responsible for, however the paramount consideration is a responsibility to act in the best interests of the person, that is, in a protective capacity, rather than in accordance with the wishes or expressed opinions of the person. In **Victoria** and **Tasmania**, guardians and administrators are obliged to give equal consideration to the best interests of the person, the wishes of the person and the least restrictive alternative; however subsequent provisions give additional weight to the requirement to act in a person's best interests. In **Queensland** and the **Australian Capital Territory**, guardians are obliged to the greatest extent possible (without resulting in harm to the person) to act in a way that, in **Queensland**, encourages the person to make their own decisions and to take into account the views and wishes of those under guardianship, and in the **Australian Capital Territory**, to give effect to the person's wishes so far as they can be determined. **South Australia** applies a substituted judgement obligation so that the paramount consideration for a guardian must be what, in the opinion of the guardian, would be the wishes of a person if they were not mentally incapacitated.

In the **Australian Capital Territory**, under the ***Guardianship and Management of Property Act 1991***, a guardian has an obligation to give effect to the person's wishes, so far as they can be determined. If giving effect to the person's wishes would have a significant adverse affect on the interests of the person, then the guardian must give effect to those wishes as far as possible without causing a significant adverse affect. If this is not possible, then the protected person's interests must take precedence over their wishes. A guardian or manager is only appointed if: the person has impaired decision-making ability in relation to a matter; there is likely to be a need for a decision or the person is likely to subject their health, welfare or property to unreasonable risk; and without an appointment the person's needs will not be met or their interests will be significantly adversely affected. When appointing a guardian or manager, the ACT Civil and Administrative Tribunal must consider the views and wishes of the protected person as well as the preservation of existing relationships and compatibility of the proposed appointee with the protected person. The powers of a guardian are limited to the scope of the order made by the ACT Civil and Administrative Tribunal and the guardian's obligations, duties and powers must be exercised in accordance with the decision-making principles. The powers provided to a guardian or administrator must be the least restrictive possible. There is provision for health attorneys to make health decisions, but there are no other informal decision-makers identified in the Act.

In **New South Wales**, under the ***Guardianship Act 1987***, the welfare and interests of the person must be given paramount consideration, however the general principles also recognise that: the person's freedom of decision and action should be restricted as little as possible; that their views should be taken into consideration in the exercise of any functions under the Act; and that they should be encouraged to be as self-reliant as possible. A guardian is only appointed by the Guardianship Tribunal of New South Wales if a person with a disability is totally or partially incapable of managing his or her person. In considering whether to make the appointment, the Tribunal must have regard to the views of the person, their spouse and carer/s, the preservation of existing family relationships and the practicability of services being provided without a guardianship order.

The Tribunal must also consider the compatibility of a prospective guardian with the person. When a guardian is appointed, a plenary guardianship order cannot be made in circumstances where a limited guardianship order would suffice. The Tribunal may also make a financial management order when a person lacks capacity, there is a need for a manager, and the order is in the best interests of the person. The Supreme Court and Mental Health Review Tribunal also have authority to appoint a manager. An appointed guardian or manager can only act within the scope of the functions provided in the order. There is provision for a person responsible (which may include a spouse, close friend or relative) to make health decisions. There are no informal decision-makers identified in the Act.

In the **Northern Territory**, the ***Adult Guardianship Act 1988*** provides that every function or power exercised under the Act must be done in a way that is least restrictive of the person's freedom, ensures the best interests of the person are promoted and gives effect, wherever possible, to the wishes of the represented person. When determining a guardianship application, the Guardianship Panel must consider: the extent of a person's intellectual disability; the nature and extent of support systems available to maintain the proposed represented person in the community; the suitability of the proposed guardian; and the implications, effects or results of the order on the person. When appointing a person as guardian, matters for consideration include the wishes of the proposed represented person, the preservation of existing family relationships and whether the proposed appointee will act in the person's best interests. The powers of a guardian are limited to those specified in the order. A guardian must act in the person's best interests and is obliged to act in a way that will encourage the person to participate in their community, to become capable of caring for themselves and to make reasonable judgements. A guardian may also be appointed as a manager of a person's estate if competent, however if they are not competent an alternative manager may be appointed by the Supreme Court. There are no provisions for informal decision-makers in the Act, including informal health care decision-makers. It is important to note that the ***Advanced Personal Planning Act 2013*** and the ***Advanced Personal Planning (Consequential Amendments) Act 2013*** were assented to on 19 December 2013. These Acts will commence on the day fixed by the Administrator by Gazette notice. As notice had not been given at the time of publishing this document, these Acts have not been included.

In **Queensland**, the ***Guardianship and Administration Act 2000*** places an overriding responsibility on guardians and administrators to perform their functions or exercise their powers in a way that promotes the care and protection of adults under guardianship. Guardians and administrators must also take into account the right of the adult to participate to the greatest extent practicable in decisions affecting their life and the importance of preserving, to the greatest extent practicable, the right of the adult to make their own decisions. This includes providing the adult with any necessary support and access to information to enable their participation and seeking and taking into account, to the greatest extent practicable, the views and wishes of the adult. Guardians and administrators must also act in the way that is least restrictive of the adult's rights. The Queensland Civil and Administrative Tribunal will appoint a guardian or administrator if: the adult has impaired capacity for a matter; there is a need for a decision or the person is likely to subject their health, welfare or property to unreasonable risk; and without an appointment the person's needs will not be adequately met or their interests will not be adequately protected. When making an appointment, the Tribunal must consider whether the proposed appointee will apply the general and health care principles, the compatibility of the adult and proposed appointee and the availability, accessibility, appropriateness and competence of the proposed appointee. Guardians and administrators must apply the general principles, act honestly and with reasonable diligence and comply with any terms of the order. Members of an adult's support network may exercise power for an adult on an informal basis, which may be ratified by the Tribunal. A statutory health attorney (a spouse, carer, friend or relative) may consent to medical treatment if no formal arrangements have been made.

In **South Australia**, under the ***Guardianship and Administration Act 1993***, the paramount consideration is what, in the decision maker's opinion, would be the wishes of the person if they were not mentally incapacitated. There is also an obligation to seek and consider the wishes of the person. When making a guardianship order, consideration must be given to the adequacy of existing informal arrangements for the person's care and financial management and the desire to not disturb these arrangements. All decisions or orders must be the least restrictive of the person's rights and personal autonomy as is consistent with their proper care and protection. A guardian can only be appointed if the Guardianship Board of South Australia is satisfied that the person has a mental incapacity and that the appointee and the person would be compatible. The Board may make a limited or full guardianship or administration order and the guardian's or administrator's powers are then limited to the particular aspects of the protected person's care or welfare contained in the order. A person can give effective consent for medical and dental treatment whether or not they are subject to a guardianship and/or administration order. Where a person lacks capacity and does not have a medical agent or appointed guardian, a relative (including a person with responsibility for the day-to-day supervision, care and wellbeing of the person) may make medical decisions for the person. There are no other provisions for informal decision-making identified in the Act.

In **Tasmania**, a guardian or administrator acting under the ***Guardianship and Administration Act 1995*** must, when exercising powers or functions, give equal consideration to the best interests of the person, the wishes of the person and the least restrictive alternative. A guardian or administrator can only be appointed if: the person has a disability; is unable by reason of that disability to make reasonable judgements in relation to matters relating to their person, circumstance or estate; and is in need of a guardian or administrator. In appointing a guardian or administrator, the Guardianship and Administration Board must consider the suitability of the proposed appointee with regard to: the wishes of the proposed represented person; the preservation of existing family relationships; the compatibility with the proposed represented person and any other appointees; and the availability and accessibility of the appointee to the proposed represented person. Limited guardianship or administration orders can be made, which limit the powers of the guardian or administrator to those specified in the order. The Board may only make a full guardianship order when it is determined that a limited order will be insufficient. A guardian or administrator has a duty to act in the best interests of the person, encourage community participation and self-reliance, act in consultation with the person and take into account their wishes, act as an advocate and protect them from abuse, neglect and exploitation. A spouse, carer, relative or friend of a person may consent to medical treatment if there is no guardian appointed, but there are otherwise no provisions for informal decision-making identified in the Act.

In **Victoria**, a power, function or authority exercised under the ***Guardianship and Administration Act 1986*** must be done in the least restrictive manner and in a way that promotes the best interests of the person, and wherever possible, gives effect to their wishes. A guardian or administrator may be appointed if: the person has a disability; is unable by reason of that disability to make reasonable judgements in relation to their person, circumstances or estate; and is in need of a guardian or administrator. In appointing a guardian, the Victorian Civil and Administrative Tribunal must take into account the: wishes of the person; the desirability of preserving existing family relationships; the compatibility with the proposed represented person and any other appointees; and the availability and accessibility of the appointee to the proposed represented person. Similar considerations apply in respect of the appointment of an administrator. Limited or plenary guardianship orders can be made, and a limited guardian can only exercise the powers specified in the Tribunal's orders.

An administrator may also be vested with limited functions or powers by the Tribunal. A guardian or administrator must act in the best interests of the person. A guardian is considered to do so if they: encourage community participation; encourage and assist the person to become capable of caring for themselves and of making reasonable judgements; act in consultation with the person; and, as far as possible, take into account the person's wishes. Similar criteria apply to administrators. If no formal appointment has been made then a spouse, carer or relative of a person may consent to medical treatment, but there are otherwise no provisions for informal decision-making.

In **Western Australia**, under the ***Guardianship and Administration Act 1990***, the primary concern of the State Administrative Tribunal, guardians and administrators must be the best interests of the person, which includes taking into account, as far as is possible, a person's wishes. Every person is presumed to be capable of looking after their own health and safety and making reasonable judgements about matters relating to themselves and their estate. The Tribunal will not make a guardianship or administration order if a person's needs could be met through other less restrictive means, and where an appointment is made it must impose the least restrictions possible. The Tribunal may appoint a plenary or limited guardian if satisfied that a person is: incapable of looking after their own health and safety; unable to make reasonable judgement about personal matters or requires oversight to do so; and is in need of a guardian. The Tribunal may appoint an administrator if satisfied that a person due to mental disability is unable to make reasonable judgements regarding their estate, and is in need of an administrator. When considering any appointment, the Tribunal must consider the wishes of the represented person. In relation to guardianship orders, the Tribunal must also consider any actual or potential conflicts of interest, the preservation of existing relationships, compatibility with any administrator, and whether the appointee will fulfil the functions. In relation to administration orders, the Tribunal must consider the compatibility with the represented person and any guardian, and the ability of an appointee to perform the role. The Tribunal is not required to consider conflicts of interest. Factors that indicate that a guardian or administrator has acted in the best interests of the represented person include: encourage community participation; encourage and assist the person to become capable of caring for themselves and of making reasonable judgements; maintain the represented person's existing supportive relationships; act in the least restrictive way; and, as far as possible, take into account the wishes of the person. Where a person lacking capacity has no advanced health directive, guardian or enduring guardian, then a spouse, close relative, unpaid carer or other person with whom there is a close personal relationship may make treatment decisions on the person's behalf. The Act also makes provision for persons who are unable, due to mental disability, to make reasonable judgements in respect of their estate but do not need to have an administrator appointed on a continuing basis. The Tribunal may, without appointing an administrator, authorise a person who could be appointed as an administrator to perform any function specified by the Tribunal.

Jurisdictional overview of guardianship legislation

Australian Capital Territory – *Guardianship and Management of Property Act 1991*

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant sections: 4, 5A	Relevant sections: 32A-32F	Relevant sections: 7, 7A, 7B, 8, 9	Relevant sections: 9, 10	Relevant sections: 4, 5A, 7, 7B, 8, 11
Decision-making principles: • The **protected person's wishes,** so far as they can be determined, **must be given effect to**, unless a decision is likely to significantly adversely affect the protected person's interests; • If giving effect to the protected person's wishes is likely to significantly adversely affect the protected person's interests, then the **decision must give effect to protected person's wishes** as far as possible **without causing significant adverse affect**; • If the protected person's wishes cannot be given effect to at all, then the protected person's **interests must be promoted**; • **Minimal interference** with the protected person's life and lifestyle; • **Encouragement of self-reliance** and community involvement; and • The decision-maker must **consult all carers**, unless this would adversely affect a protected person's interests (s 4).	Where a person cannot consent to treatment and does not have an appropriate attorney or guardian, a **health attorney** (priority order: domestic partner, carer or close relative/friend) who is best able to represent the protected person's views may consent to medical treatment of the person (ss 32B, 32D). Health professionals and health attorney must follow decision-making principles (s 32E).	A **guardian or manager** is appointed if: • a person has **impaired decision-making ability in relation to a matter** relating to their health, welfare, finances or property; and • during that impairment there is or is **likely to be a need for a decision**, or the person is likely to subject their health, welfare or property to **unreasonable risk**; and • a guardian or manager is not appointed, **the person's needs will not be met or the person's interests will be significantly adversely affected** (ss 7, 8). The Supreme Court may give a direction under the *Crimes Act 1900*, which requires the Tribunal to appoint a guardian as directed (s 7A).	Relevant considerations affecting appointment are: • person must **follow the decision-making principles** and be suitable for appointment; and • ACAT must consider the: **views and wishes** of protected person, preservation **of existing relationships, compatibility of proposed appointee with protected person**, location of proposed appointee, availability and accessibility of proposed appointee to protected person, competency of proposed appointee to exercise required functions and any conflicts of interests (s 10). Public Advocate or an individual may be appointed as guardian; Public Advocate, Public Trustee, trustee company or individual may be appointed as a manager; however priority is given to an individual (s 9).	A guardian has the **powers necessary and desirable** to make decisions for the person **in accordance with decision-making principles**. These may relate to: residence, education, employment, medical and legal matters (ss 7(2), 7(3)). A manager may be appointed to **manage all or part of a person's property**, with the powers that **are necessary or desirable** to make decisions **in accordance with the decision-making principles** (s 8(2)). The powers given to a manager are the powers that the person would have had, if the person were legally competent to exercise powers in relation to their property (s 8(3)). Powers given to a guardian or **manager must be no more restrictive of a person's freedom of decision and action** than is necessary to achieve the purpose of the order (s 11).

New South Wales - *Guardianship Act 1987 (GA)* and *New South Wales Trustee and Guardian Act 2009 (TGA)*

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant section *GA*: 4 Relevant section TGA: 39	Relevant sections *GA*: 32, 33A, 36, 40	Relevant sections *GA*: 3, 6, 6B, 14-16, 25E, 25G, 25M Relevant sections *TGA*: 40-41, 44-46, 52, 71	Relevant sections *GA*: 14, 15, 17, 25M Relevant section *TGA*: 68	Relevant sections *GA*: 6E, 6F, 16, 21, 21A, 21B, 26, 28 Relevant sections *TGA*: 16, 55-59, 59, 63-68, 71-76
The general principles: • **welfare and interests of the person** should be **given paramount consideration**; • **freedom of decision and action** of a person should be **restricted as little as possible**; • the person should be **encouraged**, as far as possible, **to live a normal life in the community**; • the **views of the person** in relation to the exercise of those functions should be **taken into consideration**; • the importance of **preserving family relationships and the cultural and linguistic environments** should be recognised; • the person should be **encouraged**, as far as possible, to **be self-reliant** in matters relating to their personal, domestic and financial affairs; and • the person should be **protected** from neglect, abuse and exploitation (s 4, 39).	A **person responsible** (hierarchy: guardian with power to consent, spouse with close relationship who is not under guardianship, carer, close fried or relative) may consent to minor or major medical or dental treatment (ss 33A, 36). A person responsible must, when considering whether to provide consent, have regard to the **views of the patient**, the details of the treatment and section 32 of the Act (s 40).	An adult may appoint another adult as their **enduring guardian**, provided the other adult is not involved or related to someone involved in the administration or provision of the person's accommodation, medical services or other support (s 6B).[1] The Tribunal may make a guardianship order if it is determined that the person is **a person in need of a guardian**, which is a person who, because of a disability, is **totally or partially incapable of managing his or her person** (ss 3, 14). When deciding whether to make a guardianship order, the Tribunal will have regard to: • **the views of the person**, their spouse and carer/s; • the **preservation of existing family relationships** and cultural and linguistic environments; and • **the practicability of services being provided** to the person **without the need for a guardianship order** (s 14(2)).	A person may be appointed as a guardian if: • their **personality is generally compatible** with the person; • there is **no conflict** between their interests and the interests of the person; and • they are **willing and able** to exercise the functions of the order (s 17). The Public Guardian must not be appointed where there is another person who could be appointed as guardian (s 15). If the Tribunal makes a financial management order, they may appoint a suitable person as manager[2] or commit the management of the estate to the NSW Trustee (s 25M(1)).[3]	An **enduring guardian** may perform the following functions: • deciding the place of residence and the health care and personal services received; • giving consent for medical and dental treatment; and • performing other functions specified in the instrument (s 6E(1)). A **plenary guardianship order** gives the guardian full custody of the person and authority to perform all of the functions a guardian has at law or in equity (s 21(1)). **A limited guardianship order must specify the extent to which the guardian has custody of the person** and which of the functions of a guardian the guardian has in respect of the represented person (s 16(2) *GA*).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
The *Guardianship Act 1987* also provides that the **community** should be **encouraged to apply and promote the principles** (s 4).		**A plenary guardianship order cannot be made** in circumstances **where a limited guardianship order would suffice** (s 15(4)). A guardianship order may be made subject to such conditions as the Tribunal considers appropriate to specify (s 16(1)). The Tribunal may make a financial management order if: • the person **does not have capacity** for those matters; • there is a **need for another person** to manage those affairs on behalf of the person; and • the order is in the **best interests** of the person (s 25E, 25G). The Tribunal may **exclude a specified part** of an estate from a financial management order (s 25E). Whilst a person's estate is subject to management, the New South Wales Trustee (NSW Trustee) may authorise the person to deal with as much of the estate as is considered appropriate (s 71).	If a private person is appointed as manager, they must not interfere with the estate in any way unless directions have been obtained from the Supreme Court or the NSW Trustee has (under division 2, part 4.5 of the *NSW Trustee and Guardian Act 2009*) authorised the person to exercise functions in respect of the estate. The person, however, may act to protect the estate pending direction or authorisation (s 25M(2)-(3)). A private manager may be required to give security to the NSW Trustee (s 68).	Where a person's estate is managed by the NSW Trustee, the Trustee may **exercise all functions necessary to the management and care of the estate**, and any other functions directed or authorised by the Supreme Court or Tribunal (s 56). In relation to its protective capacities, the NSW Trustee may: • exercise all functions the person has and **can or would have and could exercise** if not incapacitated (s 57(1)); • make decisions regarding the person's real property, business and legal matters (s 16 *TGA*); and • **apply a person's money** for expenses related to the person's estate, debts, shares and the maintenance of the person, their spouse and dependents (s 59). Where an individual is appointed as manager, the **Supreme Court or NSW Trustee may make orders** in relation to the administration and management of an estate and in connection with authorising, directing, enforcing and supervising the exercise of the functions of managers (s 64). These orders may be made generally regarding debts, maintenance of family and management of the estate and also in respect of more specific property matters (s 65).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
		The Supreme Court (on application or their own motion) and the Mental Health Review Tribunal (MHRT) (on application or when detaining a person to a mental health facility) may declare that a person is **incapable of managing their own affairs** and order that the person's estate be subject to management. The Supreme Court may appoint a suitable person or commit the management of the estate to the NSW Trustee, while the MHRT may do only the latter (ss 41, 44-46, 52). An order by the Supreme Court or the MHRT may be for the management of the whole or part of a person's estate (s 40).		The NSW Trustee (subject to an order by the Supreme Court or Tribunal) may **authorise a manager to have and exercise specified functions** necessary and incidental to the management and care of an estate or otherwise required and give directions to a manager (s 66). Before taking action in respect of a person's estate, the NSW Trustee must determine if **friends or relatives should be consulted**, conduct any necessary consultation and consider any submissions (s 72). At the request of a person or their relatives a manager must, as far as is practicable, **preserve items of a personal nature** (s 75).

[1] The legislation in New South Wales does not set a threshold for the appointment of an enduring guardian or include any statutory requirements regarding a person's capacity to make such an appointment, however see *Gibbons v Wright* (1953) 91 CLR 423. In that decision, the High Court stated that there is no 'fixed standard of sanity' that can be required to establish the validity of all transactions; rather, in respect of each transaction, each party must have the capacity to understand the general nature of what he or she is doing by participating in the transaction (437). In relation to a written instrument, that requirement is satisfied if a party can understand what they have done by executing the instrument, when the general purport of the instrument is explained to them (438). An instrument is void if at the time of signing the instrument, the signatory was incapable of understanding that he or she was making a signature (443). Further, a power of attorney is void if given by a person who is incapable of understanding its effect (448). However, any instrument (other than a power of attorney) that is executed by a person incapable of understanding the effect or the general purport of the document is not for that reason void, but may be voidable (449). If an instrument is voidable for this reason, unless and until that person or their representative elects to avoid the instrument, the instrument is valid (439).

[2] There is no definition of the term 'suitable person' in the Act, however see *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 241-243. In this decision, Kirby P (with whom Sheller JA and Windeyer A-JA agreed) stated that it was inappropriate for the court's discretion to appoint or remove a manager to be confined by rules or guidelines, other than a need to consider all relevant circumstances. However, Kirby P provided a checklist of considerations that were intended to suggest a framework of approach but were not intended to limit other applicable considerations. These included: the purposes of the legislation; demonstration of some reason for removal of an appointed manager; the abiding rule when exercising a power is the achievement of the protected person's best interests; an appointee may be removed and replaced if incompetent or acting improperly or unlawfully; a conflict of property-related interests, particularly amongst family, may be 'more apparent than real' and may not present an absolute bar to appointment; the appointment of the Protective Commissioner may have the advantages of independence, a dispassionate and neutral approach, expertise and security against loss or damage; the appointment of a family member may have the advantages of familiarity with the estate, no management costs, increased ability of the protected person (if disabled) to interact with the appointed family member (and therefore as far as possible to have charge of or influence over the management), love and affection for the protected person, special features of the case and special qualities of the applicants; and the Court should satisfy itself that the income and assets of the estate are devoted to the protected person's interests.

[3] For information regarding the hierarchy of appointees, see *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 238-239. In this decision, Kirby P (with whom Sheller JA and Windeyer A-JA agreed) observed that the equivalent section 22 of the *Protected Estates Act 1983* provided first that a 'suitable person' should be appointed as manager and only secondly that the management of an estate should be committed to the Protective Commissioner. Kirby P stated that this was 'a sensible hierarchy of choices' and that in many instances it would be appropriate for a family member to act as manager, with the court historically intervening only when family are unwilling or unsuitable for appointment. Kirby P stated that there was a danger in the administration of the Act overlooking not only this natural order but also the way in which parliament has reflected this order in the Act. These observations apply equally to the current *Guardianship Act 1987.*

Northern Territory - *Adult Guardianship Act 1988 (AGA)* and *Aged and Infirm Persons' Property Act 1979 (AIPPA)*

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant section *AGA*: 4		Relevant sections *AGA*: 8-9, 14-16 Relevant sections *AIPPA*: 5-7, 9, 11-16	Relevant sections *AGA*: 14, 16 (1)	Relevant sections *AGA*: 16-18, 20 Relevant section *AIPPA*: 17
Every function, power, authority, discretion, jurisdiction and duty conferred or imposed by the Act is to be exercised or performed so that: • people adopt means of execution that are the **least restrictive** of a represented person's freedom of decision and action; • **best interests** of represented person **are promoted**; and • **wishes of represented person are**, wherever possible, **given effect to** (s 4).	Nil provisions regarding consent to medical treatment without appointment.	When considering an application for guardianship, a Guardianship Panel of the Local Court must obtain information about: • **extent of intellectual disability** of proposed represented person; • **nature and extent of support systems available to maintain proposed represented person in the community** or that have previously been used for that person; • matters of **cultural significance** to the person or their community; and • whether a guardian should be appointed and if so**: suitability of proposed guardian**, limitations or conditions that should be placed on the guardianship order and the **implications, effects or results of the order on the proposed represented person**, their family and their community (s 9(3) *AGA*). The order may be full, conditional or temporary (s 15 *AGA*).	A person may be appointed guardian if: • they will **act in the best interests** of proposed represented person; and • there is **no actual or possible conflict** between their interests and the interests of the person; and • they are a **suitable person**. Considerations for determining suitability are: **wishes of the proposed represented person**, **preservation of existing family relationships**, **compatibility** with the proposed represented person and manager (if any), **availability and accessibility** to proposed represented person (s 14). The Public Guardian may be appointed as guardian if there is no other person who fulfils the requirements of an appointee (s 14).	If a person is appointed by a **full guardianship order**, they will have all powers and duties that would exist if they were the parent and the represented person were their infant child. The powers of a guardian include (without limitation) **decisions about residence, employment and health care**. The guardian may be made subject to **conditions and restrictions** as the Court thinks fit (s 17(1)-(3) *AGA*). If a person is appointed under a **conditional guardianship order**, they will be given **powers and duties as specified by the Court** in the guardianship order and subject to conditions and restrictions as the Court thinks fit (s 18).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
		Under the *Aged and Infirm Persons' Property Act 1979* the Supreme Court (on application or their own motion) may make, vary or rescind a protection order in respect of the estate or part of the estate of any person (ss 7, 11). The Supreme Court must be satisfied that **due to a person's age, disease, illness or mental or physical infirmity**, it is necessary in the interests of the person or their dependants that their estate be protected (s 12(1)). The Supreme Court must take into account relevant reports and whether the person is either unable (wholly or partly) to **manage their affairs or is being or liable to be unduly influenced** regarding their estate (s 12). The protection order will appoint the Public Trustee or another person/s as manager of the estate or part thereof. A person/s may be required to give a security to the Public Trustee (s 13). A protection order may be made **subject to terms and conditions** as the Supreme Court considers necessary, including the continuation of payments to dependents, the use of money or powers, and the preservation of property (s 16 *AIPPA*).	A guardian may also, if competent, be appointed as the manager of the person's estate. If the guardian is not competent, the Court may order that the Public Trustee or another person make an application under the *Aged and Infirm Persons' Property Act 1979* for a protection order (s 16(1)).	A guardian must **act in the best interests of the represented person**, and does so if they act as far as possible for the represented person: • as an advocate; • in a way that **will encourage them to participate in the community**, to become **capable of caring for themselves** and to make **reasonable judgements**; • to protect them from neglect, abuse or exploitation; and • **in consultation with them and taking into account, so far as is possible, their wishes** (s 20). A **manager** may deal with the person's estate, effects and business and may apply the person's money for the maintenance of the person and their dependants. Other powers and duties may be specified in a protection order. If the Public Trustee is the manager then the powers, obligations and duties in the *Public Trustee Act* will also apply (s 17 *AIPPA*).

Note: The *Advanced Personal Planning Act 2013* and *Advanced Personal Planning (Consequential Amendments) Act 2013* were assented to on 19 December 2013. These Acts will commence on the day fixed by the Administrator by Gazette notice. As notice had not been given at the time of publishing this document, these Acts have not been included.

Queensland - *Guardianship and Administration Act 2000 (GAA)* and *Powers of Attorney Act 1998 ss 62-63 (PAA)*

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant sections *GAA*: 5-7, schedule 1	Relevant sections *GAA*: 9, 66, 154 Relevant sections *PAA*: 62-63	Relevant sections *GAA*: 12, 19-20, 36	Relevant sections *GAA*: 15-18, 30	Relevant sections *GAA*: 11, 33-37, 40, 50-51, 54-55, schedule 2
The general principles: • adults are **presumed to have capacity**; • guardians and administrators must recognise and take into account the following: - adults have the **same basic human rights** and should be empowered to exercise them; - adults have a right to **respect for their human worth and dignity** as an individual; - adults are **valued members of society** and must be encouraged and supported to perform valuable social roles; - adults must be encouraged and supported to **live and participate in the community**; - adults must be encouraged and supported to **achieve their maximum potential and become as self-reliant** as possible; - adults' **existing supportive relationships** should be maintained; - adults' **cultural and linguistic environment and values** should be maintained;	The exercise of power for a matter for an adult with impaired capacity may be done on an **informal basis by members of the adult's existing support network** (s 9(2)). 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 if: • the informal decision-maker has acted or will act honestly and with reasonable diligence; and • the matter is not a special personal matter, health matter or special health matter (ss 154(1)-(2)).	The Tribunal may appoint a guardian for personal matters or an administrator for financial matters, if satisfied that: • the adult has **impaired capacity for the matter**; and • there is a **need for a decision** in relation to the matter, or the adult is likely to do something that will or is likely to involve **unreasonable risk to the adult's health, welfare or property**; and • without an appointment the adult's **need will not be adequately met** or the adult's **interests will not be adequately protected** (s 12(1)). The appointment of a guardian or administrator may be on **terms considered appropriate by the Tribunal** (s 12(2)) and a guardian or administrator must **exercise their power as required** by the terms of the order (s 36). The **Tribunal may impose a requirement**, including a requirement to give a security on a person who is or is to become a guardian or administrator, and the person must comply with this requirement (s 19).	In determining whether a person is an appropriate guardian or administrator, the Tribunal must consider: • whether the person is likely to **apply the general principles** and, if applicable, the health care principle; • any **conflicts of interests**; • the **compatibility** of the proposed appointee with the adult (e.g. communication skills, social and cultural knowledge) and other proposed appointees; • the **availability and accessibility** of proposed appointee to adult; and • the **appropriateness and competence** of proposed appointee to perform functions and exercise powers (includes criminal history, previous refusals or removals from appointment, and bankruptcy or administration proceedings) (s 15).	A person or entity who performs a function or exercises a power must **apply the general principles and the health care principle** (s 11(1)). Unless ordered otherwise by the Tribunal, a guardian or administrator is authorised to do, in accordance with the terms of their appointment, **anything in relation to personal or financial matters respectively that the adult could have done** if the adult had capacity (s 33). **Personal matters** include decisions regarding accommodation, employment, training, daily issues such as diet and dress, health care, legal matters (other than financial or property matters) and restrictive practices matters (sch 2, part 2). **Financial matters** include decisions regarding maintenance and accommodation for the adult and their dependents, debts, real and other property, investments, legal matters related to financial or property matters, and dealing with the adult's money (sch 2, part 1).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
- adults' **confidentiality** of information must be taken into account; • adults have a **right to participate in decisions and make their own decisions**, if possible. Adults must be **supported and informed** to enable their participation, their **views must be considered** and actions must be **least restrictive of their rights**. Substituted judgement must be used when possible, but **actions must be consistent with the adult's proper care and protection**; • **power must be exercised** in a way that is **appropriate to the adult's characteristics and needs** (sch 1). The Act acknowledges an adult's: • **right to make decisions**, including those with which others may not agree, is fundamental to their inherent dignity; • **decision-making capacity may differ** according to the nature and extent of impairment, type and complexity of decision and support available from existing support networks; • right to make decisions should be **restricted and interfered with to the least possible extent**; and • right to **adequate and appropriate decision-making support** (s 5).	Where a person cannot consent to medical treatment and does not have an advanced health directive or a guardian or an attorney, then a **statutory health attorney** (hierarchy: spouse with close and continuing relationship, unpaid carer, close friend or relative, adult guardian) may make a decision. The statutory health attorney may make any decision about a health matter that an adult could lawfully have made if the adult had capacity (s 66).	A proposed administrator must **provide a financial management plan** to the Tribunal, or its appropriately qualified nominee, for approval (s 20).	The proposed appointee must advise the Tribunal of matters that are relevant to these considerations and, if appointed, must continue to advise the Tribunal of any relevant matters that arise following the appointment and on review (ss 16-17, 30). The Tribunal may make enquiries about a person's appropriateness and competence to perform functions and exercise powers (s 18).	A guardian or administrator must: • **apply the general principles** (s 34); • exercise their power **honestly and with reasonable diligence to protect the adult's interests** (s 35); • exercise their power as required by the **terms of any Tribunal order** (s 36); and • **consult with other appointees regularly** to avoid any prejudice to the adult's interests by way of a breakdown in communication between them (s 40). An administrator must also: • **avoid conflict transactions** unless authorised by the Tribunal (s 37); • **keep records** and produce them when required (s 49); • keep their **property separate** from the adult's property, unless jointly owned (s 50); • invest only in **authorised investments**, except in cases where existing non-authorised investments are continued (s 51); and • provide for the needs of the adult's dependents, to the extent reasonable in the circumstances (s 55).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
The purpose of the Act is to **balance the adult's rights** to maximum autonomy in decision-making and appropriate support for decision-making (s 6). The Act achieves its purpose by: • **presuming that an adult has capacity** for a matter (s 7(a)); • stating **principles** to be observed (s 7(c)); and • encouraging **decision-making involvement** by adult's support network (s 7(d)). The **community** is encouraged to apply and promote the general principles (s 11(3)).				

South Australia - *Guardianship and Administration Act 1993*

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant section: 5	Relevant sections: 3, 58-59	Relevant sections: 25, 29, 35, 50-51	Relevant sections: 29, 50-51	Relevant sections: 17, 25(5), 29, 31, 39
Where a decision or an order in relation to a person or their estate is made pursuant to the Act or to powers conferred by or under the Act: • **paramount consideration** must be given to what would, in the decision-maker's opinion, be **the wishes of the person if they were not mentally incapacitated**, but only so far as there is reasonably ascertainable evidence on which to base such an opinion; • the **person's wishes should, unless not possible or reasonably practicable, be sought and considered**; • consideration must, when making or affirming a guardianship or administration order, be given to **the adequacy of existing informal arrangements** for the person's care and financial managements, and **to the desirability of not disturbing those arrangements**; and • a decision or order must be **least restrictive of the person's rights and personal autonomy** as is consistent with the proper care and protection of the person (s 5).	A person **can give effective consent** for medical and dental treatment, **whether or not they are subject to a guardianship and/or administration order** (s 58). Where a person cannot consent to medical treatment and does not have a medical agent, an **appropriate authority** (an available and empowered guardian, relative or the Board following a proper application) may consent to the treatment (ss 58, 59). A relative includes a person who is responsible for the day-to-day supervision, care and wellbeing of the person (s 3).	An adult may appoint another adult as their **enduring guardian**, provided the other adult is not involved in the person's medical care or treatment (s 25(1)-(4)). A guardian may be appointed if the Board is satisfied that: • the subject person **has a mental incapacity**; • the subject person does not have an enduring guardian; and • an order should be made in respect of the person (s 29(1)). The Board may place a person under **limited guardianship**, by which the Board will specify aspects of the person's care or welfare that are the responsibility of the guardian or, if limited guardianship is inappropriate, **under full guardianship**. An order may be **subject to conditions** or limitations as the Board thinks fit and specifies in the order (s 29(1)-(2), 29(6)).	In determining the suitability of a person as guardian or administrator, the Board must have regard to: • whether appointee and person would be **incompatible**; • if there is an **existing family arrangement or relationship that should be preserved** or should not be disturbed; • if the appointee would be **competent to perform the functions of guardian or administrator** and would do so in accordance with the principles; • if the appointee would be **readily available**; and • if any **conflict** would arise from the appointment (s 50(1)). The Public Advocate may be appointed as guardian only if no other order would be appropriate (s 29(4)).	An **enduring guardian** may exercise the powers of a guardian at law or in equity and make decisions regarding medical treatment, unless a medical agent has been appointed (s25(5)). A person appointed as a guardian under this Part has and may exercise, **subject to the Act and the terms of the Board's order**, all the powers a guardian has at law or in equity (s 31). A **limited guardianship order** is an order by which the Board specifies the **particular aspects of the protected person's care or welfare** that are to be the responsibility of the appointed guardian or guardians (s 29). An order may **be subject to conditions or limitations** as the Board thinks fit, or may confer additional powers that are necessary and desirable for proper administration, as specified in the order (s 29(1)-(2), 29(6)). An administrator has powers regarding the control and management of the estate, subject to the Act and **the terms of the administration order** (s39(2)).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
		An **administrator** may be appointed if the Board is satisfied that: • the person the subject of the application has a mental incapacity; and • an order should be made in **respect of the person** (s 35(1)). The Board may appoint an administrator for a specified part of a person's estate under **a limited administration order** or, if a limited order is not appropriate, appoint an administrator for the person's whole estate under a **full administration order** (s 35(1)).		An **administrator** may make decisions regarding the person's real and other property, business and legal matters and may apply the person's money for the maintenance of the person and their dependants (s 17).

Tasmania - *Guardianship and Administration Act 1995*

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant section: 6	Relevant sections: 4, 20, 39, 43, 51	Relevant sections: 20, 21, 32, 51, 54, 77	Relevant sections: 21, 54	Relevant sections: 17, 25-27, 32, 56-57
A function or power conferred, or duty imposed, by this Act is to be performed so that the: • means that are **least restrictive of a person's freedom of decision and action** as is possible in the circumstances are adopted; • **best interests of person with a disability** or person who is subject of an application under the Act are promoted; and • **wishes of a person with a disability** who is the subject of an application under the Act are, if possible, **carried into effect** (s 6).	A **person responsible** (priority order: guardian, spouse, carer or close friend/relative) may consent to a relevant person receiving medical or dental treatment, other than special treatment (ss 4, 39).	An adult may appoint another adult as their **enduring guardian**, provided the other adult is not involved in the person's medical care or treatment (s 32). A guardian or an administrator will be appointed if the Board concludes that a proposed represented person: • is a **person with a disability**; • is **unable, by reason of that disability, to make reasonable judgements** in respect of any or all matters relating to their person or circumstance, or to all or any part of their estate; and • is **in need of a guardian or administrator** (ss 20(1), 51(1)). In determining whether a person needs a guardian or administrator, the Board must consider whether the needs of the proposed represented person **could be met by other means that are less restrictive of the person's freedom of decision and action** (ss 20(2), 51(2)). The Board must not appoint a guardian or administrator unless satisfied that this would be in the **person's best interests** (ss 20(3), 51(3)).	A person may be appointed as guardian if they are an adult and consent to act as guardian, and if the Board is satisfied they: • will act in **the best interests** of the proposed represented person; • do not have an actual or potential **conflict of interest**; and • are a **suitable person** (s 21(1)). Considerations for determining suitability are: • **wishes of proposed represented person**; • **preservation of existing family relationships**; • **compatibility** with proposed represented person and administrator; and • **availability and accessibility** to proposed represented person (s 21(2)).	An **enduring guardian** may exercise all powers of a guardian (s 32(5)). A **full guardian** has all powers and duties as if they were the parent and the represented person were their child. They can make decisions about residence, employment and the restriction or prohibition of visits by others (ss 25(1), (2)). A **limited guardian** has one or more of the powers and duties which may be conferred on a full guardian, **as specified in the order** (s 26(1)). A guardian must act in the **best interests** of the person under guardianship, which is achieved if the guardian acts: • in **consultation with the person and taking into account as far as possible the person's wishes**; • as an advocate for the person; • to **encourage the person to participate in the community**; • to **encourage and assist the person to become capable of caring for themselves and making reasonable judgements**; and • to **protect the person** from neglect, abuse or exploitation (s 27).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
		The Board may make a **limited guardianship** order. It must be the **least restrictive of the represented person's freedom of decision and action** as is possible in the circumstances and may be subject to conditions or restrictions (ss 20(1), (5)). If the Board is satisfied a limited guardianship order would be insufficient to meet the represented person's needs, then an order for **full guardianship** may be made and **subject to such conditions or restrictions** (ss 20(1),(4)). When appointing an administrator, the order must be **the least restrictive of the represented person's freedom of decision and action as is possible** in the circumstances and may be **subject to such conditions or restrictions** (ss 20(4)-(5)). If the Supreme Court considers that a party to a proceeding before the Court requires a guardian and/or administrator, the Supreme Court may refer the issue to the Board (s 77).	A person (including an existing guardian) may be appointed as administrator if they consent to act as administrator, and if the Board is satisfied they: • will act in the **best interests** of the proposed represented person; • do not have an actual or potential conflict of interests; • are a **suitable person**; and • have **sufficient expertise** to administer the estate (s 54(1)). In determining suitability of an administrator, the Board must take into account: • **wishes of proposed represented person**; and • **compatibility** with proposed represented person and guardian (s 54(2)).	An **administrator** is responsible for the **care and management** of the person's estate and to make decisions about the person's property, business and legal matters. They may apply the person's money for the maintenance of the person and their dependants (ss 17, 56(1)). The Board may **limit an administrator's power** or direct that the represented person remains responsible for some of the property or estate (s 56(3)). An administrator must act in the **best interests** of the represented person, which is achieved if they act: • to **encourage and assist the person to become capable of administering their estate**; and • in **consultation with the person and taking into account as far as possible the person's wishes** (s 57).

Victoria - *Guardianship and Administration Act 1986*

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant section: 4	Relevant sections: 22, 37, 38, 39, 42H	Relevant sections: 22, 46, 66	Relevant sections: 23, 47	Relevant sections: 24, 25, 28, 35(B), 38, 42U, 48, 49, 50A, 58B
The provisions of the Act should be interpreted and every function, power, authority, discretion, jurisdiction and duty conferred or imposed be performed so that: • the means that are **the least restrictive of a person's freedom of decision and action** as is possible in the circumstances are adopted; • the **best interests of a person with a disability** are promoted; and • the **wishes of a person with a disability are, wherever possible, given effect to** (s 4(2)).	A **person responsible** may consent to medical or dental treatment on behalf of another person. The person responsible is the **first person reasonably available** from the following list: • person appointed under section 5A *Medical Treatment Act* 1988; • person appointed by the Tribunal or under a guardianship order to make medical treatment decisions; • enduring guardian; • a person appointed in writing by the person; • spouse or domestic partner who is not under guardianship and has a close and ongoing relationship with the person; • primary carer; then • nearest relative (s 37).	The Tribunal may appoint a **plenary or limited guardian**, if it is satisfied that the person: • has a **disability**; • is, by reason of that disability, **unable to make reasonable judgements** about matters relating to their person or circumstances; and • is in **need of a guardian** (s 22(1)). When determining whether a person needs a guardian, the Tribunal must consider: • whether the needs of the person could be **met by other means less restrictive** of the person's freedom of decision and action; • the **wishes of the person**, as far as they can be ascertained; • the **wishes of any nearest relatives** or other family members; and • **preserving existing family relationships** (s 22). The Tribunal may make a guardianship or administration order only if satisfied that the order would be in the **best interests** of the person (ss 22(3), 46(3)).	The Tribunal may appoint as a guardian an adult who consents to act as guardian, if it is satisfied that that person: • will act in the **best interests** of the person; • is not in a position where their **interests conflict** or may conflict with the interests of the person; and • is a **suitable person** to act as the guardian of the person (s 23). In determining the suitability of a potential guardian, the Tribunal must take into account: • the **wishes of the person**; • the **desirability of preserving existing family relationships**; • the **compatibility** of the proposed guardian with the person and any administrator; and • whether the proposed guardian will be **available and accessible** to the person to fulfil their guardianship requirements (s 23).	To the extent that the person becomes unable to make reasonable judgements, an **enduring guardian** will have the powers and duties specified or, if no powers are specified, the powers of a plenary guardian, but cannot consent to special procedures (s 35B). A **plenary guardian** has all powers and duties that would exist if they were the parent and the represented person were their child. They can make decisions regarding residence, health care, employment, and the restriction or prohibition of visits by others (ss 24(1), (2)). A **limited guardian** may have one or more of the powers conferred on a plenary guardian, as specified in the order (s 25). A guardian must act in the **best interests** of the person, which is achieved if they act: • as an advocate; • to **encourage participation in community life**;

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
	The person responsible must act in the **best interests** of the patient and take into account the following: • **wishes of the patient**, so far as they can be ascertained; • **wishes of nearest relative or family member** (subject to s 38(2); • **consequences** if treatment not carried out; • **alternative** treatments; • nature and degree of **significant risks** associated with proposed and alternative treatments; and • whether the treatment is only to **promote the patient's health and well-being** (s 38(1)).	The Tribunal may only make **a plenary guardianship order when satisfied that a limited order would be insufficient** to meet the person's needs (s 22(4)). Where the Tribunal makes an order appointing a limited guardian or an administrator, the order must be the **least restrictive of that person's freedom of decision and action** as is possible in the circumstances (ss 22(6), 46(4)). The Tribunal may appoint an administrator if it is satisfied that the person: • is a person with a **disability**; • is, by reason of that disability, **unable to make reasonable judgements** in respect of the matters relating to all or any part of their estate; and • **needs an administrator** (s 46(1)). When determining whether a person needs an administrator the Tribunal must consider: • whether the needs of the person could be **met by other means less restrictive** of the person's freedom of decision and action; and • the **wishes of the person**, so far as they can be ascertained (s 46(2)).	The Public Advocate may be appointed if no other person fulfils the guardianship requirements (s 23(4)). The Tribunal may appoint a person as an administrator if the person consents and the Tribunal is satisfied the person: • will act in the **best interests** of the person; • is not in a position where their **interests conflict** or may conflict with the interests of the person; • is a **suitable person** to act as the administrator of the person's estate; and • has **sufficient expertise** to administer the estate (s 47(1)). In determining the suitability of a potential administrator, the Tribunal must take into account the: • **wishes of the person**; and • **compatibility** of the proposed administrator with the person and with any guardian (s 47(2)).	• to **encourage and assist the person to become capable** of caring for themself and of **making reasonable judgements** in relation to personal matters; • to protect the person from neglect, abuse or exploitation; and • **in consultation with the represented person**, taking into account, as far as possible, their wishes (s 28). An **administrator** has the powers and duties conferred by part 5, division 3 of the Act and such of the powers and duties in division 3A as specified by the Tribunal (s 48(1)). An **administrator** has the general care and management of the person's estate and has a duty to administer and deal with the property and estate, manage the person's affairs and exercise the person's rights (s 58B(1)). An **administrator** may make decisions and take actions regarding the person's real and other property, business and legal matters and may apply the person's money for the maintenance of the person and their dependants, and the education of their children. They may also, if expedient and reasonable, give to the person for their personal use any money or personal property belonging to the person (s 58B(2)-(3)).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
		If in any civil proceedings before the Supreme, County or Magistrates Court, the Court considers that a party may need to have a guardian and/or administrator appointed, the Court may refer the issue to the Tribunal for determination (s 66).		An administrator must act in the **best interests** of the person, including by acting, as far as possible: • to **encourage and assist the represented person** to become capable of administering the estate; and • in **consultation with the represented person**, taking into account as far as possible their wishes (s 49).

Western Australia - *Guardianship and Administration Act 1990*

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant sections: 4, 51, 70	Relevant sections: 66, 110ZD, 110ZJ	Relevant sections: 43, 44, 64, 65, 68	Relevant sections: 43, 44, 64, 68	Relevant sections: 17, 45, 43, 46, 51, 64, 70, 71, 110G
In dealing with proceedings under this Act, the Tribunal must observe these principles: • the primary concern of the Tribunal will be the **best interests** of any represented person or person in respect of whom an application is made; • every person shall be **presumed to be capable of looking after their own health and safety**, making **reasonable judgements** about matters relating to their person and estate and managing their own affairs until the contrary is proven to the satisfaction of the Tribunal; • a guardianship or administration order will not be made if the needs of the person **could be met by other means less restrictive of the person's freedom of decision and action**; • a plenary guardian shall not be appointed if the appointment of **a limited guardian would be sufficient** to meet a person's needs;	When a person is unable, by reason of a mental disability, to make reasonable judgements in respect of matters relating to all or part of their estate, but does not need to have an administrator appointed on a continuing basis, the Tribunal may, **without making an appointment, by order authorise or require a person who could be appointed as administrator to perform any specified function** (s 66(1)). If a patient cannot make reasonable judgements in respect of any proposed treatment, the decision may be made by reference to, in priority order: • an advance health directive; • an enduring guardian who is authorised to make treatment decisions and is available and willing to do so; • a guardian who is authorised to make treatment decisions and is available and willing to do so; then	A Tribunal may make a guardianship appointment if satisfied that a person is: • 18 years of age; • **incapable of looking after their own health and safety**; **is unable to make reasonable judgement** in respect of matters relating to their person; or is in **need of oversight, care or control** in the interests of his own health and safety or for the protection of others; and • in **need of a guardian** (s 43(1)). A Tribunal may appoint an administrator if satisfied that a person: • is **unable, by reason of a mental disability, to make reasonable judgements** in respect of matters relating to all or any part of their estate; and • is **in need of an administrator** of his estate (s 64(1).	A person may be appointed as guardian if they are over 18 years, consent to the appointment and: • will act in the **best interests** of the proposed represented person; • must not have an **actual or potential conflict** of interest with the proposed represented person; and • is otherwise **suitable to act** as guardian (s 44(1)). Considerations for determining suitability are: • **desirability of preserving existing relationships** with the family of the proposed represented person; • **compatibility** of proposed appointee with the proposed represented person and any appointed administrator; • **wishes of proposed represented person**; and • if proposed appointee will be **able to perform functions** vested in them (s44(2)).	An **enduring guardian** has the same functions and limitations as a plenary guardian, but these will be directed by the appointing instrument (s 110G). A **plenary guardian** will, unless the appointment is restricted, have all powers and duties that would exist if they were the parent and the represented person were their child but cannot chastise or punish the person. They can make decisions regarding residence, employment, treatment, education/training, associations and legal proceedings not related to the person's estate (ss 45(1), (2)). A **limited guardian** will have the functions in section 45 as per the guardianship order (ss 43(4), 46). The appointment of a **guardian** or administrator may be made **subject to such conditions and restrictions** as the Tribunal thinks fit (ss 43(3), 64(3)).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
• an order appointing a limited guardian or administrator shall be in the terms that **impose the least restrictions possible** in the circumstances on the person's freedom of decision and action; and • in considering any matter, the Tribunal shall, as far as possible**, seek to ascertain the views and wishes of the person concerned as expressed,** in whatever manner, at the time or as gathered from the person's previous actions (s 4). Guardians and administrators must act in the **best interests** of a represented person (ss 51, 70).	• a person responsible for the patient (s 110ZJ). The **person responsible** is the first of the following persons who is 18 years of age, has full legal capacity, is reasonably available, is willing to make a treatment decision and maintains a close personal relationship (frequent personal contact and genuine interest in patient's welfare): • spouse or de-facto partner; • child, parent or sibling; • primary unpaid carer; or • any other person who maintains a close personal relationship with patient (ss 110ZD(1)-(7)). The person responsible for the patient must act according to the person's opinion of the **best interests** of the patient (s 110ZD(8)).		The Public Advocate must be appointed as guardian or administrator only where no other person or corporate trustee is suitable and willing to act, except in the case of joint appointments (ss 44(5), 68(5)). A person over 18 years or a corporate trustee may be appointed as administrator if they consent to the appointment and in the opinion of the Tribunal: • will act in the **best interests** of the proposed represented person; and • is otherwise **suitable to act** as administrator of the estate (s 68(1)). In determining those matters in section 68(1), the Tribunal must take into account: • the **compatibility** of proposed appointee with the proposed represented person and any appointed guardian; • the **wishes of proposed represented person**; and • whether proposed appointee will be **able to perform the functions** vested in them (s68(3)).	The Tribunal may appoint a **plenary administrator** who can perform any function the person could have performed if they had full legal capacity, except making a testamentary disposition (ss 71(1)-(2a)). If a plenary appointment is not made, the Tribunal may authorise an administrator to perform a **specified function** (s 71(3)). The functions of an **administrator** may relate to decisions regarding the person's real and other property, business and legal matters and accommodation/maintenance/ education of the person and their dependants (s 71). The Tribunal may also **require a function by an administrator to be performed** and give directions as to the time, manner or circumstance of performance (s 71(4)). A guardian/administrator will act in the **best interests** of a represented person if they act: • as an **advocate** for the represented person; • to **encourage the represented person to live and participate in the community**;

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
				• to **encourage and assist the represented person to become capable of caring for themselves and making reasonable judgements** regarding matters related to their person; • to **protect the represented person** from neglect, abuse or exploitation, both financial and otherwise; • **in consultation with the represented person** and take into account as far as is possible **the wishes of that person, expressed in whatever manner at the time**, or as gathered from the person's previous actions; • in a **manner that is least restrictive of the rights**, while consistent with the proper protection, of the represented person; • to **maintain any supportive relationships** the represented person has; and • to maintain the person's familiar cultural, linguistic and religious environment (ss 51(1), (2)), 70 (1),(2)).


Queensland Government