

Queensland  
Law Reform Commission

**Shaping Queensland's  
Guardianship Legislation:  
Principles and Capacity**

Discussion Paper

WP No 64  
September 2008

The short citation for this Discussion Paper is QLRC WP 64.  
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ISBN: 978 0 7242 7758 7

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You are invited to make comments and submissions on the issues and key questions in this Discussion Paper.

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**Closing date: 12 December 2008**

It would be helpful if comments and submissions addressed specific issues or questions in the Discussion Paper.

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# Table of contents

<b>CHAPTER 1 .....</b>	<b>1</b>
<b>INTRODUCTION .....</b>	<b>1</b>
THE GUARDIANSHIP REVIEW.....	1
ABOUT THIS DISCUSSION PAPER .....	3
Methodology.....	3
Content.....	3
Terminology.....	5
THE COMPANION PAPER.....	6
THE CONSULTATION PROCESS .....	6
Consultation on this Discussion Paper .....	6
CALL FOR SUBMISSIONS.....	6
<b>CHAPTER 2 .....</b>	<b>8</b>
<b>OVERVIEW OF ADULT GUARDIANSHIP LAW IN QUEENSLAND .....</b>	<b>8</b>
INTRODUCTION .....	8
OVERVIEW OF GUARDIANSHIP IN QUEENSLAND.....	9
When are adults unable to make their own decisions for a matter? .....	9
What decisions can be made for an adult? .....	10
Financial matters.....	11
Personal matters.....	11
Health matters.....	11
Special health matters .....	12
Special personal matters .....	12
Who can make substitute decisions for an adult?.....	13
Informal decision-makers.....	13
Attorneys appointed in advance by the adult.....	14
Statutory health attorneys .....	15
Guardians and administrators appointed by the Tribunal.....	16
The Tribunal.....	18
How are substitute decisions for an adult to be made? .....	19
What agencies are involved in the guardianship system? .....	21
The Tribunal.....	21
The Adult Guardian.....	23
The Public Advocate .....	24
Community visitors.....	25
The Public Trustee.....	26
<b>CHAPTER 3 .....</b>	<b>27</b>
<b>THE UNITED NATIONS CONVENTION .....</b>	<b>27</b>
INTRODUCTION .....	27
RECOGNITION OF HUMAN RIGHTS FOR ADULTS WITH IMPAIRED CAPACITY .....	27
A NEW UNITED NATIONS CONVENTION .....	28
WHAT THE CONVENTION PROVIDES.....	29
THE CONVENTION AND THE COMMISSION'S REVIEW .....	32

<b>CHAPTER 4 .....</b>	<b>34</b>
<b>THE GENERAL PRINCIPLES .....</b>	<b>34</b>
INTRODUCTION .....	34
PRINCIPLES FOR SUBSTITUTE DECISION-MAKING .....	35
THE GENERAL PRINCIPLES IN QUEENSLAND .....	37
What the General Principles contain.....	38
Applying the General Principles .....	41
THE POSITION IN OTHER JURISDICTIONS .....	43
What the principles contain .....	44
Applying the principles .....	46
ISSUES FOR CONSIDERATION.....	48
The role and purpose of the General Principles .....	48
Redrafting or refining the General Principles .....	50
Substituted judgment .....	52
Acting in the adult's interest .....	55
Best interests as an alternative approach.....	57
Consultation with families and carers .....	59
Informal arrangements .....	62
Protection from neglect, abuse, exploitation .....	63
Advocacy.....	65
Financial decisions and considerations .....	67
Conflicts and priority principles .....	68
Compliance and enforcement .....	69
Application to informal decision-makers .....	70
Location of the principles .....	71
<b>CHAPTER 5 .....</b>	<b>73</b>
<b>THE HEALTH CARE PRINCIPLE.....</b>	<b>73</b>
INTRODUCTION .....	73
MAKING HEALTH CARE DECISIONS .....	74
Health matters .....	74
Special health matters.....	75
Limitations on making health decisions for an adult .....	76
THE HEALTH CARE PRINCIPLE IN QUEENSLAND .....	77
What the Health Care Principle contains .....	77
History and amendments .....	79
THE POSITION IN OTHER JURISDICTIONS .....	81
ISSUES FOR CONSIDERATION.....	83
The role and purpose of the Health Care Principle.....	83
The United Nations Convention .....	84
General or specific .....	85
Relationship with the General Principles .....	85
What the Health Care Principle should contain .....	88
Least restrictive option: 12(1)(a) .....	88
Necessary and appropriate to maintain or promote health or well-being:	
12(1)(b)(i) .....	89
Best interests: 12(1)(b)(ii) .....	90
Views, wishes and information from others: 12(2) and (3) .....	96
Adult's right to refuse health care: 12(4).....	99
Special health matters: 12(5) .....	101
Compliance and enforcement .....	102
Location of the Health Care Principle .....	103

<b>CHAPTER 6 .....</b>	<b>105</b>
<b>DECISION-MAKING CAPACITY .....</b>	<b>105</b>
INTRODUCTION .....	105
DECISION-MAKING CAPACITY .....	106
GENERAL APPROACHES FOR DEFINING DECISION-MAKING CAPACITY .....	106
THE LAW IN QUEENSLAND .....	107
The presumption of capacity .....	108
The statutory test of capacity .....	108
The elements of the definition .....	108
Related matters .....	109
Declarations of capacity .....	109
THE POSITION IN OTHER JURISDICTIONS .....	110
Australia .....	110
The test of impaired capacity .....	110
Inability to decide or to manage affairs .....	110
The diagnostic threshold .....	111
Inability to communicate .....	112
The exclusion of certain factors .....	112
The United Kingdom .....	113
The test of impaired capacity .....	113
The exclusion of certain factors .....	114
Ireland .....	114
ISSUES FOR CONSIDERATION .....	115
The presumption of capacity .....	115
The approach to defining 'capacity' .....	117
The functional approach .....	118
The status approach .....	120
The outcome approach .....	121
The definition of 'capacity' .....	122
Ability to understand the nature and effect of the decision: clause (a) .....	123
The information required to assess understanding .....	124
Ability to make decisions about the matter freely and voluntarily: clause (b) .....	126
Ability to communicate the decisions in some way: clause (c) .....	131
The exclusion of specific matters .....	133
Fluctuating capacity .....	135
Assessments of capacity .....	136
<b>CHAPTER 7 .....</b>	<b>138</b>
<b>CAPACITY TO MAKE AN ENDURING DOCUMENT .....</b>	<b>138</b>
INTRODUCTION .....	138
THE LAW IN QUEENSLAND .....	139
Enduring documents .....	139
Capacity to make an enduring document .....	140
Capacity to revoke an enduring document .....	142
Attesting to the principal's capacity .....	143
Guidelines for witnesses .....	145
Disputes about capacity and validity .....	146
THE POSITION IN OTHER JURISDICTIONS .....	146
ISSUES FOR CONSIDERATION .....	148
The level of understanding required to appoint an attorney .....	149
An exhaustive or non-exhaustive list of factors .....	154
Relationship to the definitions of 'impaired capacity' and 'capacity' .....	155

---

Who should witness the principal's capacity.....	159
Lawyers, justices of the peace etc.....	159
Doctors.....	160
A minimum age requirement.....	164
Steps the witness should take.....	165
<b>APPENDIX 1 .....</b>	<b>167</b>
<b>TERMS OF REFERENCE .....</b>	<b>167</b>
<b>APPENDIX 2 .....</b>	<b>170</b>
<b>MEMBERSHIP OF THE REFERENCE GROUP .....</b>	<b>170</b>
<b>APPENDIX 3 .....</b>	<b>171</b>
<b>JURISDICTIONAL COMPARISON OF THE GENERAL PRINCIPLES .....</b>	<b>171</b>

# Chapter 1

## Introduction

THE GUARDIANSHIP REVIEW.....	1
ABOUT THIS DISCUSSION PAPER .....	3
Methodology.....	3
Content.....	3
Terminology.....	5
THE COMPANION PAPER.....	6
THE CONSULTATION PROCESS .....	6
Consultation on this Discussion Paper .....	6
CALL FOR SUBMISSIONS.....	6

### THE GUARDIANSHIP REVIEW

1.1 The Attorney-General has asked the Queensland Law Reform Commission to review aspects of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). This legislation regulates decision-making by and for adults with impaired decision-making capacity.

1.2 The Commission's terms of reference require it to conduct this review in two stages.<sup>1</sup>

1.3 The first stage looked at the confidentiality provisions of the legislation. The Commission completed stage one of the review in mid-2007, with the production of its final report on the confidentiality provisions, which includes draft legislation to give effect to the Commission's recommendations.<sup>2</sup> In response to the Commission's final report, the Queensland Government introduced the Guardianship and Administration and Other Acts Amendment Bill 2008 (Qld) into the Queensland Parliament on 14 May 2008. The Bill proposes to implement, in whole or in part, most of the Commission's recommendations.<sup>3</sup>

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<sup>1</sup> The Commission's terms of reference are set out in Appendix 1.

<sup>2</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007).

<sup>3</sup> In response to the Commission's final report, the Queensland Government indicated that it proposed to implement 67 of the Commission's recommendations in full and a further 14 'with minor or technical amendment'. It also indicated it would substantially depart from recommendation 4-19 of the Report, which proposed that the Public Advocate act in the role similar to that of a 'contradictor' in limitation order proceedings (excluding adult evidence orders) to provide submissions to the Tribunal and act as a safeguard to ensure that the Tribunal makes orders only in accordance with the new confidentiality provisions: Queensland Government, *Queensland Government Response to the Queensland Law Reform Commission Report 'Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System'* (May 2008) 5, <<http://www.justice.qld.gov.au/17.htm>> at 15 August 2008.

1.4 The second stage of the review involves a more general review of the legislation. In undertaking this stage, the Attorney-General has asked the Commission to give specific consideration to:

- the law relating to decisions about personal, financial, health matters and special health matters under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including but not limited to:
  - the General Principles;
  - the scope of personal matters and financial matters and of the powers of guardians and administrators;
  - the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation;
  - the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework;
  - the processes for review of decisions;
  - consent to special medical research or experimental health care;
  - the law relating to advance health directives and enduring powers of attorney;
  - the scope of the decision-making power of statutory health attorneys;
  - the ability of an adult with impaired capacity to object to receiving medical treatment;
  - the law relating to the withholding and withdrawal of life-sustaining measures;
- whether there is a need to provide protection for people who make complaints about the treatment of an adult with impaired capacity; and
- whether there are circumstances in which the *Guardianship and Administration Act 2000* (Qld) should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.

1.5 For consultation purposes, the Commission is dealing with the matters in the second stage of the review in separate Discussion Papers.

1.6 This Discussion Paper deals exclusively with the threshold issues of:

- the General Principles and the Health Care Principle; and
- the nature of decision-making capacity, and its assessment under the legislation.

1.7 The other substantive legal issues arising under the guardianship legislation and procedural issues in the operation of the guardianship system will be addressed separately.

1.8 The Commission is to give the Attorney-General its final report on stage two of its review by the end of 2008.

## **ABOUT THIS DISCUSSION PAPER**

### **Methodology**

1.9 This Discussion Paper sets out the relevant law at present in Queensland, the position in other jurisdictions and a number of issues for consideration. It invites people to make submissions so that their views can be considered when the Commission formulates its recommendations.

1.10 In stage one of its review, the Commission established an informal Reference Group, whose members represent a cross-section of people who are affected by, administer or are otherwise interested in the guardianship legislation to provide expertise and advice on the review.<sup>4</sup> The Reference Group met three times during stage one. It also met in August 2008 to provide input into this Discussion Paper. The Commission will continue to meet with the Reference Group during the remainder of the review.

1.11 The Commission is grateful for the assistance provided by these individuals and organisations and appreciates their valuable contribution to the review.

### **Content**

1.12 This Discussion Paper considers some of the threshold matters for the guardianship legislation.

1.13 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) provide a framework for decision-making by and for adults with impaired decision-making capacity. These Acts contain a set of General Principles for substitute decision-making which must be applied when a power or a function under the legislation is exercised or performed in relation to

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The current membership of the Reference Group is set out in Appendix 2.

the adult. They also contain a Health Care Principle which is to be applied by substitute decision-makers when making decisions about an adult's health matters or special health matters. Together, these principles form the philosophical underpinning for substitute decision-making under the legislation.

1.14 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) also contain provisions dealing with decision-making capacity. Among other things, these Acts set out criteria for determining when an adult has the capacity to make his or her own decisions for a matter. An adult who does not satisfy these criteria in relation to a matter has impaired capacity for that matter. The legislation also sets out the test of capacity for making an enduring power of attorney or advance health directive. Since the legislation regulates decision-making for adults with impaired capacity, the concept of capacity, and how it is assessed under the legislation, is of fundamental importance.

1.15 Chapter 2 of the Discussion Paper provides a general overview of the guardianship system in Queensland.

1.16 Chapter 3 discusses the United Nations *Convention on the Rights of Persons with Disabilities* and its relevance in guiding the Commission's consideration of the issues raised by the Discussion Paper.

1.17 Chapter 4 discusses the role and content of the General Principles. It considers whether the existing General Principles remains appropriate or whether the principles should be redrafted or expanded to include new principles. It also discusses issues raised by the application of the General Principles in practice.

1.18 Chapter 5 examines the role, content and application of the Health Care Principle. It specifically considers whether the content of the Health Care Principle and, in particular, the best interests approach, remain appropriate.

1.19 Chapter 6 discusses the test of decision-making capacity, and how that capacity is assessed under the legislation. In particular, it considers the general approaches used for conceptualising decision-making capacity and examines the specific elements of the statutory test of capacity.

1.20 Chapter 7 discusses the test of capacity to make an enduring power of attorney or an advance health directive. It considers the level of understanding required for making an enduring document and witnessing requirements.

1.21 In examining the scope of Queensland's provisions, the Commission has included information about comparative legislative provisions that operate in other Australian States and Territories. The Discussion Paper also refers to comparative provisions in the legislation of jurisdictions outside Australia where those provisions are innovative, unique or may represent best practice.

1.22 Finally, unless otherwise specified, the law is stated as at 8 August 2008.

## Terminology

1.23 Throughout this Discussion Paper, the following terminology has been used:

- a reference to ‘the adult’ means the adult with impaired decision-making capacity;
- the term ‘guardianship legislation’ is used to refer to both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld);
- the term ‘Tribunal’ is used to refer to the Guardianship and Administration Tribunal of Queensland and, unless otherwise expressed, to those bodies in other jurisdictions exercising a judicial or quasi-judicial function under the relevant guardianship legislation. Some jurisdictions have Boards (South Australia and Tasmania) whilst others rely on a Court (Northern Territory). Western Australia and Victoria do not have separate guardianship tribunals and instead each has a generalist tribunal with jurisdiction for a range of matters including guardianship (the State Administrative Tribunal and the Victorian Civil and Administrative Tribunal respectively).
- the term ‘Adult Guardian’ is used to refer to the Adult Guardian of Queensland, unless otherwise expressed, the equivalent positions in other Australian jurisdictions.<sup>5</sup> In Victoria, Western Australia, South Australia and the Australian Capital Territory, the equivalent of the Adult Guardian is the Public Advocate. New South Wales, Tasmania and the Northern Territory have a Public Guardian.
- the term ‘enduring document’ refers to an advance health directive or an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld).<sup>6</sup>
- a reference to the ‘United Nations Convention’ means the *Convention on the Rights of Persons with Disabilities* adopted by the United Nations General Assembly in 2006 and ratified by Australia on 17 July 2008. The Convention sets out the fundamental human rights of people with a disability, including people with a mental or intellectual disability.

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<sup>5</sup> The functions and powers of the Adult Guardian equivalents vary from jurisdiction to jurisdiction.

<sup>6</sup> *Powers of Attorney Act 1998* (Qld) s 28; *Guardianship and Administration Act 2000* (Qld) sch 4.

## THE COMPANION PAPER

1.24 In order to facilitate wide and inclusive consultation, this Discussion Paper is supplemented by a shorter Companion Paper summarising the key issues called *Shaping Queensland's Guardianship Legislation: A Companion Paper*. It may be read instead of, or in conjunction with, the Discussion Paper.

## THE CONSULTATION PROCESS

1.25 The Commission undertakes wide community consultation before making recommendations to the Attorney-General as to how the law might be improved. The consultation process in this review will help the Commission to:

- identify the key issues;
- find out how the law works in practice, including any problems; and
- generate and test suggestions to improve the law.

1.26 The Commission is aware of the significant community interest in this review and is keen to ensure that it hears from people affected by the guardianship legislation on a daily basis.

### Consultation on this Discussion Paper

1.27 Copies of this Discussion Paper and the Companion Paper are available on the Commission's guardianship website.<sup>7</sup> People can also request a copy of either or both of these publications by contacting the Commission.

1.28 The Commission will hold a number of public forums to promote widespread community participation in its review. The Commission also invites people to make a written submission or to contact the Commission to share their views on the issues raised in this Discussion Paper.

1.29 Details of the Commission's public consultation process, including information about dates, venues and times for public forums, will be posted on the Commission's guardianship website,<sup>8</sup> and advertised widely.

## CALL FOR SUBMISSIONS

1.30 The Commission invites submissions on the issues raised in this Discussion Paper. Submissions may relate to the issues generally or to the specific questions posed in each chapter.

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<sup>7</sup> <<http://www qlrc qld gov au/guardianship>>.

<sup>8</sup> Ibid.

1.31 Details on how to make a submission are set out at the front of this Discussion Paper.<sup>9</sup> The closing date for submissions is 12 December 2008.

1.32 Submissions will be taken into consideration when the Commission is formulating its recommendations. At the conclusion of the review, the Commission will publish its recommendations in its final report, which will be presented to the Attorney-General for tabling in Parliament.

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Information about how the Commission will treat any submissions it receives is also included at the front of this Discussion Paper.

# Chapter 2

## Overview of adult guardianship law in Queensland

INTRODUCTION .....	8
OVERVIEW OF GUARDIANSHIP IN QUEENSLAND .....	9
When are adults unable to make their own decisions for a matter? .....	9
What decisions can be made for an adult? .....	10
Who can make substitute decisions for an adult? .....	13
How are substitute decisions for an adult to be made? .....	19
What agencies are involved in the guardianship system? .....	21

### INTRODUCTION

2.1 An ordinary part of being an adult is having the authority and responsibility to make our own decisions.<sup>10</sup> Our decisions help to define us as individuals. They not only shape the practical course of our lives, they also illustrate to others how we see ourselves and what our hopes and dreams are. When our power to make our own decisions is taken away from us, our sense of self is also at risk.

2.2 Everyday living involves decision-making on a wide range of issues which vary greatly in scope and complexity. These include decisions about personal matters (for example, when to get up, what to wear, where to live, who to live with and where to work). They also include decisions about financial matters (such as day-to-day financial decisions, buying and selling property, making investments and entering into contracts) and health matters (for example, agreeing to have medical treatment).

2.3 However, an adult's capacity to make certain decisions may be impaired. An adult may have impaired capacity as a result of an intellectual disability, dementia, an acquired brain injury, mental illness, or an inability to communicate, for example, because he or she is in a coma. While an adult may have impaired capacity for some types of decisions, such as a complex financial decision, he or she may still be able to make other decisions, such as where to live. An impairment may also be temporary or subject to fluctuation.

2.4 When an adult is unable to make some or all of his or her own decisions, choices will need to be made on the adult's behalf by someone else.

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<sup>10</sup> An 'adult' is an individual who is 18 years or more: *Acts Interpretation Act 1954* (Qld) s 36.

Queensland's guardianship legislation establishes a mechanism for decision-making by and for adults with impaired decision-making capacity.

2.5 This chapter gives an overview of Queensland's system of guardianship.

## OVERVIEW OF GUARDIANSHIP IN QUEENSLAND

2.6 Queensland's guardianship legislation is comprised of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). The guardianship legislation is concerned with the following questions:

- when are adults unable to make their own decisions;
- what decisions can be made for an adult with impaired capacity;
- who can make substitute decisions for an adult;<sup>11</sup>
- how are substitute decisions to be made; and
- what agencies are involved in the guardianship system.

### When are adults unable to make their own decisions for a matter?

2.7 As mentioned above, part of being an adult is having the authority and autonomy to make our own decisions. An adult may, however, be unable to make his or her own decisions if the adult has impaired decision-making capacity. Capacity has been described as 'a gatekeeper concept' in that it is 'a mechanism by which individuals either retain or lose authority over and responsibility for decisions that affect their lives'.<sup>12</sup>

2.8 In Queensland, an adult will have 'capacity' for a matter if he or she is capable of:<sup>13</sup>

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

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11 In addition to specifying who may make substitute decisions for an adult, the legislation also facilitates an adult making decisions for him or herself in advance of losing impaired capacity.

12 P Bartlett and R Sandland, *Mental Health Law Policy and Practice* (2000) [10.5.1].

13 *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'capacity'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'capacity').

2.9 An adult who does not satisfy these criteria in relation to a matter is described as having ‘impaired capacity’,<sup>14</sup> for that matter. Under Queensland’s guardianship legislation, the Tribunal has power to make a declaration about an adult’s capacity<sup>15</sup> on the basis of medical and other evidence.<sup>16</sup>

2.10 There is a presumption, however, that every adult has capacity unless it is otherwise established.<sup>17</sup> The legislative framework also promotes the right of adults to make their own decisions to the extent that they are capable.<sup>18</sup> This includes the right to make decisions with which others may not agree.<sup>19</sup>

2.11 Impaired capacity is specific to individual decisions about matters. An adult may have capacity to make decisions about some matters but not others.<sup>20</sup> For example, an adult with mild dementia may not have sufficient capacity to execute a contract disposing of his or her total assets but may be fully capable of making day-to-day shopping or lifestyle decisions.<sup>21</sup>

### What decisions can be made for an adult?

2.12 An adult with impaired capacity for a matter may require a substitute decision-maker for decisions about that matter. The guardianship legislation makes provision for a wide range of personal and financial decisions to be made for an adult with impaired capacity. The legislation distinguishes between decisions concerning ‘financial matters’ which involve *administration*, and those concerning ‘personal matters’ which involve *guardianship*. It also differentiates between ‘health matters’, ‘special health matters’, and ‘special personal matters’.

14 *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of ‘impaired capacity’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of ‘impaired capacity’). For other discussions of the concept of capacity, see R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 3–4; R Lewis, *Elder Law in Australia* (2004) [11.69]–[11.73]. Also see *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ).

15 *Guardianship and Administration Act 2000* (Qld) ss 82(a), 146.

16 Eg, *Re MV* [2005] QGAAT 46.

17 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 1. Also see *Guardianship and Administration Act 2000* (Qld) s 7(a); *Re Bridges* [2001] 1 Qd R 574 (Ambrose J).

18 In particular, see *Guardianship and Administration Act 2000* (Qld) ss 5(d), 6(a).

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

20 The definition of ‘capacity’ is tied to the decision that needs to be made as it refers specifically to having capacity ‘for a matter’: *Powers of Attorney Act 1998* (Qld) s 3 sch 3; *Guardianship and Administration Act 2000* (Qld) s 3 sch 4. Note also that s 5(c)(ii) of the *Guardianship and Administration Act 2000* (Qld) provides that the Act acknowledges that ‘the capacity of an adult with impaired capacity to make decisions may differ according to ... the type of decision to be made, including, for example, the complexity of the decision to be made’.

21 See, eg, *Re FHW* [2005] QGAAT 50, [46] where the Tribunal held: ‘he [FHW] has capacity for simple and complex personal matters and simple financial matters but he has impaired capacity for complex financial matters’.

### **Financial matters**

2.13 All matters relating to an adult's financial or property matters are defined in the guardianship legislation as 'financial matters'.<sup>22</sup> These include buying and selling property (including land); paying the adult's expenses, rates, insurance, taxes and debts; conducting a trade or business on the behalf of the adult; making financial investments; performing the adult's contracts; and all legal matters relating to the adult's financial or property matters.

### **Personal matters**

2.14 All matters (other than 'special personal matters' and 'special health matters') relating to an adult's care or welfare are defined as 'personal matters'.<sup>23</sup> These include where and with whom the adult lives; the adult's health care;<sup>24</sup> day-to-day issues such as diet and dress; the adult's employment, education and training; legal matters that do not relate to the adult's financial or property matters; and the use of restrictive practices (for managing the challenging behaviour of particular adult's).<sup>25</sup>

### **Health matters**

2.15 A type of personal matter, 'health matters' concern the 'health care, other than special health care, of the adult'.<sup>26</sup> 'Health care' is defined in the guardianship legislation as:<sup>27</sup>

<sup>22</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 cl 1; *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 1 cl 1.

<sup>23</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 cl 2; *Guardianship and Administration Act 2000* (Qld) sch 2 cl 2. This definition has been given a wide interpretation by the Tribunal. It was held in *Re JD* [2003] QGAAT 14 that a 'guardian who is appointed to make decisions in relation to all personal matters can essentially make all the decisions in relation to a very broad range of matters and should not be read in a restricted or limited way': [27].

<sup>24</sup> See [2.15] below.

<sup>25</sup> A 'personal matter' includes a restrictive practice matter under chapter 5B of the *Guardianship and Administration Act 2000* (Qld): *Guardianship and Administration Act 2000* (Qld) sch 2 cl 2(j). Chapter 5B deals with substitute consent for the use of restrictive practices in relation to adults with an intellectual or cognitive disability who receive disability services from a funded service provider within the meaning of the *Disability Services Act 2006* (Qld): *Guardianship and Administration Act 2000* (Qld) ss 80R, 80S. Chapter 5B was inserted into the *Guardianship and Administration Act 2000* (Qld) by the *Disability Services and Other Legislation Amendment Act 2008* (Qld), which commenced on 1 July 2008.

Chapter 5B does not limit the extent to which a substitute decision-maker is authorised under a provision of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* to make a health care decision in relation to an adult to whom chapter 5B does not apply: *Guardianship and Administration Act 2000* (Qld) s 80T.

<sup>26</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 cl 4; *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 cl 4.

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.

### **Special health matters**

2.16 'Special health matters' are those relating to 'special health care'.<sup>28</sup> They involve decisions about very significant health issues. The guardianship legislation defines 'special health care' as:<sup>29</sup>

- (a) removal of tissue from the adult while alive for donation to someone else;
- (b) sterilisation of the adult;
- (c) termination of a pregnancy of the adult;
- (d) participation by the adult in special medical research or experimental health care;
- (e) electroconvulsive therapy or psychosurgery for the adult;
- (f) prescribed special health care of the adult.

### **Special personal matters**

2.17 'Special personal matters' are regarded as being of such an intimate nature that it would be inappropriate for another to make such a decision on behalf of an adult under the guardianship legislation.<sup>30</sup> These matters include

27 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 cl 5; *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 cl 5. 'Health care' can include the withholding or withdrawal of life-sustaining measures in some circumstances, but it excludes first aid treatment, non-intrusive examinations made for diagnostic purposes and the administration of non-prescription medication which would normally be self-administered: *Powers of Attorney Act 1998* (Qld) sch 2 s 5(2)–(3); *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2)–(3). The Tribunal has held that, in limited circumstances, 'health care' includes restrictive practices such as seclusion or restraint. Consent to a restrictive practice for an adult may be given only where the restrictive practice is used to maintain or treat a mental condition and carried out under the direction and supervision of a health provider: *Re JD* [2003] QGAAT 14, [32]; *Re MLI* [2006] QGAAT 31, [23], [87]; *Re WCM* [2005] QGAAT 26, [50], [54].

28 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 cl 6 (definition of 'special health matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 cl 6 (definition of 'special health matter').

29 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 cl 7; *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 cl 7.

30 The power to make decisions for an adult about special personal matters cannot be assigned in an enduring document: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). Nor can it usually be granted to a substitute decision-maker by order of the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 14(3). Further, there are no other provisions in the guardianship legislation empowering other decision-makers in relation to special personal matters.

voting; consenting to marriage; and making or revoking a will,<sup>31</sup> a power of attorney, an enduring power of attorney, or an advance health directive.<sup>32</sup>

### Who can make substitute decisions for an adult?

2.18 The guardianship legislation provides for substitute decisions for an adult to be made by several types of decision-makers, depending on the matter involved. The legislation recognises:<sup>33</sup>

- informal decision-makers;
- attorneys appointed in advance by the adult under an enduring document;
- statutory health attorneys;
- guardians and administrators appointed by the Tribunal;
- in some limited circumstances, the Tribunal.

2.19 Adults themselves may also be decision-makers, by completing an advance health directive before they lose the requisite capacity for a matter. In such a document, an adult may give directions about future health matters, including 'special health matters'.<sup>34</sup> An adult may direct, for example, that in particular circumstances, a life-sustaining measure be withheld or withdrawn.<sup>35</sup>

### Informal decision-makers

2.20 The guardianship legislation recognises that substitute decisions for an adult can be made informally by the adult's 'existing support network',<sup>36</sup> that is,

<sup>31</sup> However, the Supreme Court now has jurisdiction to make an order authorising a will to be made or altered, in the terms stated by the Court, for a person who lacks testamentary capacity, and to revoke a will or part of a will of a person who lacks testamentary capacity: see *Succession Act 1981* (Qld) ss 21–28, which commenced on 1 April 2006. An application for a grant of probate is not a special personal matter: *Re Wild* [2003] 1 Qd R 459, [20] (White J).

<sup>32</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 cl 3; *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 cl 3.

<sup>33</sup> *Guardianship and Administration Act 2000* (Qld) s 9(2). That provision also refers to the Supreme Court as a decision-maker. However, such a role is infrequently performed.

In *Re WFM* [2006] QGAAT 54, the Tribunal declared that it has the power to give directions to a guardian or administrator in relation to how the guardian or administrator exercises a power conferred on him or her and how a matter for which the guardian or administrator has been appointed should be decided.

<sup>34</sup> *Powers of Attorney Act 1998* (Qld) s 35(1).

<sup>35</sup> *Powers of Attorney Act 1998* (Qld) s 35(2)(b). Also see s 36(2) of the *Powers of Attorney Act 1998* (Qld) for the conditions that must apply for a direction to withdraw or withhold life-sustaining measures to operate.

<sup>36</sup> *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

the adult's family and close friends, and other people who the Tribunal decides provide support to the adult.<sup>37</sup>

2.21 If there is doubt about the appropriateness of a decision, the Tribunal may ratify or approve informal decisions.<sup>38</sup>

2.22 However, sometimes situations can arise where the decision-making process for an adult needs to be formalised. This might be because:

2.23 the person wishing to make a decision on behalf of the adult does not have the necessary authority to do so;

- the authority of the person making the decision is disputed;
- there is no appropriate person to make the decision;
- the decision or decisions being made are considered inappropriate; or
- a conflict occurs over the decision-making process.

2.24 The remainder of the decision-makers described below are part of the formal decision-making processes established by the guardianship legislation.

### ***Attorneys appointed in advance by the adult***

2.25 Adults may formalise future substitute decision-making for themselves by appointing a person (an attorney) to make particular decisions on their behalf in the event they subsequently lose capacity. There are two instruments that an adult (the principal) may use to appoint an attorney: an enduring power of attorney and an advance health directive.<sup>39</sup> An adult may make such a document only if he or she has sufficient capacity.<sup>40</sup>

2.26 In an enduring power of attorney, a principal can assign to his or her nominated attorney or attorneys decision-making power for some or all financial matters or personal matters, including health matters.<sup>41</sup> A principal cannot, however, give power to an attorney for 'special health matters' or 'special personal matters'.<sup>42</sup>

<sup>37</sup> *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'support network').

<sup>38</sup> *Guardianship and Administration Act 2000* (Qld) s 82(1)(e).

<sup>39</sup> There are particular formal requirements for the execution of such instruments: *Powers of Attorney Act 1998* (Qld) s 44. An adult may also appoint an attorney for financial matters in a general power of attorney although this operates only while the adult has capacity: *Powers of Attorney Act 1998* (Qld) ss 8(a), 18(1). An 'enduring power of attorney' differs from a 'general power of attorney' in that it will operate during a period when the principal has impaired capacity for the matter.

<sup>40</sup> *Powers of Attorney Act 1998* (Qld) ss 41, 42. See also Chapter 6 as to the general definition of capacity that applies under the guardianship legislation.

<sup>41</sup> *Powers of Attorney Act 1998* (Qld) s 32(1)(a).

<sup>42</sup> *Powers of Attorney Act 1998* (Qld) s 32(1)(a).

2.27 In an advance health directive, a principal can assign decision-making power to an attorney or attorneys for some or all health matters, other than for 'special health matters'.<sup>43</sup>

2.28 An attorney can exercise his or her assigned power with respect to personal matters only during a period when the principal no longer has capacity for the particular matter.<sup>44</sup> The power for financial matters becomes exercisable either at the time or in the circumstance the principal nominates in the document, or otherwise, once the enduring power of attorney is made.<sup>45</sup> Power for financial matters is also exercisable at any time the principal has impaired capacity.<sup>46</sup>

2.29 The legislation imposes a range of obligations on attorneys as to how they exercise their power. For example, attorneys must act honestly and diligently<sup>47</sup> and must comply with the General Principles set out in the legislation and, for decisions about health matters, the Health Care Principle.<sup>48</sup> Attorneys for financial matters are also required, for example, to avoid conflict transactions<sup>49</sup> and to keep their property separate from that of the adult.<sup>50</sup> Attorneys are also regarded as the agents of their principal and so would be subject to the general law of agency to the extent that it is not inconsistent with the guardianship legislation.<sup>51</sup>

### **Statutory health attorneys**

2.30 A statutory health attorney is a person in a particular relationship with the adult who is declared by the legislation to be a person with authority to make decisions about health matters for an adult. The legislation lists the relationships in an order of priority. The first of the following who is 'readily available and culturally appropriate' to make the decision will be an adult's statutory health attorney.<sup>52</sup>

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43 *Powers of Attorney Act 1998* (Qld) s 35(1)(c).

44 *Powers of Attorney Act 1998* (Qld) ss 33(4), 36(3).

45 *Powers of Attorney Act 1998* (Qld) s 33(1), (2).

46 *Powers of Attorney Act 1998* (Qld) s 33(3).

47 *Powers of Attorney Act 1998* (Qld) s 66(1).

48 *Powers of Attorney Act 1998* (Qld) s 76. The General Principles and the Health Care Principle are discussed in Chapters 4 and 5.

49 *Powers of Attorney Act 1998* (Qld) s 73. A conflict transaction is one in which there may be conflict, or which results in conflict, between the attorney's duty to the adult and either the interests of the attorney or a person in a close personal or business relationship with the attorney, or another duty of the attorney: *Powers of Attorney Act 1998* (Qld) s 73(2).

50 *Powers of Attorney Act 1998* (Qld) s 86.

51 S Fisher, *Agency Law* (2000) [12.2.1], [12.2.4], [12.2.5]; R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 92.

52 *Powers of Attorney Act 1998* (Qld) s 63(1).

- the adult's spouse,<sup>53</sup> if the relationship is close and continuing;
- a person 18 years or older who is caring for the adult but who is not a paid carer<sup>54</sup> of the adult; or
- a close friend or relation of the adult 18 years or older and who is not a paid carer<sup>55</sup> of the adult.

2.31 If no-one from that list is 'readily available and culturally appropriate', the Adult Guardian becomes the adult's statutory health attorney.<sup>56</sup>

2.32 A statutory health attorney is authorised by the legislation to make any decision about an adult's health matter that the adult could have made if he or she had capacity for the matter,<sup>57</sup> but only during a period when the adult has impaired capacity for the matter.<sup>58</sup> A statutory health attorney must comply with the General Principles and the Health Care Principle set out in the legislation when exercising his or her power.<sup>59</sup>

### ***Guardians and administrators appointed by the Tribunal***

2.33 In some circumstances, the Tribunal has power to appoint formal substitute decision-makers for particular matters for an adult.<sup>60</sup> A guardian can be appointed for a personal matter, including a health matter (but not 'special health matters').<sup>61</sup> An administrator can be appointed for a financial matter.

53 A 'spouse' includes a person's de facto partner: *Acts Interpretation Act 1954* (Qld) s 36. A reference in an Act to a 'de facto partner' is a reference to one of two persons who are living together as a couple (in either a heterosexual or same sex partnership) on a genuine domestic basis but who are not married to each other or related by family: *Acts Interpretation Act 1954* (Qld) s 32DA(1), (5).

54 A 'paid carer' for an adult is defined as someone who performs services for the adult's care and who receives remuneration for those services from any source other than a Commonwealth or State Government carer payment or benefit for the provision of home care, or remuneration based on damages that may be awarded for voluntary services for the adult's care: *Powers of Attorney Act 1998* (Qld) s 3 sch 3; *Guardianship and Administration Act 2000* (Qld) s 3 sch 4.

55 See note 54 above.

56 *Powers of Attorney Act 1998* (Qld) s 63(2). The Adult Guardian is an independent statutory official appointed under the *Guardianship and Administration Act 2000* (Qld): see [2.54]–[2.55] below.

57 *Powers of Attorney Act 1998* (Qld) s 62(1).

58 *Powers of Attorney Act 1998* (Qld) s 62(2).

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

60 *Guardianship and Administration Act 2000* (Qld) ss 12(1), 82(1)(c).

61 *Guardianship and Administration Act 2000* (Qld) s 12(1), sch 2 cl 2.

2.34 The Tribunal may appoint a guardian for a personal matter or an administrator for a financial matter, on terms it considers appropriate, if:<sup>62</sup>

- (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.

2.35 A person may be appointed as a guardian or administrator for an adult only if that person is 18 years or older, is not a health provider or a paid carer for the adult, and the Tribunal considers the person is appropriate for appointment.<sup>63</sup>

2.36 The Tribunal is required by the guardianship legislation to take into account several considerations in deciding whether a person is appropriate for appointment.<sup>64</sup> These include:<sup>65</sup>

- the extent to which the adult's and the person's interests are likely to conflict;

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*Guardianship and Administration Act 2000* (Qld) s 12(1), (2). In certain circumstances, a guardian has power to make decisions about health care which involve restrictive practices such as seclusion or restraint: *Re MLI* [2006] QGAAT 31; *Re WMC* [2005] QGAAT 26. The guardian's power is limited to the circumstances in which the restrictive practice is used to maintain or treat a mental condition and is carried out under the direction and supervision of a health provider.

Section 12 of the *Guardianship and Administration Act 2000* (Qld) does not apply for the appointment of a guardian for a restrictive practice matter under chapter 5B of the Act: *Guardianship and Administration Act 2000* (Qld) s 12(4). Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) deals with substitute consent for the use of restrictive practice matters for an adult with an intellectual or cognitive disability who receives disability services from a funded service provider within the meaning of the *Disability Services Act 2006* (Qld): *Guardianship and Administration Act 2000* (Qld) ss 80R, 80S. The Tribunal may appoint a guardian for a restricted practice matter under chapter 5B of the Act if, amongst other things, the Tribunal is satisfied that the adult's behaviour has previously resulted in harm to the adult or others and without the appointment the adult's behaviour is likely to cause harm to the adult or others: *Guardianship and Administration Act 2000* (Qld) s 80ZD. In certain circumstances, the Adult Guardian may give short term approval to the use of containment or seclusion for an adult to whom chapter 5B applies: *Guardianship and Administration Act 2000* (Qld) ch 5B pt 4.

Chapter 5B was inserted into the *Guardianship and Administration Act 2000* (Qld) by the *Disability Services and Other Legislation Amendment Act 2008* (Qld), which commenced on 1 July 2008.

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*Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(i), (b)(i), (c). The Adult Guardian is eligible for appointment as a guardian for an adult and the Public Trustee is eligible for appointment as an adult's administrator: *Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(ii), (b)(ii). A person who is bankrupt 'or taking advantage of the laws of bankruptcy as a debtor' is ineligible for appointment as an adult's administrator: *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(i) and see s 15(4)(c).

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

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*Guardianship and Administration Act 2000* (Qld) s 15(1).

- whether the adult and the person are compatible including, for example, whether the person's communication skills and cultural or social experience are appropriate;
- whether the person would be available and accessible to the adult; and
- the person's appropriateness and competence to perform the functions and exercise the powers conferred by an appointment order.

2.37 A guardian or administrator is conferred, in accordance with the terms of appointment, with the authority to do anything in relation to a personal or financial matter for which he or she is appointed that the adult could have done if the adult had capacity for that matter.<sup>66</sup>

2.38 Given the breadth of this power, the guardianship legislation imposes strict requirements on the exercise of authority by a guardian or administrator. Such a person must exercise his or her power honestly and diligently,<sup>67</sup> must apply the General Principles contained in the legislation (and the Health Care Principle, if appropriate),<sup>68</sup> is subject to regular review,<sup>69</sup> and, if he or she is an administrator, must submit a management plan<sup>70</sup> and avoid conflict transactions.<sup>71</sup> These requirements are reflective of those imposed in respect of the common law of agency.<sup>72</sup>

### **The Tribunal**

2.39 The guardianship legislation also empowers the Tribunal to make substitute decisions for an adult in relation to some types of 'special health care'.<sup>73</sup> If a special health matter for an adult is not dealt with by a direction given by the adult in an advance health directive, the Tribunal has power to consent to special health care for an adult, other than electroconvulsive therapy or psychosurgery.<sup>74</sup>

<sup>66</sup> *Guardianship and Administration Act 2000* (Qld) s 33. Also see s 36.

<sup>67</sup> *Guardianship and Administration Act 2000* (Qld) s 35.

<sup>68</sup> *Guardianship and Administration Act 2000* (Qld) s 34. The General Principles and the Health Care Principle are discussed at [2.42]–[2.47] below.

<sup>69</sup> *Guardianship and Administration Act 2000* (Qld) ss 28, 29.

<sup>70</sup> *Guardianship and Administration Act 2000* (Qld) s 20.

<sup>71</sup> *Guardianship and Administration Act 2000* (Qld) s 37(1). See note 49 above as to what constitutes a conflict transaction. For other functions and powers of administrators, see also *Guardianship and Administration Act 2000* (Qld) ch 4 pt 2.

<sup>72</sup> See S Fisher, *Agency Law* (2000) [7.2.1]–[7.5.6].

<sup>73</sup> *Guardianship and Administration Act 2000* (Qld) ss 65(4), 68(1), 82(1)(g).

<sup>74</sup> *Guardianship and Administration Act 2000* (Qld) ss 65, 68. Electroconvulsive therapy and psychosurgery fall within the jurisdiction of the Mental Health Review Tribunal: *Mental Health Act 2000* (Qld) ch 6 pt 6.

2.40 The Tribunal's authority to give consent is limited by several specific requirements imposed by the legislation. The Tribunal must be satisfied, for example, that the special health care involves minimal risk to the adult and is the only reasonably available option.<sup>75</sup> In deciding whether to give consent, the Tribunal must also apply the General Principles and the Health Care Principle contained in the legislation.<sup>76</sup>

2.41 The Tribunal may also consent to the withholding or withdrawal of a life-sustaining measure for an adult with impaired capacity (if the matter is not dealt with by a direction given in an advance health directive)<sup>77</sup> and to the sterilisation of a child with an impairment.<sup>78</sup>

### How are substitute decisions for an adult to be made?

2.42 Queensland's guardianship legislation contains eleven General Principles, which apply to all decisions for adults, and an additional Health Care Principle, which applies only in relation to decisions about health matters.

2.43 The General Principles and the Health Care Principle must be applied by any person or entity performing a function or exercising a power under the guardianship legislation in relation to a matter for an adult, including a substitute decision-maker for the adult.<sup>79</sup> The guardianship legislation also makes specific provision for the application of these principles to the Tribunal,<sup>80</sup> the Adult Guardian,<sup>81</sup> and an adult's guardian or administrator.<sup>82</sup>

2.44 The legislation also states that the 'community is encouraged to apply and promote the general principles'.<sup>83</sup>

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<sup>75</sup> Eg, *Guardianship and Administration Act 2000* (Qld) ss 69(1)(a), (d) (Donation of tissue); 70(1)(a)(i), (3) (Sterilisation); 72(1)(b), (d), (2)(b), (d) (Special medical research or experimental health care).

<sup>76</sup> *Guardianship and Administration Act 2000* (Qld) s 11.

<sup>77</sup> *Guardianship and Administration Act 2000* (Qld) ss 66(3), 82(1)(f). See also s 66A, which provides that this consent cannot operate unless the adult's health provider reasonably considers the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.

<sup>78</sup> *Guardianship and Administration Act 2000* (Qld) ch 5A, s 82(1)(h).

<sup>79</sup> *Powers of Attorney Act 1998* (Qld) s 76 (although note the different terminology of 'must be complied with' rather than 'must apply'); *Guardianship and Administration Act 2000* (Qld) s 11(1), (2).

<sup>80</sup> There is a specific requirement for the Tribunal to consider the General Principles (and Health Care Principle if appropriate) when deciding whether a person is appropriate for appointment as an adult's guardian or administrator: *Guardianship and Administration Act 2000* (Qld) s 15(1)(a), (b).

<sup>81</sup> *Guardianship and Administration Act 2000* (Qld) s 174(3).

<sup>82</sup> *Guardianship and Administration Act 2000* (Qld) ss 34, 74(4).

<sup>83</sup> *Guardianship and Administration Act 2000* (Qld) s 11(3).

2.45 The General Principles include:<sup>84</sup>

- the presumption that an adult has capacity to make decisions;
- an adult's right to basic human rights and the importance of empowering an adult to exercise those rights;
- an adult's right to respect for his or her human worth and dignity;
- an adult's right to be a valued member of society and the importance of encouraging an adult to perform valued social roles;
- the importance of encouraging an adult to participate in community life;
- the importance of encouraging an adult to become as self-reliant as possible;
- an adult's right to participate in decision-making as far as possible and the importance of preserving wherever possible the adult's right to make his or her own decisions;
- the principle of substituted judgment and a requirement to exercise power in the way least restrictive of the adult's rights;
- the importance of maintaining an adult's existing supportive relationships;
- the importance of maintaining the adult's cultural, linguistic and religious environment; and
- an adult's right to confidentiality of information about them.

2.46 The Health Care Principle provides that power for a health or special health matter should be exercised in the way least restrictive of the adult's rights and only if the exercise of power:<sup>85</sup>

- is necessary and appropriate to maintain or promote the adult's health or well-being; or
- is, in all the circumstances, in the adult's best interests.

2.47 In deciding whether the exercise of a power is appropriate, the adult's views and wishes and information given by the adult's health provider are to be

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<sup>84</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1. More than eleven issues are included in this list because some of the General Principles include a number of elements.

<sup>85</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 cl 12(1); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 2 cl 12(1).

taken into account.<sup>86</sup> In addition, in deciding whether to consent to special health care, the Tribunal, which is the only potential decision-maker for such matters, must take into account the views of the adult's guardian, attorney or statutory health attorney.<sup>87</sup>

### What agencies are involved in the guardianship system?

2.48 Queensland's guardianship legislation confers responsibilities on several agencies and officials. These include:

- the Tribunal;
- the Adult Guardian;
- the Public Advocate;
- community visitors; and
- the Public Trustee.

#### **The Tribunal**

2.49 The Guardianship and Administration Tribunal is a quasi-judicial body established by the *Guardianship and Administration Act 2000* (Qld).<sup>88</sup> The Tribunal has exclusive jurisdiction for the appointment of guardians and administrators for adults,<sup>89</sup> subject to the exercise of the Tribunal's powers by the Supreme or District Court to make, change, or revoke the appointment of a guardian or administrator in particular civil proceedings.<sup>90</sup> The Tribunal also has concurrent jurisdiction with the Supreme Court for matters relating to enduring documents and attorneys appointed under enduring documents.<sup>91</sup>

2.50 The Tribunal's functions include:<sup>92</sup>

- making declarations about an adult's capacity for a matter;

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86 *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 cl 12(2); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 2 cl 12(2).

87 *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 cl 12(5); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 2 cl 12(5).

88 *Guardianship and Administration Act 2000* (Qld) s 81.

89 *Guardianship and Administration Act 2000* (Qld) s 84(1).

90 Section 245 of the *Guardianship and Administration Act 2000* (Qld) provides that the Supreme or District Court may exercise the Tribunal's powers in relation to the appointment of a guardian or administrator for an adult if the Court sanctions a settlement between an adult and another person or orders payment to an adult by another person in a civil proceeding and the Court considers the adult has impaired capacity for a matter. See *Willett v Fletcher* (2005) 221 CLR 62, [28].

91 *Guardianship and Administration Act 2000* (Qld) s 84(2).

92 *Guardianship and Administration Act 2000* (Qld) s 82(1).

- hearing applications for the appointment of a guardians or administrator for an adult, appointing guardians and administrators if necessary and reviewing the appointments;
- making declarations, orders or recommendations, or giving directions or advice in relation to guardians, administrators, attorneys, and enduring documents;
- ratifying or approving an exercise of power by an informal decision-maker for an adult;
- giving consent to some types of special health care for an adult, to the withholding or withdrawal of life-sustaining measures, and to the sterilisation of a child with an impairment; and
- giving approvals for the use, by a relevant service provider, of a restrictive practice in relation to an adult, and reviewing the approvals.

2.51 At a hearing, the Tribunal must be constituted by three members, unless the President considers it appropriate that a matter be heard by one or two members.<sup>93</sup> To the extent that it is practicable,<sup>94</sup> the Tribunal is also to be constituted by either the President, a Deputy President or a legal member;<sup>95</sup> a professional member;<sup>96</sup> and a personal experience member,<sup>97</sup> although the composition of the Tribunal may also depend on the nature of the matter.<sup>98</sup>

2.52 Proceedings before the Tribunal are to be conducted as simply and quickly as practicable.<sup>99</sup> The Tribunal may inform itself on a matter in any way it considers appropriate,<sup>100</sup> but it must observe the rules of procedural fairness.<sup>101</sup>

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93 *Guardianship and Administration Act 2000* (Qld) s 101(1). In 2006–2007, the majority (approximately 60 per cent) of finalised tribunal applications (not including applications finalised prior to hearing) were heard by single-member tribunals. The remainder of the applications were heard by three-member tribunals (approximately 35 per cent) and two-member tribunals (approximately 5 per cent): Guardianship and Administration Tribunal, *Annual Report 2006–2007* (2007) 37–8.

94 *Guardianship and Administration Act 2000* (Qld) s 101(2).

95 A legal member must be a lawyer of at least five years standing and possess relevant knowledge and skills in the jurisdiction: *Guardianship and Administration Act 2000* (Qld) s 90(4)(a).

96 A professional member must possess extensive professional knowledge or experience of people with impaired capacity: *Guardianship and Administration Act 2000* (Qld) s 90(4)(b).

97 A personal experience member is a person who has had experience of a person with impaired capacity for a matter: *Guardianship and Administration Act 2000* (Qld) s 90(4)(c).

98 For example, non-contentious matters may have been heard by a single-member panel: Guardianship and Administration Tribunal, *Annual Report 2006–2007* (2007) 37.

99 *Guardianship and Administration Act 2000* (Qld) s 107(1).

100 *Guardianship and Administration Act 2000* (Qld) s 107(2).

101 *Guardianship and Administration Act 2000* (Qld) s 108(1).

2.53 Tribunal orders are enforceable as if they were orders of a court.<sup>102</sup> A person may appeal against a Tribunal decision to the Supreme Court.<sup>103</sup>

### **The Adult Guardian**

2.54 The Adult Guardian is an independent statutory official whose position is established under the *Guardianship and Administration Act 2000* (Qld) to protect the rights and interests of adults with impaired capacity.<sup>104</sup> The Adult Guardian's functions include:<sup>105</sup>

- protecting adults from neglect, exploitation, or abuse;<sup>106</sup>
- conducting investigations of complaints of such allegations, and investigations into the actions of an adult's substitute decision-maker;<sup>107</sup>
- mediating and conciliating disputes between an adult's substitute decision-maker and others, such as health providers;
- acting as an attorney for an adult under an enduring document or as an adult's statutory health attorney;
- acting as an adult's guardian if appointed by the Tribunal;
- approving the use, by a relevant service provider, of a restrictive practice in relation to an adult;
- consenting to the forensic examination of an adult;<sup>108</sup>
- seeking government or organisational assistance for an adult; and
- undertaking educative, advisory, and research activities on the operation of the guardianship legislation.

2.55 The Adult Guardian is also conferred with significant protective powers in relation to adults. For example, the Adult Guardian may:

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<sup>102</sup> *Guardianship and Administration Act 2000* (Qld) s 172.

<sup>103</sup> *Guardianship and Administration Act 2000* (Qld) s 164(1). Leave to appeal from the Supreme Court is required, except for appeals on questions of law only: s 164(2).

<sup>104</sup> *Guardianship and Administration Act 2000* (Qld) ss 173, 174(1), 176.

<sup>105</sup> *Guardianship and Administration Act 2000* (Qld) s 174(2).

<sup>106</sup> *Guardianship and Administration Act 2000* (Qld) s 174(2)(a).

<sup>107</sup> *Guardianship and Administration Act 2000* (Qld) ss 174(2)(b), 180.

<sup>108</sup> See *Guardianship and Administration Act 2000* (Qld) ss 174(2)(f), 198A. A 'forensic examination' is defined as a medical or dental procedure carried out for forensic purposes other than because the adult is suspected of having committed a criminal offence: *Powers of Attorney Act 1998* (Qld) s 3 sch 3; *Guardianship and Administration Act 2000* (Qld) s 3 sch 4.

- temporarily suspend an attorney's powers if there are reasonable grounds to suspect that the attorney is not competent;
- apply to the courts to claim and recover possession of property that the Adult Guardian considers has wrongfully been held or detained;<sup>109</sup> and
- apply to the Tribunal for a warrant to remove an adult from a place if there are reasonable grounds to suspect the adult is at immediate risk of harm due to neglect, exploitation, or abuse.<sup>110</sup>

### **The Public Advocate**

2.56 The Public Advocate is an independent statutory official whose position is established under the *Guardianship and Administration Act 2000* (Qld) to promote and protect the rights of adults.<sup>111</sup>

2.57 The Public Advocate's other functions include:<sup>112</sup>

- promoting the protection of adults from neglect, exploitation, or abuse;
- encouraging the development of programs that foster and maximise adults' autonomy;
- promoting service and facility provision for adults; and
- monitoring and reviewing service and facility delivery to adults.

2.58 The Public Advocate's functions are aimed at *systemic* advocacy rather than advocacy on behalf of individual adults. The Public Advocate seeks to identify issues in the systems that impact on adults, and works towards influencing appropriate change. Those systems include policy, service and legislative systems, across the government and non-government sectors. Systemic advocacy strategies may include 'discussions, correspondence, committee representation, submissions, discussion and issues papers, forums and conferences'.<sup>113</sup>

2.59 The Public Advocate may do all things necessary and convenient for the performance of its functions<sup>114</sup> and may, with leave, intervene in a

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109 *Guardianship and Administration Act 2000* (Qld) s 194.

110 *Guardianship and Administration Act 2000* (Qld) s 197.

111 *Guardianship and Administration Act 2000* (Qld) ss 208, 209(a), 211.

112 *Guardianship and Administration Act 2000* (Qld) s 209.

113 Department of Justice and Attorney-General, *Public Advocate* <<http://www.justice.qld.gov.au/473.htm>> at 21 August 2008.

114 *Guardianship and Administration Act 2000* (Qld) s 210(1).

proceeding involving the protection of the rights or interests of adults in a court, tribunal, or official inquiry.<sup>115</sup>

### **Community visitors**

2.60 Community visitors are appointed by the Queensland Government under the *Guardianship and Administration Act 2000* (Qld) to safeguard the interests of ‘consumers’ by regularly visiting ‘visitable sites’.<sup>116</sup>

2.61 A ‘consumer’ means any person who lives or receives services at an authorised mental health service; or an adult with impaired capacity for a matter or with a mental or intellectual impairment and who lives or receives services at a visitable site.<sup>117</sup>

2.62 A ‘visitable site’ means a place where a consumer lives and receives services and is prescribed to be such a site under a regulation.<sup>118</sup> This includes residences and services funded by Disability Services Queensland or the Department of Health, some hostels and authorised mental health inpatient services.<sup>119</sup>

2.63 Community visitors’ functions include:<sup>120</sup>

- inquiring into and reporting on a range of matters about the visitable sites such as the adequacy of services for the assessment, treatment and support of adults; the appropriateness of services for adults’ accommodation, health and well-being; the extent to which adults receive services in the way that is least restrictive of their rights; and the adequacy of information given to adults about their rights; and
- inquiring into and seeking to resolve complaints, and referring complaints to other entities for further investigation or resolution.

2.64 Community visitors have power to do all things necessary or convenient in the performance of these functions.<sup>121</sup>

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115 *Guardianship and Administration Act 2000* (Qld) s 210(2), (3).

116 *Guardianship and Administration Act 2000* (Qld) s 223(1).

117 *Guardianship and Administration Act 2000* (Qld) s 222.

118 *Guardianship and Administration Act 2000* (Qld) s 222.

119 *Guardianship and Administration Regulation 2000* (Qld) s 8 sch 2.

120 *Guardianship and Administration Act 2000* (Qld) s 224(2).

121 *Guardianship and Administration Act 2000* (Qld) s 227(1).

### ***The Public Trustee***

2.65 The Public Trustee of Queensland is a Queensland Government corporation established under the *Public Trustee Act 1978* (Qld).<sup>122</sup> It may be appointed by the Tribunal as an adult's administrator.<sup>123</sup> If appointed as an administrator, the Public Trustee has the same obligations as any other administrator appointed under the guardianship legislation.<sup>124</sup>

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122 *Public Trustee Act 1978* (Qld) ss 7, 8.

123 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

124 However, there is no obligation on the Tribunal to review the appointment of the Public Trustee (or a trustee company) as administrator as there is for other administrators: *Guardianship and Administration Act 2000* (Qld) s 28(1).

# Chapter 3

## The United Nations Convention

INTRODUCTION .....	27
RECOGNITION OF HUMAN RIGHTS FOR ADULTS WITH IMPAIRED CAPACITY .....	27
A NEW UNITED NATIONS CONVENTION .....	28
WHAT THE CONVENTION PROVIDES.....	29
THE CONVENTION AND THE COMMISSION'S REVIEW .....	32

### INTRODUCTION

3.1 The United Nations *Convention on the Rights of Persons with Disabilities* entered into force on 3 May 2008. This chapter gives an overview of the Convention and sets out those parts of it which are of particular relevance to the General Principles and the definition of capacity under the guardianship legislation.

### RECOGNITION OF HUMAN RIGHTS FOR ADULTS WITH IMPAIRED CAPACITY

3.2 Adults with impaired decision-making capacity may require assistance in making decisions. The guardianship legislation in Queensland, as in other jurisdictions, provides a framework for the provision of such assistance. It provides for measures both to enable adults to make their own decisions and for others to make decisions on behalf of adults when required.

3.3 It is important that such legislation recognises that adults with impaired decision-making capacity are entitled to the same fundamental human rights as others.

3.4 The rights of persons with mental or intellectual disabilities have been the subject of international attention in recent years. A change in attitudes toward people with such disabilities has been reflected in international statements of rights<sup>125</sup> which have emphasised that disability 'is not an absolute state and that individuals' capacities to reason and to make decisions continue,

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125

Eg, International League of Societies for the Mentally Handicapped, *Declaration of General and Special Rights of the Mentally Handicapped* (1970); United Nations, *Declaration on the Rights of Disabled Persons*, GA Res 3447, 9 December 1975; United Nations, *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856, 20 December 1971.

or can be developed, in some areas, albeit that they are lost, or cannot be exercised without assistance or training in others'.<sup>126</sup>

## A NEW UNITED NATIONS CONVENTION

3.5 The most recent significant international attention given to the rights of people with mental or intellectual disabilities was the adoption by the United Nations General Assembly in 2006 of the *Convention on the Rights of Persons with Disabilities* (the 'United Nations Convention').<sup>127</sup> It 'is the first ever binding international instrument concerned exclusively with disability rights'.<sup>128</sup>

3.6 The United Nations Convention was adopted after an intensive five-year negotiation process involving input from both government and non-government organisations.<sup>129</sup> This included the Australian Government and a number of Australian non-government organisations, including delegates from Queensland.<sup>130</sup> The Convention entered into force on 3 May 2008 and has 130 signatories and 34 ratifications to date.<sup>131</sup> Australia ratified the Convention on 17 July 2008.<sup>132</sup>

126 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 38.

127 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006.

128 R Kayess and B Fogarty, 'The Rights and Dignity of Persons with Disabilities: A United Nations Convention' (2007) 32(1) *Alternative Law Journal* 22, 23.

129 The negotiation process for this Convention has been called:

a revolutionary process, as it involved a high level of participation both by nation states and civil society. In fact, the development of the Convention involved the highest level of participation by representatives of organisations of people with disabilities of any human rights convention, or indeed any other United Nations process, in history.

See M Small, 'The Convention on the Rights of Persons with Disabilities' (Speech delivered at the Physical Disability Council of Australia forum, Hobart, 24 October 2007) <[http://www.hreoc.gov.au/disability\\_rights/speeches/2007/pdca.htm](http://www.hreoc.gov.au/disability_rights/speeches/2007/pdca.htm)> at 15 August 2008. For a history of the negotiation process, see United Nations Enable, 'Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' <<http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>> at 15 August 2008.

130 Eg, M Small, 'The Convention on the Rights of Persons with Disabilities' (Speech delivered at Physical Disability Council of Australia forum, Hobart, 24 October 2007) <[http://www.hreoc.gov.au/disability\\_rights/speeches/2007/pdca.htm](http://www.hreoc.gov.au/disability_rights/speeches/2007/pdca.htm)> at 15 August 2008; United Nations Enable, 'List of NGO Representatives, Registered for the Eighth Session' <<http://www.un.org/esa/socdev/enable/rights/ahc8ngolistpart.htm>> at 15 August 2008.

131 United Nations Enable, 'Entry Into Force' <<http://www.un.org/disabilities/default.asp?id=210>> at 3 June 2008; United Nations Enable, 'Countries and Regional Integration Organizations' <<http://www.un.org/disabilities/countries.asp?id=166>> at 15 August 2008.

132 United Nations Enable, 'Countries that have ratified the Convention' <<http://www.un.org/disabilities/default.asp?navid=18&pid=257>> at 15 August 2008; Attorney-General for Australia, Hon Robert McClelland MP, 'Australia ratifies UN Disabilities Convention' (Press release, 18 July 2008).

3.7 The United Nations Convention sets out the fundamental human rights of people with a disability, including people with a mental or intellectual disability.<sup>133</sup>

The Convention marks a 'paradigm shift' in attitudes and approaches to persons with disabilities. It takes to a new height the movement from viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.

3.8 The Convention draws on the principles of the *Charter of the United Nations*<sup>134</sup> and places the rights and freedoms articulated in the *International Bill of Human Rights* and other human rights instruments<sup>135</sup> in the context of disability.<sup>136</sup> Under the Convention, persons with disabilities include:<sup>137</sup>

those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

## WHAT THE CONVENTION PROVIDES

3.9 The United Nations Convention covers a broad range of topics including access to the physical environment, community participation, personal mobility, freedom of expression, privacy, education, health, work and employment and participation in public and cultural life.

3.10 The Convention is based on the eight principles set out in article 3:

133 United Nations Enable, 'Convention on the Rights of Persons with Disabilities' <<http://www.un.org/disabilities/default.asp?navid=12&pid=150>> at 15 August 2008.

134 Available at <<http://www.un.org/aboutun/charter/>> at 15 August 2008.

135 Including the *International Convention on the Elimination of All Forms of Racial Discrimination*; the *Convention on the Elimination of All Forms of Discrimination against Women*; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *Convention on the Rights of the Child*; and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. For general information about United Nations human rights instruments, see Office of the United Nations High Commissioner for Human Rights, 'The Core International Human Rights Instruments and Their Monitoring Bodies' <<http://www2.ohchr.org/english/law/>> at 15 August 2008.

The 'International Bill of Human Rights' consists of the *Universal Declaration of Human Rights*, GA Res 217A (III), 10 December 1948; the *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), 16 December 1966; and the *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 16 December 1966: see United Nations Office of the High Commissioner for Human Rights, 'Fact Sheet No 2 (Rev 1), The International Bill of Human Rights' <<http://www.unhcr.ch/html/menu6/2/fs2.htm>> at 15 August 2008.

136 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Preamble, para (a), (b), (d), (u), (w). And see R Kayess and B Fogarty, 'The Rights and Dignity of Persons with Disabilities: A United Nations Convention' (2007) 32(1) *Alternative Law Journal* 22, 23.

137 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 1.

### **Article 3 General principles**

The principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

3.11 Article 12 of the United Nations Convention deals with the exercise of legal capacity by persons with disabilities and is of particular significance to substitute decision-making legislation. It provides:<sup>138</sup>

### **Article 12 Equal recognition before the law**

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free

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138

Australia made a formal declaration indicating its understanding of article 12. The declaration states in part:

Australia recognises that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards: United Nations Enable, 'Declarations and Reservations', <http://www.un.org/disabilities/default.asp?id=475> at 29 August 2008.

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. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

3.12 Article 16 provides for the protection of persons with disabilities from exploitation, violence and abuse. This may also be important for guardianship legislation because of the vulnerability of adults who rely on others to make decisions on their behalf. Article 16 provides:

**Article 16**  
**Freedom from exploitation, violence and abuse**

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.
2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.
3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.
4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.
5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

3.13 The United Nations Convention also provides, among other things, that every human being has the inherent right to life, and that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.<sup>139</sup>

## THE CONVENTION AND THE COMMISSION'S REVIEW

3.14 In its review of the laws relating to decision-making by and for adults with impaired decision-making capacity in the 1990s, the Queensland Law Reform Commission considered that its proposed guardianship legislation should recognise the human rights enunciated in existing international statements of the rights of adults with mental or intellectual disabilities.<sup>140</sup> At that time, the existing law was disparate and gave insufficient recognition to human rights principles.<sup>141</sup>

3.15 The current guardianship legislation, enacted after the Queensland Law Reform Commission's Report in 1996, includes specific recognition of the rights of adults. For example, section 5 of the *Guardianship and Administration Act 2000* (Qld) acknowledges that the adult's right to make decisions, including the right to make decisions with which others may not agree, is 'fundamental to the adult's inherent dignity' and 'should be restricted, and interfered with, to the least possible extent'.<sup>142</sup> The General Principles in the guardianship legislation also provide, among other things, for the recognition of the adult's human rights.<sup>143</sup>

3.16 The United Nations Convention is the most recent international statement about the rights of people with a disability and it has been ratified by Australia.<sup>144</sup> As a party to the Convention, Australia has undertaken to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention, and to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against

<sup>139</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 10 (Right to life), 25 (Health).

<sup>140</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making for People who Need Assistance Because of Mental or Intellectual Disability*, Discussion Paper No 38 (1992) 2; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 27.

<sup>141</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 6, 23–5.

<sup>142</sup> Also see *Guardianship and Administration Act 2000* (Qld) s 6 which provides that the Act seeks to strike an appropriate balance between the right of an adult to the greatest possible degree of autonomy in decision-making and the adult's right to adequate and appropriate support for decision-making.

<sup>143</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 2; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 2. General Principle 2 provides that the right of all adults to the same basic human rights regardless of a particular adult's capacity, and the importance of empowering an adult to exercise the adult's basic human rights, must be recognised and taken into account.

<sup>144</sup> See note 132 above.

persons with disabilities.<sup>145</sup> The Commission considers it appropriate for its review of the General Principles and the definition of capacity under the guardianship legislation to be informed by the United Nations Convention. In particular, it may be appropriate for any amendments to the legislation to be consistent with the principles enunciated in the Convention.

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United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 4(1)(a), (b). Article 4 of the United Nations Convention imposes general obligations on States Parties to the Convention to 'ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'. The Convention has not been enacted as part of the domestic law of Australia. However, when interpreting a statutory provision, regard may be had (in certain circumstances) to extrinsic materials such as a treaty or other international agreement that is mentioned in the statute: *Acts Interpretation Act 1954* (Qld) s 14B(1), (3)(d); *Acts Interpretation Act 1901* (Cth) s 15AB(1), (2)(d). In addition, the courts should endeavour to adopt a construction of Australian legislation which conforms to relevant international Conventions: see, recently, for example, *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ). See generally P Hanks, *Laws of Australia*, 21 Human Rights, 'Principles of international law can affect the development of the law in Australia' [21.2.42] (at 22 July 2008).

# Chapter 4

## The General Principles

INTRODUCTION .....	34
PRINCIPLES FOR SUBSTITUTE DECISION-MAKING .....	35
THE GENERAL PRINCIPLES IN QUEENSLAND .....	37
What the General Principles contain.....	38
Applying the General Principles.....	41
THE POSITION IN OTHER JURISDICTIONS .....	43
What the principles contain .....	44
Applying the principles .....	46
ISSUES FOR CONSIDERATION.....	48
The role and purpose of the General Principles .....	48
Redrafting or refining the General Principles .....	50
Substituted judgment .....	52
Acting in the adult's interest .....	55
Best interests as an alternative approach.....	57
Consultation with families and carers .....	59
Informal arrangements .....	62
Protection from neglect, abuse, exploitation .....	63
Advocacy.....	65
Financial decisions and considerations .....	67
Conflicts and priority principles .....	68
Compliance and enforcement .....	69
Application to informal decision-makers .....	70
Location of the principles .....	71

### INTRODUCTION

4.1 The Commission's terms of reference direct it to review the General Principles set out in the *Powers of Attorney Act 1998 (Qld)* and the *Guardianship and Administration Act 2000 (Qld)*.<sup>146</sup> The General Principles are to be applied when particular decisions about an adult are made. The terms of reference require the Commission to have particular regard to 'the need to ensure that the General Principles continue to provide an appropriate balance of relevant factors to protect the interests of an adult with impaired capacity'.

4.2 This chapter outlines the role and content of the General Principles in Queensland. It also sets out the position in the other Australian jurisdictions.

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146

The terms of reference are set out in Appendix 1.

4.3 The Commission is interested in receiving submissions in response to the questions posed throughout this chapter, or on any other issues respondents consider relevant to the General Principles.

## PRINCIPLES FOR SUBSTITUTE DECISION-MAKING

4.4 The United Nations Convention is the most recent international statement of rights for people with disabilities, including people with mental or intellectual disabilities, to which Australia is a party.<sup>147</sup>

4.5 The Convention, and earlier international rights declarations,<sup>148</sup> recognise that adults with impaired decision-making capacity are entitled to the same human rights, and respect for their dignity, as others. At the same time, adults with impaired decision-making capacity are entitled to be protected from exploitation and abuse.<sup>149</sup> Guardianship laws should assist adults with impaired decision-making capacity without unduly encroaching on their rights.<sup>150</sup>

4.6 The United Nations Convention is based on a number of principles including 'respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.<sup>151</sup>

4.7 Article 12 of the Convention deals with the exercise of legal capacity and provides that persons with disabilities are to be given necessary support to exercise their legal capacity and that such measures must respect 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 circumstances, apply for the shortest time possible and be subject to regular review. Article 12 is set out in full at [3.11] above.

<sup>147</sup> United Nations Enable, 'Countries that have ratified the Convention' <<http://www.un.org/disabilities/default.asp?navid=18&pid=257>> at 15 August 2008; Attorney-General for Australia, Hon Robert McClelland MP, 'Australia ratifies UN Disabilities Convention' (Press release, 18 July 2008).

<sup>148</sup> Eg, International League of Societies for the Mentally Handicapped, *Declaration of General and Special Rights of the Mentally Handicapped* (1970); United Nations, *Declaration on the Rights of Disabled Persons*, GA Res 3447, 9 December 1975; United Nations, *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856, 20 December 1971.

<sup>149</sup> See especially, United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12 (Equal recognition before the law), 16 (Freedom from exploitation, violence and abuse).

<sup>150</sup> Eg, J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 136; T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 29. Also, see generally the discussion of the nature of the guardianship system in Queensland in Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) Vol 1 [3.58]–[3.69].

<sup>151</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 3. Article 3 is set out at [3.10] above.

4.8 The following four concepts which have generally been recognised as appropriate to underpin substitute decision-making for adults with impaired capacity are also reflected in the United Nations Convention:<sup>152</sup>

- The presumption of competence — every adult should be presumed to be legally competent to make his or her own decisions unless it is shown otherwise. Competence should be assessed in relation to individual decisions and it should not be assumed that lack of competence in one area of activity necessarily means the person does not have competence in another area.<sup>153</sup>
- Normalisation and inclusion — people with disabilities or mental illness should be treated, as far as possible, as other members of society. People’s self-reliance and participation in community life should be encouraged.
- The least restrictive option — interventions in a person’s life should be limited to those that are necessary. The least restrictive option available, when intervention is necessary, should be adopted.
- Respect for autonomy — the former three principles reflect the importance of respect for an adult’s autonomy. The autonomy principle has been given expression by the ‘substituted judgment’ standard of decision-making.<sup>154</sup> This requires the decision-maker to make decisions he or she considers best equate with the decisions the adult would have made. This is contrasted with the ‘best interests’ standard which requires a decision-maker to make decisions that he or she considers best promotes the adult’s welfare.

4.9 These concepts are reflected in the guardianship legislation of most of the Australian jurisdictions, in part through the adoption of a set of general principles. In Queensland, they are embodied in the ‘General Principles’ of the guardianship legislation. Similar guiding principles have also been adopted in other Queensland statutes, such as the *Mental Health Act 2000* (Qld), the *Disability Services Act 2006* (Qld) and, in relation to children, the *Child*

<sup>152</sup> See generally, I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 205–9; T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 29–30; R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 40–3; J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 136–8; Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.1]–[2.8].

<sup>153</sup> Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.3]. Also, eg, The Bamford Review of Mental Health and Learning Disability (Northern Ireland), *A Comprehensive Legislative Framework*, Report (2007) [5.1]; Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.39]; Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.2], [3.14]; Law Reform Commission of Nova Scotia, *Reform of the Laws Dealing with Adult Guardianship and Personal Health Care Decisions*, Report (1995) 24, 26.

<sup>154</sup> R Creyke, *Who Can Decide? Legal Decision-Making For Others* (1995) 41.

*Protection Act 1999* (Qld).<sup>155</sup>

## THE GENERAL PRINCIPLES IN QUEENSLAND

4.10 The General Principles are set out in the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). When the guardianship legislation was introduced into Parliament, the General Principles were described as the ‘philosophical cornerstone’ of the legislation.<sup>156</sup>

4.11 The General Principles must be complied with by statutory health attorneys and attorneys appointed under an enduring document<sup>157</sup> when making decisions for an adult with impaired capacity.<sup>158</sup> The General Principles are also to be applied by guardians and administrators.<sup>159</sup> Except in limited circumstances,<sup>160</sup> informal substitute decision-makers are not expressly required to apply the General Principles.<sup>161</sup> However, the community is ‘encouraged to apply and promote’ the principles under the *Guardianship and Administration Act 2000* (Qld).<sup>162</sup>

4.12 Any other person or entity who performs a function or exercises a power for a matter for an adult with impaired capacity under the *Powers of Attorney Act 1998* (Qld), the *Guardianship and Administration Act 2000* (Qld) or

<sup>155</sup> *Mental Health Act 2000* (Qld) s 8; *Disability Services Act 2006* (Qld) pt 2, 3; *Child Protection Act 1999* (Qld) s 5.

<sup>156</sup> See the second reading speech and debate of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3690 (Hon Denver Beanland, Attorney-General and Minister for Justice), 22 April 1998, 837 (Mr Matthew Foley). Also see the second reading speech and debate of the Guardianship and Administration Bill 1999 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 December 1999, 6079 (Hon Matthew Foley, Attorney-General and Minister for Justice), 12 April 2000, 781 (Dr Lesley Clark).

<sup>157</sup> An enduring document means an enduring power of attorney or an advance health directive: *Powers of Attorney Act 1998* (Qld) s 28; *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 (definition of ‘enduring document’).

<sup>158</sup> *Powers of Attorney Act 1998* (Qld) s 76.

<sup>159</sup> *Guardianship and Administration Act 2000* (Qld) s 34(1). Under s 74(4) of that Act, a guardian who is appointed by the Tribunal under s 74 to consent to the continuation of special health care or the carrying out of special health care similar to the special health care to which the Tribunal has consented must also apply the General Principles (and the Health Care Principle).

<sup>160</sup> Certain informal decision-makers are required to apply the General Principles when deciding whether to consent to the use of certain restrictive practices in relation to particular adults: *Guardianship and Administration Act 2000* (Qld) s 80ZS. See also [4.120] below.

<sup>161</sup> Section 9(1) of the Act provides that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) authorise ‘the exercise of power for a matter for an adult with impaired capacity for a matter’. Section 9(2) of the Act provides that, depending on the type of matter involved, this may be done on an informal basis by members of the adult’s support network or on a formal basis by an attorney appointed in advance by the adult under an enduring power of attorney or an advance health directive, a statutory health attorney, a guardian or an administrator, the Tribunal or the Supreme Court. Section 11(1) of the Act provides that a person or other entity who performs a function or exercises a power under the Act for a matter in relation to an adult with impaired capacity for the matter must apply the General Principles. There may be an argument that the effect of s 9 is that an informal decision-maker is performing a function or power under the *Guardianship and Administration Act 2000* (Qld), and that he or she is therefore required by s 11 to apply the General Principles.

<sup>162</sup> *Guardianship and Administration Act 2000* (Qld) s 11(3).

an enduring document must also apply the General Principles.<sup>163</sup> This includes the Tribunal and the Supreme Court when it exercises jurisdiction under the guardianship legislation.<sup>164</sup>

4.13 The Adult Guardian is also specifically required to apply the General Principles in the performance and exercise of his or her functions and powers under the guardianship legislation.<sup>165</sup>

4.14 The Tribunal is also specifically required, when it is deciding whether a person is appropriate for appointment as a guardian or administrator, to consider the General Principles ‘and whether the person is likely to apply them’.<sup>166</sup>

### What the General Principles contain

4.15 There are 11 General Principles, some of which include a number of considerations. They are located in the first schedule to the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).<sup>167</sup> There are some minor wording differences to reflect the different persons to whom these Acts apply, but the principles are otherwise the same under each Act.

4.16 The first principle is that an adult is presumed to have capacity for a matter.<sup>168</sup> The rest of the principles specify certain things a person must consider, or steps a person must take, when making decisions about, or for, an adult.<sup>169</sup>

4.17 Some of the principles require that particular matters be recognised and/or taken into account. Many of these refer to the adult’s rights. For example, General Principle 3 provides that ‘an adult’s right to respect for his or

<sup>163</sup> *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 11(1). Under the *Powers of Attorney Act 1998* (Qld), the General Principles are to be ‘complied with’; under the *Guardianship and Administration Act 2000* (Qld), the General Principles are to be ‘applied’. In addition, a person or other entity who is authorised to make a decision for an adult about ‘prescribed special health care’ must apply the General Principles: *Guardianship and Administration Act 2000* (Qld) s 11(2). ‘Prescribed special health care’ means health care prescribed under a regulation: *Guardianship and Administration Act 2000* (Qld) sch 2 cl 17. To date, no such regulation has been made.

<sup>164</sup> *VJC v NSC* [2005] QSC 068 [16] (Wilson J).

<sup>165</sup> *Guardianship and Administration Act 2000* (Qld) s 174(3).

<sup>166</sup> *Guardianship and Administration Act 2000* (Qld) s 15(1)(a).

<sup>167</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 (General principles); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 (General principles).

<sup>168</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 1; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 1. The presumption of capacity is discussed at [6.49]–[6.55] below.

<sup>169</sup> General Principle 10 is an exception. It provides that an attorney, guardian or administrator ‘should’ exercise power for a matter in a way that is appropriate to the adult’s characteristics and needs.

her human worth and dignity as an individual must be recognised and taken into account'.<sup>170</sup>

4.18 Other principles require different steps to be taken. For example, General Principle 7 requires, among other things, that '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'.<sup>171</sup> Other examples are that 'the adult's views and wishes are to be sought', that functions and powers must be performed and exercised in the way least restrictive of the adult's rights and that 'the principle of substituted judgment must be used'.<sup>172</sup>

4.19 Most of the principles are expressed as things the person 'must' do. General Principle 10, however, provides that an attorney, guardian or administrator 'should' exercise power for a matter in a way that is appropriate to the adult's characteristics and needs.<sup>173</sup>

4.20 The General Principles set out in the *Guardianship and Administration Act 2000* (Qld) are:<sup>174</sup>

**1 Presumption of capacity**

An adult is presumed to have capacity for a matter.

**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.

**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.

**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.

170 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 3; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 3.

171 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 7(3)(a); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(3)(a).

172 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 7(3)(b), (c), (4); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(3)(b), (c), (4).

173 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 10; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 10.

174 The text in square brackets reflects the different wording used in the *Powers of Attorney Act 1998* (Qld).

- (2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

**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.

**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.

**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 [or an enduring document] 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 [or an enduring document] 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.

**8 Maintenance of existing supportive relationships**

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

**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<sup>175</sup> or Island custom<sup>176</sup>), must be taken into account. (in original)

**10 Appropriate to circumstances**

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

**11 Confidentiality**

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

**Applying the General Principles**

4.21 The General Principles have been recognised by the Supreme Court of Queensland as 'an important statement of contemporary values in relation to the welfare of an intellectually disabled person'.<sup>177</sup> In *Re JD*,<sup>178</sup> the Guardianship and Administration Tribunal described the role of the General Principles in this way:

The Tribunal's view is that a guardian does possess wide powers but the Act contains a balance to these powers in the form of the General Principles and the Health Care Principle. A guardian must apply these principles and these principles contain the essential protections to any possible abuse of a guardian's power. These principles are essentially a restatement of the UN Declarations in relation to the Rights of the Mentally Ill and ensure appropriate decision making by both guardians and administrators.

175

**Aboriginal tradition** means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships—see the *Acts Interpretation Act 1954*, section 36.

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**Island custom**, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to the particular persons, areas, objects or relationships—see the *Acts Interpretation Act 1954* (Qld), section 36.

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*VJC v NSC* [2005] QSC 068 [16] (Wilson J).

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[2003] QGAAT 14, [39].

4.22 Application of the principles is a binding obligation. Additionally, most of the principles stipulate certain considerations that ‘must’ be recognised and/or taken into account or other steps that ‘must’ be taken. However, the legislation does not provide any guidance about how the principles are to be balanced. No single principle in the guardianship legislation is given priority or is expressed as a paramount consideration. The Public Advocate has noted, for example, that:<sup>179</sup>

It is possible that application of different principles will suggest different outcomes in any given situation. There is no prescribed priority or hierarchy to suggest some principles are more important than others or any procedure to resolve conflict arising when application of different principles suggests different outcomes.

4.23 The Tribunal has recognised that the principles may conflict and will need to be balanced appropriately according to the particular facts in each case.<sup>180</sup> The Tribunal has also made some statements in relation to the General Principles which may provide guidance about their application.

4.24 In *Re JD*,<sup>181</sup> the Tribunal considered a guardian’s power to give consent to the detention of an adult at a mental health facility against the adult’s wishes. In considering the General Principles (and the Health Care Principle), the Tribunal suggested that the principles ‘essentially require that all decisions are made in the adult’s best interests and are consistent with the adult’s proper care and protection’.<sup>182</sup> The Tribunal considered the tension between taking account of the adult’s wishes and making decisions consistent with the adult’s care and protection in General Principle 7.<sup>183</sup> It concluded that precedence may be given to the adult’s care and protection:<sup>184</sup>

This idea that the decision which is made must be one which is consistent with the adult’s proper care and protection clearly envisages that the ultimate decision which must be made is a decision which is objectively in the adult’s best interests and not simply the decision which the adult would have made.

4.25 This view was also expressed in *Re SD*:<sup>185</sup>

Although any appointed administrator is required by Section 11 of the *Guardianship and Administration Act 2000* to apply the General Principles, which require that the adult’s views and wishes must be taken into account

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179 M Howard, ‘Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform’ (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 173.

180 Eg, *Re HG* [2006] QGAAT 26, [67].

181 [2003] QGAAT 14, [22].

182 *Re JD* [2003] QGAAT 14, [22]. A similar view was expressed in *Re MJG* [2004] QGAAT 58, [49].

183 The need to balance these factors was also recognised in *Re SVG* [2002] QGAAT 3, [31]–[33].

184 *Re JD* [2003] QGAAT 14, [35].

185 [2005] QGAAT 71, [39].

(General Principle 7(4)), these must be taken in the context of a person with impaired capacity and ultimately in accordance with General Principle 7(5), the administrator is required to exercise powers ‘*in a way consistent with the adult’s proper care and protection*’. (emphasis in original)

4.26 In a later case, *Re CRS*,<sup>186</sup> the Tribunal suggested that maintenance of the adult’s existing supportive relationships (General Principle 8) is ‘one of the most important General Principles specified in the Act’.

## THE POSITION IN OTHER JURISDICTIONS

4.27 The guardianship legislation in each of the other Australian jurisdictions also contains general or guiding principles.

4.28 In the ACT, New South Wales, the Northern Territory, Tasmania and Victoria, the principles apply to any person in the exercise or performance of a function or power under the guardianship legislation.<sup>187</sup> In South Australia, the principles apply to the Tribunal, guardians and administrators, the Public Advocate and any court or other body or person who makes a decision or order in relation to a person, or pursuant to powers conferred under, the guardianship legislation.<sup>188</sup>

4.29 In the ACT, a set of principles for attorneys appointed under an enduring power of attorney is included in the *Powers of Attorney Act 2006* (ACT).<sup>189</sup> In Tasmania, Victoria and Western Australia, the legislation also contains a set of principles specific to guardians and administrators.<sup>190</sup>

4.30 In New South Wales, the principles additionally provide that the community should be encouraged to apply and promote the principles.<sup>191</sup> In Victoria, the general principles are also to be applied in the interpretation of the legislation.<sup>192</sup>

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186 [2006] QGAAT 57, [90].

187 *Guardianship and Management of Property Act 1991* (ACT) s 4(1); *Guardianship Act 1987* (NSW) s 4; *Adult Guardianship Act* (NT) s 4; *Guardianship and Administration Act 1995* (Tas) s 6; *Guardianship and Administration Act 1986* (Vic) s 4(2).

188 *Guardianship and Administration Act 1993* (SA) s 5.

189 *Powers of Attorney Act 2006* (ACT) s 44, sch 1.

190 *Guardianship and Administration Act 1995* (Tas) ss 27, 57; *Guardianship and Administration Act 1986* (Vic) ss 28, 49; *Guardianship and Administration Act 1990* (WA) ss 51, 70. The Northern Territory legislation also contains principles specific to guardians: *Adult Guardianship Act* (NT) s 20.

191 *Guardianship Act 1987* (NSW) s 4(h).

192 *Guardianship and Administration Act 1986* (Vic) s 4(2).

## What the principles contain

4.31 The number and content of the principles in each of the jurisdictions varies. However, there are three principles common to most of the jurisdictions:

- the means that are least restrictive of the adult's rights or freedom of decision and action are to be adopted;<sup>193</sup>
- the wishes and/or views of the adult are to be considered;<sup>194</sup> and
- the adult's welfare and interests<sup>195</sup> or best interests<sup>196</sup> are to be promoted.

4.32 In the Northern Territory and Tasmania, the general principles are limited to these three principles.<sup>197</sup> Other jurisdictions contain many more principles. For example, attorneys under an enduring power of attorney must apply 11 principles in the ACT.<sup>198</sup> Those principles are very similar to the General Principles in Queensland.

4.33 Some of the jurisdictions include similar principles to Queensland:

- the adult's wishes should be taken into account or given effect;<sup>199</sup>
- the adult should be encouraged to participate in community life;<sup>200</sup>

<sup>193</sup> *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.6(1)–(3); *Guardianship Act 1987* (NSW) s 4(b); *Adult Guardianship Act* (NT) s 4(a); *Guardianship and Administration Act 1993* (SA) s 5(d); *Guardianship and Administration Act 1995* (Tas) s 6(a); *Guardianship and Administration Act 1986* (Vic) s 4(2)(a); *Guardianship and Administration Act 1990* (WA) ss 4(2)(c)–(e), 51(2)(f), 70(2)(f).

<sup>194</sup> *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.6(3), (4); *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a), (b); *Guardianship Act 1987* (NSW) s 4(d); *Adult Guardianship Act* (NT) s 4(c); *Guardianship and Administration Act 1993* (SA) s 5(a), (b); *Guardianship and Administration Act 1995* (Tas) s 6(c); *Guardianship and Administration Act 1986* (Vic) ss 4(2)(c), 28(2)(e), 49(2)(b); *Guardianship and Administration Act 1990* (WA) ss 4(2)(f), 51(2)(e), 70(2)(e).

<sup>195</sup> *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(c) ('interests'); *Guardianship Act 1987* (NSW) s 4(a) ('welfare and interests').

<sup>196</sup> *Adult Guardianship Act* (NT) ss 4(b), 20(1); *Guardianship and Administration Act 1995* (Tas) ss 6(b), 27(1), 57(1); *Guardianship and Administration Act 1986* (Vic) ss 4(2)(b), 28(1), 49(1); *Guardianship and Administration Act 1990* (WA) ss 4(2)(a), 51(1), 70(1).

<sup>197</sup> *Adult Guardianship Act* (NT) s 4; *Guardianship and Administration Act 1995* (Tas) s 6. However, in those jurisdictions, the legislation includes an additional provision specifying what it means for a particular decision-maker to act in the adult's best interests: *Adult Guardianship Act* (NT) s 20(2); *Guardianship and Administration Act 1995* (Tas) ss 27(2), 57(2).

<sup>198</sup> *Powers of Attorney Act 2006* (ACT) s 44, sch 1.

<sup>199</sup> See note 194 above.

<sup>200</sup> *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.4; *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(f); *Guardianship Act 1987* (NSW) s 4(c); *Adult Guardianship Act* (NT) s 20(2)(b); *Guardianship and Administration Act 1995* (Tas) s 27(2)(c); *Guardianship and Administration Act 1986* (Vic) s 28(2)(b); *Guardianship and Administration Act 1990* (WA) ss 51(2)(b), 70(2)(b).

- the adult must be encouraged to be self-reliant;<sup>201</sup>
- the importance of maintaining the adult's supportive or family relationships should be taken into account;<sup>202</sup>
- the importance of maintaining the adult's cultural, linguistic and religious environment and values should be taken into account;<sup>203</sup>
- functions must be exercised or decisions made in a way consistent with the adult's care or protection;<sup>204</sup>
- every adult is presumed capable to make decisions;<sup>205</sup> and
- the community should be encouraged to apply and promote the principles.<sup>206</sup>

4.34 Some of the jurisdictions also include different principles to Queensland:

- the adult's welfare and interests or best interests are to be promoted;<sup>207</sup>
- the adult is to be protected from neglect, abuse or exploitation;<sup>208</sup>
- an adult's wish and need to have access to family members and relatives, and to involve family members and relatives in decisions affecting the adult, must be taken into account;<sup>209</sup>

201 *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(e); *Guardianship Act 1987* (NSW) s 4(f); *Adult Guardianship Act* (NT) s 20(2)(c); *Guardianship and Administration Act 1995* (Tas) ss 27(2)(d), 57(2)(a); *Guardianship and Administration Act 1986* (Vic) ss 28(2)(c), 49(2)(a); *Guardianship and Administration Act 1990* (WA) ss 51(2)(c), 70(2)(c).

202 *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.8; *Guardianship Act 1987* (NSW) s 4(e); *Guardianship and Administration Act 1990* (WA) ss 51(2)(g), 70(2)(g).

203 *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.9; *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(d); *Guardianship Act 1987* (NSW) s 4(e); *Guardianship and Administration Act 1990* (WA) ss 51(2)(h), 70(2)(h).

204 *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.6(5); *Guardianship and Administration Act 1993* (SA) s 5(d); *Guardianship and Administration Act 1990* (WA) ss 51(2)(f), 70(2)(f).

205 *Guardianship and Administration Act 1990* (WA) s 4(2)(b). Also see *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.7 which provides that an 'individual must not be treated as unable to take part in making a decision only because the individual makes unwise decisions'.

206 *Guardianship Act 1987* (NSW) s 4(h).

207 See note 195 and 196 above.

208 *Guardianship Act 1987* (NSW) s 4(g); *Adult Guardianship Act* (NT) s 20(2)(d); *Guardianship and Administration Act 1986* (Vic) s 28(2)(d); *Guardianship and Administration Act 1990* (WA) ss 51(2)(d), 70(2)(d).

209 *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.1.

- decision-makers must consult with the adult's carers, except if it would adversely affect the adult's interests to do so;<sup>210</sup>
- when making or affirming a guardianship or administration order, consideration should be given to existing informal arrangements and the desirability of not disturbing those arrangements;<sup>211</sup> and
- a guardian or administrator must act as an advocate for the adult.<sup>212</sup>

4.35 A comparison of the Australian jurisdictions is included in a table in Appendix 3.

### Applying the principles

4.36 Compliance with the principles under the legislation of the other Australian jurisdictions is generally mandatory. However, in the ACT, an attorney under an enduring power of attorney is to comply with the relevant principles 'to the maximum extent possible'.<sup>213</sup> In Western Australia, guardians and administrators will be taken to act in the adult's best interests if they act 'as far as possible' in compliance with the principles.<sup>214</sup> In addition, a guardian's obligation to act in the adult's best interests is 'subject to any direction' of the Tribunal.<sup>215</sup>

4.37 In some jurisdictions, particular principles are to be given priority. The welfare and interests of the adult are to be given 'paramount consideration' in New South Wales.<sup>216</sup> Similarly, in Western Australia, the adult's best interests are to be the 'primary concern' of the Tribunal.<sup>217</sup> Guardians and administrators in Tasmania, Victoria and Western Australia are also to be chiefly concerned with the adult's best interests by acting in accordance with the rest of the principles.<sup>218</sup>

210 *Guardianship and Management of Property Act 1991* (ACT) s 4(3).

211 *Guardianship and Administration Act 1993* (SA) s 5(c).

212 *Adult Guardianship Act* (NT) s 20(2)(a); *Guardianship and Administration Act 1995* (Tas) s 27(2)(b); *Guardianship and Administration Act 1986* (Vic) s 28(2)(a); *Guardianship and Administration Act 1990* (WA) ss 51(2)(a), 70(2)(a).

213 *Powers of Attorney Act 2006* (ACT) s 44.

214 *Guardianship and Administration Act 1990* (WA) ss 51(2), 70(2).

215 *Guardianship and Administration Act 1990* (WA) s 51(1).

216 *Guardianship Act 1987* (NSW) s 4(a).

217 *Guardianship and Administration Act 1990* (WA) s 4(2)(a).

218 *Guardianship and Administration Act 1995* (Tas) ss 27(1), (2), 57(1), (2); *Guardianship and Administration Act 1986* (Vic) ss 28(1), (2), 49(1), (2); *Guardianship and Administration Act 1990* (WA) ss 51(1), (2), 70(1), (2). Also see *Adult Guardianship Act* (NT) s 20(1), (2) in relation to guardians, but not administrators.

4.38 In contrast, in South Australia, ‘paramount consideration’ must be given to what would, in the opinion of the decision-maker, be the wishes of the adult if he or she had capacity.<sup>219</sup>

4.39 Prior to amendments in 2001, the ACT legislation provided that the adult’s wishes were to be given paramount consideration. The amended legislation provides, instead, a staged approach to consideration of the adult’s wishes to address the potential conflict between consideration of the adult’s wishes and his or her welfare:<sup>220</sup>

#### 4 Principles to be followed by decision-makers

...

(2) The *decision-making principles* to be followed by the decision-maker are the following:

- (a) the protected person’s wishes, as far as they can be worked out, must be given effect to, unless making the decision in accordance with the wishes is likely to significantly adversely affect the protected person’s interests;<sup>221</sup> (note added)
- (b) if giving effect to the protected person’s wishes is likely to significantly adversely affect the person’s interests—the decision-maker must give effect to the protected person’s wishes as far as possible without significantly adversely affecting the protected person’s interests;
- (c) if the protected person’s wishes cannot be given effect to at all—the interests of the protected person must be promoted;

...

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219 *Guardianship and Administration Act 1993* (SA) s 5(a).

220 *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a)–(c). See Explanatory Memorandum, *Guardianship and Management of Property Amendment Bill 2001* (ACT) 2–3; Second reading speech of the *Guardianship and Management of Property Amendment Bill 2001*: ACT, *Parliamentary Debates*, Legislative Assembly, 3 May 2001, 1410–11 (Mr Michael Moore, Minister for Health, Housing and Community Services, on behalf of Mr Bill Stefaniak, Attorney General).

221 Section 5A of the *Guardianship and Management of Property Act 1991* (ACT) provides that a person’s ‘interests’ include:

- protection of the person from physical or mental harm;
- prevention of the physical or mental deterioration of the person;
- the ability of the person to—
  - look after himself or herself; and
  - live in the general community; and
  - take part in community activities; and
  - maintain the person’s preferred lifestyle (other than any part of the person’s preferred lifestyle that is harmful to the person);
- promotion of the person’s financial security;
- prevention of the wasting of the person’s financial resources or the person becoming destitute.

## ISSUES FOR CONSIDERATION

4.40 The inclusion of the General Principles in the guardianship legislation raises a number of issues. Some of these relate to the content of the General Principles. Other issues relate to their application.

### The role and purpose of the General Principles

4.41 A threshold issue to consider is what role the General Principles should play in the guardianship legislation.

4.42 When the Powers of Attorney Bill 1997 (Qld) was introduced into Parliament, the then Attorney-General described the General Principles as ‘the philosophical cornerstone’ of the legislation ‘which guide and regulate the conduct of an attorney when making decisions for a person with impaired capacity’.<sup>222</sup> The Explanatory Notes to the Bill stated that:<sup>223</sup>

These principles recognize the rights of people with a decision-making disability as reflected in United Nations Declarations on such rights. They provide guidance for attorneys and others in relation to the exercise of powers for a person with impaired capacity.

4.43 The inclusion of the General Principles in the guardianship legislation gave effect to the recommendation of the Queensland Law Reform Commission in its Report in 1996. In its Report, the Commission expressed concern that, at that time, there was insufficient provision requiring substitute decision-makers to respect the rights of people with decision-making disabilities.<sup>224</sup> The Commission recommended the inclusion of a set of principles to give statutory recognition to the rights of people with a decision-making disability.<sup>225</sup> This was considered an important step in moving away from a paternalistic philosophy towards a more positive approach which affirmed the human rights of people with impaired decision-making capacity.<sup>226</sup>

4.44 An examination of the General Principles first requires an understanding of their role and purpose. This will inform choices about the level of detail and specificity the principles should have, what principles should be included, and how the principles should be applied.

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<sup>222</sup> See the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3690 (Hon Denver Beanland, Attorney-General and Minister for Justice).

<sup>223</sup> Explanatory Notes, Powers of Attorney Bill 1997 (Qld) 37.

<sup>224</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 25.

<sup>225</sup> *Ibid* 27.

<sup>226</sup> See, generally, Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making For People who Need Assistance Because of a Mental or Intellectual Disability*, Discussion Paper No 38 (1992) 1–2.

4.45 The General Principles may fulfil many roles. The principles may affirm the basic rights of adults with impaired decision-making capacity, provide a set of guidelines for making substitute decisions for an adult,<sup>227</sup> act as a safeguard to protect the adult's rights and interests,<sup>228</sup> or serve an educative function.<sup>229</sup>

4.46 It may be that the General Principles should be kept entirely general. That is, the role of the General Principles may be to enunciate the philosophy underlying the legislation rather than to act as a specific or detailed decision-making checklist. It may be appropriate to supplement such general statements of philosophy with more specific principles or provisions directed at how particular decisions should be made. Guidance of that kind may more appropriately be included with other substantive provisions of the legislation rather than as part of the General Principles.<sup>230</sup>

4.47 On the other hand, it may be that the General Principles should be more specific, with the purpose of providing comprehensive or detailed guidance on making decisions for, or about, an adult. It may be appropriate, for example, to provide different principles for different types of decisions. Again, however, specific principles of this nature may be better included alongside other obligations and responsibilities set out in the legislation rather than in a statement of 'General Principles'.

**4-1 What role and purpose should the General Principles have in the Queensland guardianship legislation?**

**4-2 Should the General Principles be expressed in general terms, or more specifically to provide detailed guidance about particular issues?**

<sup>227</sup> Eg, M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166.

<sup>228</sup> Eg, Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) 5–6; J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 136.

<sup>229</sup> Eg, R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 39. Also see the debate of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 22 April 1998, 837 (Hon Michael Foley).

<sup>230</sup> At present, for example, General Principle 11 provides that the adult's right to confidentiality of information about him or her must be recognised and taken into account. The legislation also contains other provisions which impose specific confidentiality obligations in relation to particular information: *Guardianship and Administration Act 2000* (Qld) ss 109, 112, 249. Those provisions were the subject of the first stage of the Commission's review: see Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007); and see the Guardianship and Administration and Other Acts Amendment Bill 2008 (Qld) cl 10, 11, 20 which propose to insert new ss 109D, 109E and 249A and to replace s 112 of the *Guardianship and Administration Act 2000* (Qld).

## Redrafting or refining the General Principles

4.48 A consideration of the role and purpose of the General Principles raises the issue of what the General Principles should contain. It also raises the complexity of the General Principles.

4.49 A threshold issue is whether the overall content of the General Principles remains appropriate. This will be informed by what role the General Principles should have. It may also be informed by the provisions of the United Nations Convention, particularly articles 3 and 12.<sup>231</sup>

4.50 The United Nations Convention is the most recent international statement about the rights of people with a disability and it has been ratified by Australia.<sup>232</sup> The Commission's preliminary view is that the General Principles should reflect the United Nations Convention and that any revisions to the General Principles should be guided by the objectives of simplicity and conformance to contemporary, internationally agreed principles.<sup>233</sup>

4.51 One issue to consider is whether the General Principles should be redrafted anew. This may be desirable, for example, to ensure the General Principles reflect the clear, contemporary statement of positive rights evident in the United Nations Convention. It might also be appropriate to redraft the General Principles afresh to remove any unwanted complexities which may hinder their commonsense application. Alternatively, it may be appropriate to retain the General Principles in their current form but to refine them.

4.52 In considering whether and, if so, how the General Principles should be changed, an issue to consider is whether the General Principles contain too few or too many principles. There are 11 General Principles, but many of these have more than one element. General Principle 7, for example, has six main clauses.<sup>234</sup> The role of the General Principles will inform whether the principles should be reduced or expanded and in what ways.

4.53 There may be provisions which should be removed from the General Principles and relocated to other parts of the legislation. For example, General Principle 10 applies only to the exercise of power by an attorney, guardian or

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231 Articles 3 and 12 are set out in full at [3.10], [3.11] above.

232 See note 147 above.

233 When interpreting a statutory provision, regard may be had (in certain circumstances) to extrinsic materials, such as a treaty or other international agreement that is mentioned in the statute: *Acts Interpretation Act 1954* (Qld) s 14B(1), (3)(d); *Acts Interpretation Act 1901* (Cth) s 15AB(1), (2)(d). In addition, the courts should endeavour to adopt a construction of Australian legislation which conforms to relevant international Conventions: see, recently, for example, *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, [34] (Gummow A CJ, Callinan, Heydon and Crennan JJ). See generally P Hanks, *Laws of Australia*, 21 Human Rights, 'Principles of international law can affect the development of the law in Australia' [21.2.42] (at 25 August 2008).

234 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 7; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7.

administrator.<sup>235</sup> It may be appropriate to move this out of the General Principles and include it, instead, with the other specific duties of attorneys, guardians and administrators. Alternatively, it may be appropriate to extend the application of this principle to all persons who are required to apply the General Principles.<sup>236</sup>

4.54 In contrast, there may be some principles that should be limited to certain decision-makers or decisions. For example, it may be hard to see how the presumption of capacity is to be applied by a guardian when making a substitute decision for a matter for which the adult has impaired capacity.<sup>237</sup>

4.55 There may be new principles that should be added to the General Principles. Some possible principles for inclusion are discussed below. For example, it may be appropriate to add a principle requiring consultation with the adult's support network or carers. Again, such principles may more appropriately be dealt with as specific duties or obligations which apply to certain decision-makers or in particular situations.

4.56 Another issue to consider is whether the existing principles provide too little, or too much, detail. For example, the wording of a principle may be unclear or confusing because it is too vague, complex or heavily reliant on subjective interpretation.<sup>238</sup> It may be appropriate to include examples of what is meant for particular principles or to identify relevant factors to be considered when applying particular principles. On the other hand, it may be desirable to maintain flexibility in the application of the principles.

**4-3 Should the General Principles be:**

- (a) redrafted anew; or
- (b) retained in their current form but refined?

**4-4 Should the General Principles be redrafted or refined to reflect articles 3 and 12 of the United Nations Convention?**

**4-5 Are there any principles that should be removed or relocated to other parts of the guardianship legislation?**

<sup>235</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 10; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 10. General Principle 10 provides that an attorney, guardian or administrator should exercise power for a matter in a way that is appropriate to the adult's characteristics and needs.

<sup>236</sup> See *Re HG* [2006] QGAAT 26, [80].

<sup>237</sup> See [6.49]–[6.55] above.

<sup>238</sup> Eg, M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 183–5, 188.

- 4-6 Are there any new principles that should be added to the General Principles?**
- 4-7 Are there any principles that should be reworded or changed in some way? For example, are there any principles that should identify additional factors to be considered or taken into account, or any principles that should include examples?**

### Substituted judgment

4.57 In the other Australian jurisdictions, the principles require decision-makers to consider<sup>239</sup> or give effect to the adult's views or wishes.<sup>240</sup> In the ACT, South Australia and Western Australia, this includes consideration of what the adult's wishes would be, as determined, for example, from the adult's previous actions.<sup>241</sup> These principles reflect the substituted judgment approach to decision-making.

4.58 The substituted judgment approach has been said to accord greater respect for the adult's autonomy than the 'best interests' standard.<sup>242</sup> Under this approach, the decision-maker tries to make the same decision the adult would make if he or she had capacity.<sup>243</sup> Decisions should reflect what the adult would have wanted:<sup>244</sup>

This principle allows for individual preferences, even to the extent that what may be regarded as idiosyncratic or eccentric points of view are respected. Substitute judgment is closely linked to the least restrictive option approach in that the substitute decision maker does not impose his or her ideas on the disabled person.

4.59 This approach relies on the decision-maker's understanding of the adult's preferences. These may have been clearly expressed by the adult or

<sup>239</sup> *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.6(3), (4); *Guardianship Act 1987* (NSW) s 4(d); *Guardianship and Administration Act 1993* (SA) s 5(a), (b); *Guardianship and Administration Act 1986* (Vic) ss 28(2)(e), 49(2)(b); *Guardianship and Administration Act 1990* (WA) ss 4(2)(f), 51(2)(e), 70(2)(e).

<sup>240</sup> *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a); *Adult Guardianship Act* (NT) s 4(c); *Guardianship and Administration Act 1995* (Tas) s 6(c); *Guardianship and Administration Act 1986* (Vic) s 4(2)(c).

<sup>241</sup> *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.6(4); *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a); *Guardianship and Administration Act 1993* (SA) s 5(a); *Guardianship and Administration Act 1990* (WA) ss 4(2)(f), 51(2)(e), 70(2)(e).

<sup>242</sup> R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 41. Also, eg, South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [5.2].

<sup>243</sup> Eg, J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 137.

<sup>244</sup> Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.7].

the decision-maker may be able to infer them from the adult's actions, beliefs and values.<sup>245</sup>

4.60 However, it may not always be possible to know what the adult would have wanted. The main criticism of the substituted judgment standard has been its inability to apply when the adult has never had capacity to make his or her own decisions.<sup>246</sup> In those circumstances, it has been suggested that a 'fall-back' standard is required, such as a 'best interests' standard.<sup>247</sup> Where the adult's current views are unknown, the substituted judgment approach has also been criticised as leading decision-makers into 'contortions of logic in trying to determine what the person would have decided had she or he been able to make such a decision'.<sup>248</sup> Such a determination leads decision-makers to consider 'recollections of past conversations, scattered remarks and comments' that would otherwise be considered unreliable hearsay.<sup>249</sup> It has been commented, for example, that:<sup>250</sup>

Since we cannot read the incompetent person's thoughts, memories and emotions, we cannot in reality 'substitute' our decision-making process and our judgment for those of an incompetent person.

4.61 In Queensland, General Principle 7 reflects the principles of least restriction on the adult's rights and decision-making by substituted judgment.<sup>251</sup> This approach emphasises the importance of the adult's right to make, and participate in, decisions to the greatest extent practicable. This is balanced against the requirement for decisions also to be consistent with the adult's proper care and protection.<sup>252</sup>

4.62 General Principle 7 requires the adult's views and wishes to be 'sought and taken into account'. It also requires that 'if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be', those views and wishes are to be taken into account.<sup>253</sup>

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245 I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 190.

246 Eg, Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.25].

247 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 42.

248 J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 137. Also see I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 190.

249 D Mendelson, 'Substituted Consent: From Lunatics to Corpses' (2007) 14 *Journal of Law and Medicine* 449, 457.

250 *Ibid* 461.

251 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 7; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7.

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

253 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 7(3)(b), (4); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(3)(b), (4).

Views and wishes may be expressed orally, in writing, by conduct or in another way.<sup>254</sup>

4.63 An issue to consider is whether the General Principles should specifically require decision-makers to give effect to the adult's wishes rather than simply take them into account. This may help ensure that appropriate regard is given to the adult's autonomy and right to participate in decisions. It would also reflect the provision in article 12 of the United Nations Convention requiring that measures relating to the exercise of legal capacity 'respect the rights, will and preferences of the person'.<sup>255</sup> On the other hand, this may make decision-making more difficult if the adult's views are unclear or would put the adult in harm.

4.64 Another issue to consider is how the obligation to consider the adult's wishes should relate to the requirement in General Principle 7(5) to make decisions in a way 'consistent with the adult's proper care and protection'.<sup>256</sup> It may be appropriate to allow a decision-maker to override the adult's wishes if it is necessary to ensure the adult's interests are protected. On the other hand, this may undermine the adult's autonomy. A staged approach, similar to the approach under the ACT's legislation, may be useful.<sup>257</sup>

4.65 A related issue is whether the General Principles adequately and appropriately deal with the substituted judgment approach. It may be appropriate, for example, to provide specifically for situations in which the adult's views and wishes are not known at all. This might involve nominating a particular principle — such as the adult's care and protection, or the least restrictive means — that is to be applied in those circumstances. On the other hand, this may be unnecessary.

**4-8 Do the existing General Principles provide for adequate and appropriate weight to be given to the adult's views and wishes?**

**4-9 Should the General Principles continue to require that the adult's views and wishes should be taken into account, or be changed to require that effect be given to the adult's views and wishes?**

<sup>254</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 7(6); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(6).

<sup>255</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12(4).

<sup>256</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 7(5); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(5).

<sup>257</sup> See [4.39] above.

**4-10 Should the General Principles specify whether and, if so, when the adult's views and wishes can be overridden by other considerations, such as the adult's proper care and protection? For example, should the General Principles adopt an approach similar to the staged approach used in the ACT legislation?**

**4-11 Should the General Principles specify a principle or principles that must apply if the adult's views and wishes are not known at all?**

### Acting in the adult's interest

4.66 The 'substituted judgment' approach to decision-making is often contrasted with the 'best interests' standard of decision-making. Before discussing best interests, this chapter considers the related, but different, concept of acting in the adult's interest.

4.67 At present, the guardianship legislation provides for the protection of the adult's interests in two main ways. First, it provides that the Tribunal may appoint a guardian or administrator only if it is satisfied that, among other things, without an appointment the adult's needs will not be adequately met or 'the adult's interests will not be adequately protected'.<sup>258</sup> Second, the legislation imposes a specific duty on attorneys, guardians and administrators to exercise power for an adult 'honestly and with reasonable diligence to protect the adult's interests'.<sup>259</sup> The maximum penalty for breach of this duty is a fine of \$15 000.<sup>260</sup> This duty, at least to the extent it applies to attorneys, appears to have been intended to reflect the standard of responsibility ordinarily expected from a person who acts as another's agent.<sup>261</sup>

4.68 Agency is a form of fiduciary relationship.<sup>262</sup> Fiduciaries are in a special position of trust and loyalty characterised by an obligation to act in the

<sup>258</sup> *Guardianship and Administration Act 2000* (Qld) s 12(1)(c). Also see the similar provision in relation to the appointment of a 'guardian for restrictive practice matters' under new s 80ZD(1)(d)(ii) of the *Guardianship and Administration Act 2000* (Qld). That provision was inserted by *Disability Services and Other Legislation Amendment Act 2008* (Qld), which commenced on 1 July 2008.

<sup>259</sup> *Powers of Attorney Act 1998* (Qld) s 66(1); *Guardianship and Administration Act 2000* (Qld) s 35. Also note that attorneys, guardians and administrators for an adult must regularly consult with one another 'to ensure the adult's interests are not prejudiced by a breakdown in communication between them': *Powers of Attorney Act 1998* (Qld) s 79; *Guardianship and Administration Act 2000* (Qld) s 40(1).

<sup>260</sup> *Powers of Attorney Act 1998* (Qld) s 66(1); *Guardianship and Administration Act 2000* (Qld) s 35; *Penalties and Sentences Act 1992* (Qld) s 5 (meaning of 'penalty unit').

<sup>261</sup> See the discussion in relation to attorneys (but not guardians or administrators) in the debate of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1022 (Hon Denver Beanland, Attorney-General and Minister for Justice). Also see, eg, *Re BAB* [2007] QGAAT 19, [50]; and *Re JK* [2005] QGAAT 58, [48]–[53] in which the Tribunal commented that attorneys and administrators, respectively, are in a fiduciary relationship with the principal.

<sup>262</sup> FMB Reynolds, *Bowstead and Reynolds on Agency* (17th ed, 2001) [6-032], [6-034].

interests of the other party (the 'beneficiary').<sup>263</sup> This means the fiduciary must not act for his or her own benefit but for the benefit of the beneficiary.<sup>264</sup> This overriding obligation is given expression by a number of specific duties. Rather than specifying positive steps the fiduciary must undertake, these duties generally proscribe what a fiduciary must not do in order to avoid a conflict with the beneficiary's interests and to ensure the fiduciary acts in the beneficiary's interest and not in the interest of any other person.<sup>265</sup>

4.69 An issue to consider is whether the General Principles should include a requirement for decision-makers to act in the adult's interests. In the ACT, the principles refer to the promotion of the adult's 'interests' and in New South Wales, to the consideration of the adult's 'welfare and interests'.<sup>266</sup> Such a requirement would be consistent with the specific duty imposed on attorneys, guardians and administrators to act with 'reasonable diligence to protect the adult's interests'. It may usefully clarify that decisions for or about an adult should give precedence to the adult's interests, rather than to the interests of the decision-maker or others. This would accord with the provision in article 12 of the United Nations Convention requiring measures relating to the exercise of legal capacity to be 'free of conflict of interest'.<sup>267</sup> As an alternative to a 'best interests' principle, it may also avoid the paternalistic connotations associated with the 'best interests' approach.<sup>268</sup>

4.70 On the other hand, the incorporation of a principle dealing with the adult's interests may be unnecessary. As noted above, attorneys, guardians and administrators are already under a specific duty to protect the adult's interests.

**4-12 Should the General Principles include a new principle which requires decision-makers to act in the adult's interests?**

<sup>263</sup> PD Finn, *Fiduciary Obligations* (1977) [15], [27]; P Parkinson, 'Fiduciary Obligations' in P Parkinson (ed), *The Principles of Equity* (1996) [1001].

<sup>264</sup> PD Finn, *Fiduciary Obligations* (1977) [28].

<sup>265</sup> Ibid [28], [30]; M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) [2.180]. See also, eg, *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ), 137–8 (Gummow J).

<sup>266</sup> *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(c); *Guardianship Act 1987* (NSW) s 4(a).

<sup>267</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12(4).

<sup>268</sup> See [4.73] below.

## Best interests as an alternative approach

4.71 In the Northern Territory, Tasmania, Victoria and Western Australia, the general principles include a requirement to act in the adult's best interests.<sup>269</sup> In the ACT, the principles refer to the promotion of the adult's 'interests' and in New South Wales to the consideration of the adult's 'welfare and interests'.<sup>270</sup> An issue to consider is whether a similar principle should apply in Queensland.

4.72 While the existing General Principles in Queensland do not adopt the language of 'best interests',<sup>271</sup> the concept of best interests may be reflected in General Principle 7(5) which requires power for a matter to be exercised in a way consistent with the adult's care and protection.<sup>272</sup> The guardianship legislation otherwise makes only limited express provision for particular decisions to be made 'in the adult's best interests'.<sup>273</sup> As noted at [4.67] above, the legislation includes other provisions referring to the adult's 'interests'.

4.73 The best interests approach is often regarded as an alternative to the substituted judgment standard of decision-making. It requires decision-makers to make the decision in the interests of the adult's welfare<sup>274</sup> or which 'provides the maximum anticipated benefit' to the adult.<sup>275</sup> This approach has been said to centre on the adult, excluding consideration of other people's interests.<sup>276</sup> However, it has been criticised because of its reliance on the decision-maker's own values.<sup>277</sup> It has been suggested, however, that the best interests standard may be useful if the decision-maker's values 'emphasise enhancement of valued social roles, community inclusion and a concern that the wishes of the person be taken into account'.<sup>278</sup> Another criticism is that the

269 *Adult Guardianship Act* (NT) ss 4(b), 20(1); *Guardianship and Administration Act 1995* (Tas) ss 6(b), 27(1), 57(1); *Guardianship and Administration Act 1986* (Vic) ss 4(2)(b), 28(1), 49(1); *Guardianship and Administration Act 1990* (WA) ss 4(2)(a), 51(1), 70(1).

270 *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(c); *Guardianship Act 1987* (NSW) s 4(a).

271 However, the Health Care Principle, which is to be applied when decisions about an adult's health care or special health care are made, incorporates a 'best interests' test: *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 cl 12(1)(b)(ii); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 2 cl 12(1)(b)(ii). See Chapter 5 of this Discussion Paper.

272 See the Tribunal's comments in *Re JD* [2003] QGAAT 14, [35]; and *Re SD* [2005] QGAAT 71, [39] discussed at [4.24], [4.25] above.

273 If it is in the person's best interests, the Supreme Court (or Tribunal) may authorise an attorney to undertake a transaction the attorney is not otherwise authorised to undertake; the Adult Guardian may make an attorney, guardian or administrator subject to his or her supervision or consent to the forensic examination of an adult; and the Tribunal may consent to the sterilisation of a child with an impairment: *Powers of Attorney Act 1998* (Qld) s 118(2); *Guardianship and Administration Act 2000* (Qld) ss 198A(a), 80C(2).

274 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 41.

275 I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 189.

276 *Ibid.*

277 Eg, *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 271 (Brennan J); I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 189–90; Scottish Law Reform Commission, *Incapable Adults*, Report No 151 (1995) [2.50].

278 J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 138.

best interests approach, which was developed in the context of child law, carries connotations of paternalism.<sup>279</sup>

4.74 Some jurisdictions have adopted a modified ‘best interests’ approach. In the Northern Territory, Tasmania, Victoria, Western Australia and the United Kingdom, the general principles first provide that decisions are to be made in the adult’s best interests and then specify, by listing a number of factors, what it means to act in the adult’s best interests.<sup>280</sup> Those factors include taking into account the adult’s views and wishes. Scotland has adopted a similar approach based on decision-making for the adult’s ‘benefit’.<sup>281</sup> This approach specifies positive steps a decision-maker must take in meeting the obligation to act in the adult’s best interests. (This can be contrasted with the obligation of a fiduciary to prefer the beneficiary’s interests.)

4.75 An issue to consider is whether Queensland’s General Principles should expressly include a best interests principle. General Principle 7(5), which requires that a person’s powers or functions are to be exercised or performed ‘in a way consistent with the adult’s proper care and protection’, already implies a best interests approach.<sup>282</sup> It may be desirable, however, to clarify whether a best interests approach is to be taken.

4.76 One option may be to include an overarching ‘best interests’ requirement which is satisfied by applying the rest of the General Principles. This may be appropriate to reflect current practice or parlance. For example, in considering whether a person is appropriate for appointment as a guardian or administrator, the Tribunal has sometimes referred to the person’s likelihood of acting in the adult’s ‘best interests’.<sup>283</sup>

4.77 An alternative approach may be to add an additional, specific requirement to act in the adult’s best interests to be applied generally or in certain situations. For example, a best interests approach may be appropriate in those situations when it is not possible to know what the adult would have

<sup>279</sup> Eg, Scottish Law Commission, *Incapable Adults*, Report No 151 (1995) [2.50]; South African Law Commission, *Assisted Decision-Making: Adults With Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [5.2].

<sup>280</sup> *Adult Guardianship Act* (NT) ss 4(b), 20(1), (2); *Guardianship and Administration Act 1995* (Tas) ss 6(b); 27(1), (2), 57(1), (2); *Guardianship and Administration Act 1986* (Vic) ss 28, 49; *Guardianship and Administration Act 1990* (WA) ss 51, 70; *Mental Capacity Act 2005* (UK) ss 1(5), 4. Note, this approach applies, in the Northern Territory to guardians only, and in Tasmania, Victoria and Western Australia, to guardians and administrators only. In the Northern Territory and Tasmania, the obligation to act in the adult’s best interests appears not only as part of the general principles but as a specific duty imposed on the decision-maker: *Adult Guardianship Act* (NT) s 20(1); *Guardianship and Administration Act 1995* (Tas) ss 27(1), 57(1).

<sup>281</sup> *Adults with Incapacity (Scotland) Act 2000* (Scotland) s 1.

<sup>282</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 7(5); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(5).

<sup>283</sup> Eg, *Re HAS* [2001] QGAAT 3, [112]; *Re CP* [2003] QGAAT 24, [47]–[51]; *Re EJR* [2003] QGAAT 6, [73]; *Re VGM* [2003] QGAAT 22, [38]; *Re MJG* [2004] QGAAT 58, [49]–[50]; *Re MDCA* [2005] QGAAT 24, [43]. Also see *Re JD* [2003] QGAAT 14, [40] where the Tribunal seemed to equate the General Principles (and Health Care Principle) with consideration of the adult’s best interests.

wanted. If a best interests principle were added to the General Principles, another issue to consider is what it should mean. Different people may have different ideas about what it means to act in the adult's best interests.

4.78 On the other hand, it may be undesirable to include a best interests requirement in the General Principles. It may inappropriately give discretion to a decision-maker to override the adult's views and wishes and shift the emphasis away from respect for the adult's autonomy. There is a tension between adopting an approach based on the decision-maker's conception of what is in the adult's best interests and one which tries to make the decision the adult would have made (a substituted judgment approach).

**4-13 Should the General Principles require decision-makers to act in the adult's 'best interests'?**

**4-14 If yes to Question 4-13, should 'best interests' be defined and, if so, how?**

### Consultation with families and carers

4.79 One of the principles in the ACT's guardianship legislation is that decision-makers must consult with the adult's carers, except if it would adversely affect the adult's interests.<sup>284</sup> In addition, attorneys under an enduring power of attorney in the ACT are to take account of the adult's wish and need to involve family members and relatives in decisions affecting the adult.<sup>285</sup> An issue for consideration is whether the General Principles in Queensland should contain any similar principles.

4.80 An obligation to consult is included in the general principles of the guardianship legislation in Scotland. Under the *Adults with Incapacity (Scotland) Act 2000* (Scotland), account is to be taken, in so far as it is reasonable and practicable to do so, of the views of:<sup>286</sup>

- the nearest relative of the adult;
- the primary carer of the adult;
- any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and

<sup>284</sup> *Guardianship and Management of Property Act 1991* (ACT) s 4(3).

<sup>285</sup> *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.1.

<sup>286</sup> *Adults with Incapacity (Scotland) Act 2000* (Scotland) s 1(4)(b)–(d). Under s 1(4)(c)(ii), the decision-maker is also to consult with any person whom the sheriff has directed to be consulted.

- any person who appears to have an interest in the adult's welfare or in the proposed intervention, if the person's views have been made known.

4.81 A similar provision is contained in the Mental Capacity and Guardianship Bill 2008 (Ireland) which additionally provides for account to be taken of the views of the person with whom the adult resides.<sup>287</sup> The legislation in the United Kingdom also provides for consultation in determining what is in the adult's best interests.<sup>288</sup>

4.82 Consultation by decision-makers was raised in the Commission's Report on the confidentiality provisions of the guardianship legislation. A number of submissions raised in the first stage of this review spoke of a need for consultation by guardians and administrators with members of the adult's support network in gathering information and views when making decisions for the adult.<sup>289</sup> The Queensland guardianship legislation defines the adult's 'support network' as members of the adult's family and close friends of the adult.<sup>290</sup>

4.83 Attorneys, guardians and administrators are already required by the Queensland legislation to consult with other attorneys, guardians or administrators for the adult 'to ensure the adult's interests are not prejudiced by a breakdown in communication between them'.<sup>291</sup> This is one of the specific duties imposed on attorneys, guardians and administrators. This duty does not, however, extend to consultation with others.

4.84 The existing General Principles provide that the importance of maintaining the adult's existing supportive relationships must be taken into account.<sup>292</sup> This principle does not specifically require decision-makers to consult with members of the adult's support network or to take account of their views. However, it is difficult to see how this principle may be applied in practice in the absence of such consultation.

4.85 Consultation with members of the adult's support network or the adult's carers may provide valuable information and perspectives to help with decision-making for the adult. For example, consultation may help a decision-maker ascertain what the adult's views and wishes would be. It may also help a

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287 Mental Capacity and Guardianship Bill 2008 (Ireland) s 4(d).

288 *Mental Capacity Act 2005* (UK) s 4(7). The decision-maker is to consult with anyone who is engaged in caring for the adult or is interested in his or her welfare, anyone named by the adult as someone to be consulted on the matter, an attorney under a 'lasting power of attorney' granted by the adult and any 'deputy' appointed by the court for the adult under that section.

289 Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) Vol 1 [8.267]–[8.273].

290 *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 (definition of 'support network'). Other people who the Tribunal decides provide support to the adult are also part of the adult's support network.

291 *Powers of Attorney Act 1998* (Qld) s 79(1); *Guardianship and Administration Act 2000* (Qld) s 40(1).

292 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 8; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 8.

decision-maker to consider the impact of decisions on the adult's family members or carers.

4.86 Consultation may also take into account the significant role that the adult's support network or the adult's carers may play in the adult's life. In particular, the primary responsibility for assistance and support for an adult often rests with his or her family. In many situations, the views of the adult's family may beneficially inform the decision-making process. However, this may not always be the case, particularly where the adult and his or her family do not have a close relationship.

4.87 The inclusion in the General Principles of a requirement for decision-makers to consult with the adult's carers would also be consistent with the Queensland Government's *Carer Recognition Policy*. That policy provides a set of key principles, for adoption by Queensland Government departments and agencies, which recognise the important role of carers.<sup>293</sup>

4.88 On the other hand, a requirement in the General Principles to take into account the views of others may undermine respect for the adult's autonomy. Similarly, a requirement to take account of the impact of decisions on members of the adult's family, for example, may inappropriately shift emphasis away from the adult's views and interests.

**4-15 Should the General Principles require consultation with any one or more of the following:**

- (a) members of the adult's family;**
- (b) members of the adult's support network (ie members of the adult's family and close friends of the adult);**
- (c) the adult's primary carer/s;**
- (d) an attorney (under an enduring power of attorney), a guardian or administrator for the adult;**
- (e) any person who appears to have an interest in the adult's welfare or in the proposed decision;**
- (f) a person with whom the adult resides;**
- (g) other?**

<sup>293</sup>

Queensland Government, *Carer Recognition Policy* (February 2007) 3. See, generally, Disability Services Queensland, 'Carer support and recognition' <<http://www.disability.qld.gov.au/community/carers-recognition/>> at 1 September 2008.

**4-16** If yes to Question 4-15, when should the requirement to consult apply? For example, should it apply only when substitute decisions are being made? Or, should it also apply to Tribunal determinations? Should it apply generally, or should it apply only in certain circumstances, such as when working out what the adult's views and wishes would be?

**4-17** If yes to Question 4-15, should the requirement to consult with particular persons be subject to any exceptions (for example, if consultation would adversely affect the adult's interests)?

### Informal arrangements

4.89 In South Australia, the principles provide that when making or affirming a guardianship or administration order, consideration must be given to existing informal arrangements and the desirability of not disturbing those arrangements.<sup>294</sup> An issue for consideration is whether Queensland's General Principles should include a similar principle.

4.90 The *Guardianship and Administration Act 2000* (Qld) recognises that decisions for an adult with impaired decision-making capacity may be made on an informal basis by members of the adult's existing support network.<sup>295</sup> The Tribunal may appoint a guardian or administrator for an adult only in certain circumstances. The Tribunal must be satisfied that:<sup>296</sup>

- the adult has impaired capacity for the matter;
- 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
- without an appointment, the adult's needs will not be adequately met, or the adult's interests will not be adequately protected.

4.91 In addition, the Tribunal must apply the General Principles.<sup>297</sup> The principles, which focus on the adult's rights, do not specifically refer to existing informal decision-making arrangements for the adult. They do provide, however, that the importance of maintaining the adult's 'existing supportive relationships' must be taken into account.<sup>298</sup> 'Supportive relationships' are not

<sup>294</sup> *Guardianship and Administration Act 1993* (SA) s 5(c).

<sup>295</sup> *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

<sup>296</sup> *Guardianship and Administration Act 2000* (Qld) s 12(1).

<sup>297</sup> *Guardianship and Administration Act 2000* (Qld) s 11(1).

<sup>298</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 8.

defined in the legislation. It may refer to the adult's 'support network', which comprises the adult's family members and close friends.<sup>299</sup> A supportive relationship might also be one that involves informal decision-making for the adult.

4.92 A specific requirement to take into account the importance of the adult's existing informal decision-making arrangements under the General Principles may help ensure that the appointment of guardians and administrators is made only when it is necessary. Such a requirement may, alternatively, be too specific for inclusion in the General Principles. For example, such a principle may have little relevance to decisions made by an attorney, guardian or administrator.

4.93 It may also be unnecessary to refer specifically to informal decision-making arrangements if a 'supportive relationship' includes a relationship involving informal decision-making for the adult.

**4-18 Should the General Principles include a requirement to consider the adult's existing informal decision-making arrangements?**

**4-19 If yes to Question 4-18, should this apply generally, or only in certain situations, for example, when the Tribunal is considering the appointment or continued appointment of a guardian or administrator?**

**4-20 Should the General Principles clarify what is meant by 'existing supportive relationships'? For example, should the term 'existing supportive relationships' refer to the adult's 'support network'?**

### Protection from neglect, abuse, exploitation

4.94 In New South Wales, one of the general principles is that the adult should be protected from neglect, abuse or exploitation.<sup>300</sup> Similarly, in Victoria, one of the general principles is that a guardian must act in such a way as to protect the adult from neglect, abuse or exploitation.<sup>301</sup> The same principle applies in Western Australia to both guardians and administrators.<sup>302</sup> Article 16 of the United Nations Convention also provides for the protection of people with

<sup>299</sup> *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 (definition of 'support network'). Other people who the Tribunal decides provide support to the adult are also part of the adult's support network.

<sup>300</sup> *Guardianship Act 1987* (NSW) s 4(g).

<sup>301</sup> *Guardianship and Administration Act 1986* (Vic) s 28(2)(d).

<sup>302</sup> *Guardianship and Administration Act 1990* (WA) ss 51(2)(d), 70(2)(d). An administrator is to protect the adult from 'financial' neglect, abuse or exploitation.

disabilities from exploitation and abuse.<sup>303</sup> An issue for consideration is whether a similar principle should be included in Queensland's General Principles.

4.95 In Queensland, the General Principles do not refer to the need to protect an adult from neglect, exploitation and abuse. However, the *Guardianship and Administration Act 2000* (Qld) includes several substantive provisions dealing with this.

4.96 For example, one of the Adult Guardian's functions is 'protecting adults who have impaired capacity for a matter from neglect, exploitation or abuse'.<sup>304</sup> The Adult Guardian is given power to investigate complaints or allegations that an adult 'is being or has been neglected, exploited or abused'<sup>305</sup> and may apply to the Tribunal for a warrant to remove an adult in such situations.<sup>306</sup> If there is an immediate risk of harm to an adult because of abuse, exploitation or neglect, the Tribunal is also empowered to make an interim order.<sup>307</sup>

4.97 Attorneys, guardians and administrators are not under any specific duty to protect the adult from neglect, abuse or exploitation. However, one of the specific duties imposed on attorneys, guardians and administrators is that they must exercise their powers with 'reasonable diligence to protect the adult's interests'.<sup>308</sup>

4.98 One of the existing General Principles also provides that a person or other entity performing a function or exercising a power under the guardianship legislation must do so 'in a way consistent with the adult's proper care and protection'.<sup>309</sup>

4.99 It may help clarify a person's obligations if a reference to the adult's need for protection from neglect, exploitation or abuse is included in the General Principles. On the other hand, it may be unnecessary to add such a principle given the existing principle that functions and powers are to be performed and exercised in a way that is consistent with the adult's proper care and protection. Alternatively, it may be desirable to clarify that the reference to 'proper care and protection' includes protection from neglect, exploitation or abuse.

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303 See [3.12] above.

304 *Guardianship and Administration Act 2000* (Qld) s 174(2)(a).

305 *Guardianship and Administration Act 2000* (Qld) s 180(a).

306 *Guardianship and Administration Act 2000* (Qld) s 197. The Tribunal has power to issue such a warrant under *Guardianship and Administration Act 2000* (Qld) s 149(1).

307 *Guardianship and Administration Act 2000* (Qld) s 129(1).

308 *Powers of Attorney Act 1998* (Qld) s 66(1); *Guardianship and Administration Act 2000* (Qld) s 35.

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

**4-21 Should the General Principles refer to the adult's protection from neglect, abuse or exploitation?**

**4-22 If yes to Question 4-21, how should the General Principles refer to the adult's protection from neglect, abuse or exploitation:**

- (a) as an additional stand-alone principle; or**
- (b) as part of another principle and, if so, which principle; or**
- (c) in another way?**

## Advocacy

4.100 In Victoria, the general principles require guardians to act 'as an advocate' for the adult.<sup>310</sup> The same principle applies to guardians in the Northern Territory and Tasmania, and to both guardians and administrators in Western Australia.<sup>311</sup> An issue for consideration is whether the General Principles in Queensland should include a similar principle.

4.101 Some adults with impaired decision-making capacity may need assistance to exercise their rights and obtain suitable services. 'Attention to such matters by someone who acts as a personal advocate for the individual may make a profound difference to the individual's quality of life.'<sup>312</sup>

4.102 The existing General Principles do not specifically require decision-makers to advocate for the adult. However, the General Principles provide that 'the importance of empowering an adult to exercise the adult's basic human rights' must be recognised and taken into account.<sup>313</sup> The General Principles also require that the importance of preserving, to the greatest extent practicable, the adult's right to make his or her own decisions, and to participate in decision-making that affects the adult, must be taken into account.<sup>314</sup> This includes providing 'necessary support, and access to information' to enable the adult to participate in decisions.<sup>315</sup>

<sup>310</sup> *Guardianship and Administration Act 1986* (Vic) s 28(2)(a).

<sup>311</sup> *Adult Guardianship Act* (NT) s 20(2)(a); *Guardianship and Administration Act 1995* (Tas) s 27(2)(b); *Guardianship and Administration Act 1990* (WA) ss 51(2)(a), 70(2)(a).

<sup>312</sup> R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 16.

<sup>313</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 2(2); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 2(2).

<sup>314</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 7(1), (2); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(1), (2).

<sup>315</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 7(3)(a); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(3)(a).

4.103 In addition, attorneys, guardians and administrators are required, under their specific duties, to act with ‘reasonable diligence to protect the adult’s interests’.<sup>316</sup>

4.104 The guardianship legislation also provides for individual advocacy for adults through the functions of the community visitors<sup>317</sup> and the Adult Guardian,<sup>318</sup> and for systemic advocacy through the Public Advocate.<sup>319</sup>

4.105 A specific requirement in the General Principles for an adult’s substitute decision-maker to advocate for the adult may help promote the adult’s rights and interests. For example, it may require a substitute decision-maker to advocate for the appropriate implementation of particular decisions. On the other hand, imposing an advocacy requirement may inappropriately extend the role of a substitute decision-maker beyond making substitute decisions. This may cause conflict, for example, where members of the adult’s support network may be better placed to undertake a personal advocacy role.

4.106 It may also be unnecessary to incorporate a specific requirement of advocacy in the General Principles given the existing individual advocacy functions of the community visitors and the Adult Guardian under the guardianship legislation.

4.107 Another issue to consider is how ‘advocacy’ should be defined if it were to be included in the General Principles. Different people may have a different understanding of what advocacy requires. For example, individual advocacy may involve the active promotion of the fundamental interests and needs of the individual.<sup>320</sup> It may be described as ‘speaking out’ or ‘standing by’ the individual.<sup>321</sup> Or, it may mean acting in the person’s best interests.<sup>322</sup> It may be important to clarify what is intended by such a requirement.

**4-23 Should the General Principles include a principle requiring a substitute decision-maker to act as the adult’s advocate?**

<sup>316</sup> *Powers of Attorney Act 1998* (Qld) s 66(1); *Guardianship and Administration Act 2000* (Qld) s 35.

<sup>317</sup> Community visitors’ functions include, for example, inquiring and reporting on the adequacy of services and information: *Guardianship and Administration Act 2000* (Qld) s 224(2)(a), (b), (d).

<sup>318</sup> One of the Adult Guardian’s functions is to seek help for an adult from, for example, government departments, institutions, welfare organisations or service providers: *Guardianship and Administration Act 2000* (Qld) s 174(2)(g).

<sup>319</sup> *Guardianship and Administration Act 2000* (Qld) s 209.

<sup>320</sup> See, eg, Queensland Advocacy Incorporated, *Key Elements of Advocacy* (July 2004) <[http://www.qai.org.au/content/online\\_library\\_documents.cfm?ID=45](http://www.qai.org.au/content/online_library_documents.cfm?ID=45)> at 1 September 2008.

<sup>321</sup> R Phillips, *Older Residents and the Law* (1996) [2.2.1].

<sup>322</sup> C Ronalds, *Residents’ Rights in Nursing Homes and Hostels: Final Report* (1989) 6, quoted in R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 16.

**4-24 If yes to Question 4-23, should the principle be limited to attorneys, guardians and administrators?**

**4-25 If a principle of advocacy is included in the General Principles, how should 'advocacy' be defined?**

## Financial decisions and considerations

4.108 Administrators and attorneys are required to comply with the General Principles. An issue for consideration is whether adequate provision is made in the General Principles for decision-makers to consider the adult's lifestyle and social needs when making financial decisions for the adult.

4.109 It may be important for a financial decision-maker to consider the impact of such decisions on the adult's lifestyle choices. For example, decisions about the payment of debts or continuing investments may impact on the adult's day-to-day spending on social events or activities. It may be appropriate to reflect this in the General Principles.

4.110 A related issue is whether the General Principles should also provide for decision-makers to take the adult's financial situation into account when making decisions about an adult's personal matters. For example, decisions about where an adult should live may have detrimental financial implications for the adult.

4.111 The existing General Principles do not specifically address these issues. However, the General Principles require the importance of 'encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential', and of maintaining the adult's cultural and linguistic environment, to be taken into account.<sup>323</sup> In addition, General Principle 10 provides that guardians and administrators should exercise power 'in a way that is appropriate to the adult's characteristics and needs'. This may include consideration of the adult's lifestyle and social needs by an administrator, and consideration of the adult's financial circumstances by a guardian.

4.112 To an extent, this is also provided for in other parts of the legislation. Section 79 of the *Powers of Attorney Act 1998* (Qld) and section 40 of the *Guardianship and Administration Act 2000* (Qld) provide that if there are two or more attorneys, guardians or administrators for the adult, they must consult with one another. This would not assist, however, in situations where there is only one appointed substitute decision-maker.

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*Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 6, 9; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 6, 9.

- 4-26 Should the General Principles clarify that decisions about financial matters must include consideration of the adult's lifestyle and social needs?**
- 4-27 Should the General Principles clarify that decisions about personal matters must include consideration of the adult's financial circumstances or needs?**
- 4-28 If yes to Question 4-26 or 4-27, should this be done by adding an example to General Principle 10 which provides that guardians and administrators should exercise power in a way that is appropriate to the adult's characteristics or needs, or in some other way?**

### Conflicts and priority principles

4.113 Some of the other jurisdictions provide that certain principles are to be given 'paramount' or 'primary' consideration. In South Australia, paramount consideration is to be given to the adult's wishes.<sup>324</sup> In New South Wales and Western Australia, priority is to be given to the adult's welfare or best interests.<sup>325</sup> In the ACT, an order of priority is established for consideration of the adult's wishes and interests.<sup>326</sup> An issue for consideration is whether any of Queensland's General Principles should be given priority over the others and, if so, how this should be done.

4.114 In some circumstances, the principles may conflict. For example, the adult's wishes may conflict with the adult's care and protection. The Public Advocate has noted that different principles may suggest different outcomes, and has commented on the lack of guidance for resolving such conflicts:<sup>327</sup>

There is no mechanism for resolving a less than unanimous outcome. Should the decision-maker tally up those for and against, and the one with the greatest numbers prevails? Should the decision-maker decide to allocate greater weight to some Principles than others...?

4.115 Conflicts may be reduced if paramount consideration were to be given to a particular principle or if an order of priority were established among some or all the principles. This may provide some guidance or certainty to help a decision-maker come to a decision. It may also help avoid reliance on

<sup>324</sup> *Guardianship and Administration Act 1993* (SA) s 5(a).

<sup>325</sup> *Guardianship Act 1987* (NSW) s 4(a); *Guardianship and Administration Act 1990* (WA) ss 4(2)(a), 51(1), 70(1).

<sup>326</sup> *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a)–(c). See [4.39] above.

<sup>327</sup> M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 185.

individual decision-maker's personal values. It may be useful, for example, to include a staged approach similar to the approach taken under the ACT's legislation. On the other hand, prioritisation of particular principles over others may inappropriately tie a decision-maker's hands. Flexibility may be important to deal with different people and different situations and to ensure appropriate outcomes in each case.

**4-29 Should any of the General Principles be given priority and, if so, which principle should this be?**

**4-30 Alternatively, should the General Principles give an order of priority to any of the principles and, if so, what should this be?**

**4-31 If no single principle is to be given paramount consideration and no order of priority is to apply, should the General Principles include some other mechanism for resolving conflicts between different principles and, if so, what should this mechanism be?**

## Compliance and enforcement

4.116 In some jurisdictions, the principles need only be complied with as far as, or to the maximum extent, possible.<sup>328</sup> In Western Australia, a guardian's obligation to act in the adult's best interests is 'subject to any direction' of the Tribunal.<sup>329</sup> An issue for consideration is whether similar provision should be made in Queensland.

4.117 This may assist decision-makers in situations where some of the General Principles are not relevant to a particular decision<sup>330</sup> or where a decision needs to be made urgently and there is insufficient time to fully consider all of the principles. On the other hand, such a provision may lead some decision-makers to give the General Principles little or no consideration.

4.118 Another issue for consideration is whether the legislation should provide for the enforceability of a person's obligation to apply the General Principles. At present, the legislation does not make specific provision about what may happen if a person fails to apply the principles. It does not, for example, provide that failure to apply the principles is an offence. The requirement to apply the General Principles may seem to lose its importance without specific provision for its enforcement.

<sup>328</sup> *Powers of Attorney Act 2006* (ACT) s 44; *Guardianship and Administration Act 1990* (WA) ss 51(2), 70(2).

<sup>329</sup> *Guardianship and Administration Act 1990* (WA) s 51(1).

<sup>330</sup> See, eg, M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 182–3.

4.119 On the other hand, it may be unnecessary for the guardianship legislation to make specific provision about a person's failure to apply the General Principles because of existing complaint and review mechanisms.<sup>331</sup> For example, the appointment of a guardian or administrator may be revoked by the Tribunal if the appointee is no longer competent because, for example, the appointee has neglected his or her duties or otherwise contravened the *Guardianship and Administration Act 2000* (Qld).<sup>332</sup> There may also be some practical difficulties in attempting to enforce the application of what are flexible and subjective principles.

**4-32 To what extent, if any, are there difficulties in complying with or applying the existing General Principles?**

**4-33 Should people be required to 'comply with' or 'apply' the General Principles:**

- (a) in all circumstances; or
- (b) only as far as, or to the maximum extent, possible; or
- (c) other?

**4-34 Should there be specific provision for what may happen if a person fails to comply with or apply the General Principles and, if so, what should this be?**

### Application to informal decision-makers

4.120 Subject to one exception, the *Guardianship and Administration Act 2000* (Qld) does not expressly require informal substitute decision-makers to apply the General Principles.<sup>333</sup> Certain informal decision-makers are required

<sup>331</sup> Tribunal decisions can be appealed to the Supreme Court; complaints about 'inappropriate or inadequate decision-making arrangements' for an adult can be investigated by the Adult Guardian; and applications for review of an appointment or for orders, directions or recommendations can be made to the Tribunal or the Supreme Court: *Powers of Attorney Act 1998* (Qld) s 110(1); *Guardianship and Administration Act 2000* (Qld) ss 164, 180(b), 82(1)(c), (d), 115(1). Internal complaints processes are also available for decisions of the Adult Guardian and the Public Trustee: Department of Justice and Attorney-General, the Adult Guardian, 'Resolving Complaints' <<http://www.justice.qld.gov.au/222.htm>> at 21 May 2008; The Public Trustee of Queensland, 'Resolving Problems' <<http://www.pt.qld.gov.au/corporate/resolve.htm>> at 21 May 2008.

<sup>332</sup> *Guardianship and Administration Act 2000* (Qld) s 31(4). The Tribunal must review an appointment at least every five years, but may do so at any time on its own initiative or on application: *Guardianship and Administration Act 2000* (Qld) ss 28, 29. See, eg, *Re SD* [2005] QGAAT 71, [39], [44] in which the appointment of the administrator was revoked in part because, in the Tribunal's view, the administrator had not properly complied with General Principles.

<sup>333</sup> See note 160 above.

to apply the General Principles when deciding whether to consent to the use of certain restrictive practices in relation to particular adults.<sup>334</sup>

4.121 The *Guardianship and Administration Act 2000* (Qld) also provides that the ‘community is encouraged to apply and promote the general principles’.<sup>335</sup>

4.122 An issue for consideration is whether all informal substitute decision-makers should be required, or specifically encouraged, to apply the General Principles. It may be that this would promote greater consistency with formal decision-making. However, there may be significant practical difficulties in enforcing such an obligation on informal decision-makers who are not otherwise regulated by the guardianship legislation.

**4-35 Should all informal substitute decision-makers be required to apply the General Principles?**

**4-36 Alternatively, should informal substitute decision-makers be specifically encouraged to apply the General Principles?**

### Location of the principles

4.123 The obligations to apply or comply with the General Principles are found in specific sections of the guardianship legislation. For example, the obligation of guardians and administrators to apply the principles is set out in section 34 of the *Guardianship and Administration Act 2000* (Qld), in the chapter dealing with the functions and powers of guardians and administrators.

4.124 The General Principles are themselves set out in the first schedule to the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). As such, the principles form part of the legislation.<sup>336</sup>

4.125 An issue to consider, however, is whether the principles should be set out in another part of the legislation to give them greater prominence.

<sup>334</sup> *Guardianship and Administration Act 2000* (Qld) s 80ZS(2)(a), (3)(a). An informal decision-maker for this provision means a member of the adult’s support network, other than a paid carer for the adult: *Guardianship and Administration Act 2000* (Qld) s 80U; *Disability Services Act 2006* (Qld) s 123E. These provisions apply only in relation to adults with an intellectual or cognitive disability who receive disability services from a funded service provider within the meaning of the *Disability Services Act 2006* (Qld): *Guardianship and Administration Act 2000* (Qld) s 80R. These provisions were inserted in the *Guardianship and Administration Act 2000* (Qld) by the *Disability Services and Other Legislation Amendment Act 2008* (Qld), which commenced on 1 July 2008.

<sup>335</sup> *Guardianship and Administration Act 2000* (Qld) s 11(3).

<sup>336</sup> *Acts Interpretation Act 1954* (Qld) s 14(5).

**4-37** Should the General Principles, which are set out in schedule 1 of the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld), instead be set out in another part of the legislation?

# Chapter 5

## The Health Care Principle

INTRODUCTION .....	73
MAKING HEALTH CARE DECISIONS .....	74
Health matters .....	74
Special health matters.....	75
Limitations on making health decisions for an adult .....	76
THE HEALTH CARE PRINCIPLE IN QUEENSLAND .....	77
What the Health Care Principle contains .....	77
History and amendments .....	79
THE POSITION IN OTHER JURISDICTIONS .....	81
ISSUES FOR CONSIDERATION.....	83
The role and purpose of the Health Care Principle.....	83
What the Health Care Principle should contain .....	88
Compliance and enforcement .....	102
Location of the Health Care Principle .....	103

### INTRODUCTION

5.1 The Commission’s terms of reference direct it to review the ‘law relating to decisions about personal, financial, health matters and special health matters’ under the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).<sup>337</sup> The Commission is specifically required to have regard to, among other things, ‘the need to ensure that adults with impaired capacity receive only treatment that is necessary and appropriate to maintain or promote their health or well-being, or that is in their best interests’.

5.2 The *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) contain a Health Care Principle which is to be applied by substitute decision-makers when decisions about an adult’s health matters or special health matters are made.

5.3 This chapter examines the Health Care Principle. The Commission will examine the law in relation to health matters and special health matters in detail later in stage two.

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337

The terms of reference are set out in Appendix 1.

## MAKING HEALTH CARE DECISIONS

5.4 At common law, medical treatment ordinarily requires patient consent.<sup>338</sup> A ‘competent’ patient may refuse consent. This is based on the principles of self-determination and autonomy.<sup>339</sup> Treatment decisions for a patient who does not have capacity to give, or refuse to give, consent are to be made in accordance with the patient’s ‘best interests’.<sup>340</sup>

5.5 In Queensland, these issues are governed by statute.

5.6 The *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) provide a framework for decision-making by and for adults with impaired capacity about health matters and special health matters.

5.7 These matters are specifically dealt with in chapter 5 of the *Guardianship and Administration Act 2000* (Qld). Section 61 of that Act sets out the purpose of chapter 5:

### 61 Purpose to achieve balance for health care

This chapter seeks to strike a balance between—

- (a) ensuring an adult is not deprived of necessary health care only because the adult has impaired capacity for a health matter or special health matter; and
- (b) ensuring health care given to the adult is only—
  - (i) health care that is necessary and appropriate to maintain or promote the adult’s health or well-being; or
  - (ii) health care that is, in all the circumstances, in the adult’s best interests. (note omitted)

## Health matters

5.8 A health matter is one relating to the adult’s ‘health care’.<sup>341</sup> This is defined as care or treatment of the adult, or a service or procedure for the adult, to diagnose, maintain, or treat the adult’s physical or mental condition, carried

<sup>338</sup> Eg, *Airedale NHS Trust v Bland* [1993] AC 789, 891 (Lord Mustill); *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 232–4 (Mason CJ, Dawson, Toohey and Gaudron JJ). In Queensland, see also *Criminal Code* (Qld) ss 245 (Definition of **assault**), 246 (Assaults unlawful), 282 (Surgical operations), 282A (Palliative care).

<sup>339</sup> Eg, *Re B* [2002] 2 All ER 449, [16]–[21] (Dame Butler-Sloss P).

<sup>340</sup> Eg, *Re F* [1990] 2 AC 1; *Re T* [1992] 4 All ER 649, 664 (Lord Donaldson MR). This applies also to the withdrawal or withholding of treatment: *Airedale NHS Trust v Bland* [1993] AC 789, 872 (Lord Goff), 883 (Lord Browne-Wilkinson). However, if a valid anticipatory directive has been given by the adult, treatment decisions are to be made in accordance with the directive: *Re C* [1994] 1 All ER 819, 824 (Thorpe J).

<sup>341</sup> *Powers of Attorney Act 1998* (Qld) sch 2 cl 4; *Guardianship and Administration Act 2000* (Qld) sch 2 cl 4.

out by, or under the direction or supervision of, a health provider.<sup>342</sup> It includes the withholding or withdrawal of a life-sustaining measure.<sup>343</sup>

5.9 Most health care for an adult requires either consent on behalf of the adult or authorisation by the Supreme Court.<sup>344</sup> Only certain persons may give consent for an adult with impaired capacity. If the adult has made an advance health directive dealing with the matter, the directive is to be followed. If there is no advance health directive, decisions are to be made by the first applicable person in the following list:<sup>345</sup>

- a guardian appointed by the Tribunal for the matter;<sup>346</sup>
- an attorney for the matter appointed by the adult under an enduring document;
- the adult's statutory health attorney (being, in order of priority, the adult's spouse, carer, close friend or relation, or the Adult Guardian).<sup>347</sup>

## Special health matters

5.10 A 'special health matter' is one relating to the adult's special health care.<sup>348</sup> This is defined as:<sup>349</sup>

<sup>342</sup> *Powers of Attorney Act 1998* (Qld) sch 2 cl 5(1); *Guardianship and Administration Act 2000* (Qld) sch 2 cl 5(1). A 'health provider' is defined as a person who provides health care, or special health care, in the practice of a profession or the ordinary course of business, such as a dentist: *Powers of Attorney Act 1998* (Qld) s 3 sch 3; *Guardianship and Administration Act 2000* (Qld) s 3 sch 4. 'Health care' does not include first aid treatment, non-intrusive examination for diagnostic purposes or, in certain circumstances, the administration of a pharmaceutical drug: *Powers of Attorney Act 1998* (Qld) sch 2 cl 5(3); *Guardianship and Administration Act 2000* (Qld) sch 2 cl 5(3).

<sup>343</sup> But only if its commencement or continuation would be inconsistent with good medical practice: *Powers of Attorney Act 1998* (Qld) sch 2 cl 5(2); *Guardianship and Administration Act 2000* (Qld), sch 2 cl 5(2). A 'life-sustaining measure' is defined as health care intended to sustain or prolong life and that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation, including cardiopulmonary resuscitation, assisted ventilation, and artificial nutrition and hydration, but not including a blood transfusion: *Powers of Attorney Act 1998* (Qld) sch 2 cl 5A; *Guardianship and Administration Act 2000* (Qld) sch 2 cl 5A.

<sup>344</sup> *Guardianship and Administration Act 2000* (Qld) s 79. Some health care may be carried out without consent: *Guardianship and Administration Act 2000* (Qld) ss 63 (Urgent health care), 63A (Life-sustaining measures in acute emergency), 64 (Minor, uncontroversial health care).

<sup>345</sup> *Guardianship and Administration Act 2000* (Qld) s 66. Also note s 78 (Offence to exercise power for adult if no right to do so).

<sup>346</sup> Or in accordance with an order made by the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 66(3). Section 66(3) might apply, for example, if the Tribunal has made an order that an informal decision-maker may make a particular health decision for the adult. The Tribunal has power to make orders about, for example, guardians, attorneys, enduring documents and related matters and to ratify an exercise of power, or approve a proposed exercise of power, by an informal decision-maker for an adult: *Guardianship and Administration Act 2000* (Qld) ss 82(1)(d), (e), 83.

<sup>347</sup> *Powers of Attorney Act 1998* (Qld) s 63.

<sup>348</sup> *Powers of Attorney Act 1998* (Qld) sch 2 cl 6; *Guardianship and Administration Act 2000* (Qld) sch 2 cl 6.

<sup>349</sup> *Powers of Attorney Act 1998* (Qld) sch 2 cl 7; *Guardianship and Administration Act 2000* (Qld) sch 2 cl 7.

- removal of tissue from the adult while alive for donation to someone else;
- sterilisation;
- termination of pregnancy;
- participation in special medical research or experimental health care;
- electroconvulsive therapy or psychosurgery; and
- any other special health care prescribed under a regulation.<sup>350</sup>

5.11 If the adult has made an advance health directive dealing with the special health matter, the advance directive is to be followed. If not, consent to special health care can generally be given by the Tribunal only.<sup>351</sup>

### Limitations on making health decisions for an adult

5.12 The guardianship legislation places a number of limitations on the exercise of power for an adult's health matters and special health matters. For example, consent given by a substitute decision-maker is generally ineffective if the adult objects to the health care.<sup>352</sup>

5.13 There are also limitations on the circumstances in which consent to the withdrawal or withholding of a life-sustaining measure will operate<sup>353</sup> and when the Tribunal may give consent to special health care.<sup>354</sup>

5.14 In addition, a person or entity who exercises power for a health matter or special health matter for an adult must apply the General Principles and the Health Care Principle.<sup>355</sup>

5.15 The General Principles were examined in Chapter 4 of this Discussion Paper. This chapter considers the Health Care Principle.

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350 To date, no other special health care has been prescribed.

351 Unless another entity is authorised to deal with the matter: *Guardianship and Administration Act 2000* (Qld) s 65. Note that the Tribunal cannot give consent to electroconvulsive therapy or psychosurgery: *Guardianship and Administration Act 2000* (Qld) s 68(1).

352 *Guardianship and Administration Act 2000* (Qld) s 67. There are exceptions to this set out in s 67(2).

353 *Guardianship and Administration Act 2000* (Qld) s 66A.

354 *Guardianship and Administration Act 2000* (Qld) ss 69 (Donation of tissue), 70 (Sterilisation), 71 (Termination of pregnancy), 72 (Special medical research or experimental health care), 73 (Prescribed special health care).

355 *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) ss 11, 34, 174(3).

## THE HEALTH CARE PRINCIPLE IN QUEENSLAND

5.16 The Health Care Principle must be complied with by statutory health attorneys and attorneys appointed under an enduring document when making decisions about an adult's health matters.<sup>356</sup> The principle must also be applied by a guardian when making a health care decision<sup>357</sup> and by any other person or entity who performs a function or exercises a power under the guardianship legislation for a health matter or special health matter for an adult, including the Tribunal.<sup>358</sup>

5.17 The Adult Guardian is also specifically required to apply the Health Care Principle in performing or exercising a function or power.<sup>359</sup>

5.18 In addition, the Tribunal is specifically required, when it is deciding whether a person is appropriate for appointment as a guardian for a health matter, to consider the Health Care Principle 'and whether the person is likely to apply it'.<sup>360</sup>

5.19 If an attorney or a guardian makes a health care decision that is contrary to the Health Care Principle, the Adult Guardian is empowered to exercise power for the health matter.<sup>361</sup>

### What the Health Care Principle contains

5.20 The Health Care Principle sets out the way in which power for a health matter or special health matter should be exercised.<sup>362</sup> It first provides that power should be exercised 'in the way least restrictive of the adult's rights'. It then provides that power should be exercised only if either:<sup>363</sup>

- it is necessary and appropriate to maintain or promote the adult's health or well-being; *or*
- it is, in all the circumstances, in the adult's best interests.

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<sup>356</sup> *Powers of Attorney Act 1998* (Qld) s 76.

<sup>357</sup> *Guardianship and Administration Act 2000* (Qld) s 34(2).

<sup>358</sup> *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 11(1). Also, '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': *Guardianship and Administration Act 2000* (Qld) s 11(2).

<sup>359</sup> *Guardianship and Administration Act 2000* (Qld) s 174(3).

<sup>360</sup> *Guardianship and Administration Act 2000* (Qld) s 15(1)(b).

<sup>361</sup> *Guardianship and Administration Act 2000* (Qld) s 43(1).

<sup>362</sup> Also see the general explanation of the Health Care Principle in *Re HG* [2006] QGAAT 26, [83], [88].

<sup>363</sup> *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(1); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(1).

5.21 The Health Care Principle also provides that the adult's views and wishes, and information given by the adult's health provider,<sup>364</sup> must be taken into account when deciding whether the exercise of power is appropriate.<sup>365</sup>

5.22 It also provides that, for special health care, the views of the adult's guardian, attorney, or statutory health attorney must be taken into account.<sup>366</sup>

5.23 The Health Care Principle is located in the first schedule to the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). There are some minor differences in wording as between each statute, although, with one exception, they are almost identical.<sup>367</sup> The Health Care Principle set out in the *Guardianship and Administration Act 2000* (Qld) provides.<sup>368</sup>

## 12 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 [an attorney] 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 well-being; 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 [attorney] guardian, the adult guardian, tribunal or other entity must, to the greatest extent practicable—

364 On request, a health provider who is treating, or has treated, the adult must give information about the adult's condition and health care to the adult's statutory health attorney, attorney under an enduring power of attorney or guardian, or to the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 76.

365 *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(2); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(2).

366 *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(5); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(5).

367 See note 369 below.

368 Note, the text in square brackets reflects the different wording used in the *Powers of Attorney Act 1998* (Qld).

- (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 omitted)
- (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.<sup>369</sup> (note added)

## History and amendments

5.24 In its Report in 1996, the Queensland Law Reform Commission recommended the inclusion of a Health Care Principle to provide that a health care decision should be made for an adult with impaired capacity only if the decision is appropriate to promote and maintain the person's health and well-being.<sup>370</sup>

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Clause 12(5) of the Health Care Principle does not appear in the *Powers of Attorney Act 1998* (Qld). Statutory health attorneys and attorneys appointed under an enduring power of attorney or under an advance health directive are not authorised to exercise power for an adult's special health matters: *Powers of Attorney Act 1998* (Qld) ss 32(1)(a), 35(1)(c), 62(1).

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Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Draft Report (1995) [9.7.3]; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 359. The recommended draft provision for inclusion in the proposed legislation read as follows:

**144 Health Care Principle**

- (1) A health care or special health care decision for an adult should be made only if the decision is appropriate to promote and maintain the adult's health and well-being. This principle is the 'health care principle'.
- (2) In deciding whether a decision is appropriate, the tribunal or relevant person must, to the greatest extent practicable—

5.25 This recommendation was given effect when the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) were passed. In his second reading speech of the Powers of Attorney Bill 1997 (Qld), the then Attorney-General explained that:<sup>371</sup>

Health care decisions are required by Clause 12 to be made in a way which adopts the least restrictive option and only if the exercise of power is appropriate to promote and maintain the adult's health and well-being.

5.26 The inclusion of the additional requirement to adopt the least restrictive option reflected the requirement that applied at that time under the *Intellectually Disabled Citizens Act 1985* (Qld), under which a 'legal friend' could give substituted consent to medical treatment for particular persons.<sup>372</sup>

5.27 In 2001, the guardianship legislation was amended to clarify the ability of substitute decision-makers to consent to the withdrawal or withholding of a life-sustaining measure in certain circumstances. As part of those amendments, the Health Care Principle was also amended. First, the amendments clarified that the Health Care Principle applied to special health care decisions.<sup>373</sup> Second, the amendments added a second basis on which health care decisions could be made: the best interests of the adult.<sup>374</sup> This addition appears to have been intended to provide a basis for decisions that might not otherwise be justified.<sup>375</sup>

- 
- (a) seek the adult's views and wishes and take them into account; and
  - (b) take the information given by the adult's health care provider to the person or tribunal into account. (note omitted)
- (3) Views and wishes may be expressed orally, in writing or in another way, for example, by conduct.

See Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 2 Draft Legislation, 88.

371 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3690 (Hon Denver Beanland, Attorney-General and Minister for Justice). Also see Explanatory Notes, Powers of Attorney Bill 1997 (Qld) 37; and Explanatory Notes, Guardianship and Administration Bill 1999 (Qld) 53.

372 *Intellectually Disabled Citizens Act 1985* (Qld) reprint 2B, s 26(5A).

373 *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) ss 4, 16.

374 *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) ss 16, 28.

375 See the debate of the Guardianship and Administration and Other Acts Amendment Bill 2001 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 6 December 2001, 4336 (Hon Rodney Welford, Attorney-General and Minister for Justice). The amending legislation also amended s 61 of the *Guardianship and Administration Act 2000* (Qld) to reflect the additional basis of best interests for health care decision-making: *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) s 5. The Explanatory Notes for the amending legislation explain that:

This amendment acknowledges that it may be in the adult's interest to have health care for a reason other than for promoting and maintaining the adult's health or well-being (the previous wording). For example, it may be in the adult's interests for the natural processes of dying not to be interfered with by the futile administration of artificial measures.

See Explanatory Notes, Guardianship and Administration and Other Acts Amendment Bill 2001 (Qld) 6. Also see 9, 11.

the reason for that paragraph being added is that obviously there are some circumstances in which we cannot talk of someone's health and well-being being enhanced. If there is nothing that can be done for a person who is about to die, then the option of doing something to enhance their health and well-being obviously does not arise. There has to be some other way of describing how it can be appropriate to, say, not conduct intrusive surgery or conduct CPR in a way that might end up breaking a person's ribs, if they are elderly and frail. Not undertaking intrusive intervention at a time when it would be futile and unlikely to have any effective benefit to the person is what I think would be regarded as in their best interest. That is why 'best interest' needed to be added.

## THE POSITION IN OTHER JURISDICTIONS

5.28 The guardianship legislation in most of the other Australian jurisdictions includes provisions for the way in which substitute health care decisions are to be made for an adult.

5.29 In the ACT, attorneys under an enduring power of attorney are required to apply a set of General Principles.<sup>376</sup> One of those principles is in terms very similar to Queensland's Health Care Principle. It provides:<sup>377</sup>

### 1.11 Health care

- (1) An individual is entitled to have decisions about health care matters made by an attorney—
  - (a) in the way least restrictive of the individual's rights and freedom of action; and
  - (b) only if the exercise of power—
    - (i) is, in the attorney's opinion, necessary and appropriate to maintain or promote the individual's health and well-being; or
    - (ii) is, in all the circumstances, in the individual's best interests.
- (2) An individual's wishes in relation to health care matters, and any information provided by the individual's health care provider, must be taken into account when an attorney decides what is appropriate in the exercise of power for a health care matter.

5.30 In New South Wales, the guardianship legislation provides that a substitute decision-maker must have regard to information about the adult's condition and treatment, the adult's views and the objects of part 5 of the

<sup>376</sup> *Powers of Attorney Act 2006* (ACT) s 44.

<sup>377</sup> *Powers of Attorney Act 2006* (ACT) sch 1 cl 1.11.

legislation in considering whether to give consent to medical or dental treatment for the adult.<sup>378</sup> The objects of part 5 are:<sup>379</sup>

- (a) to ensure that people are not deprived of necessary medical or dental treatment merely because they lack the capacity to consent to the carrying out of such treatment, and
- (b) to ensure that any medical or dental treatment that is carried out on such people is carried out for the purpose of promoting and maintaining their health and well-being.

5.31 In most of the remaining jurisdictions, the legislation specifies that particular substitute health care decisions are to be made in accordance with the adult's best interests.<sup>380</sup> In Tasmania and Victoria, the legislation specifies a list of factors to be considered by a substitute decision-maker in determining the adult's best interests. For example, section 43(2) of the *Guardianship and Administration Act 1995* (Tas) provides:

- (2) For the purposes of determining whether any medical or dental treatment would be in the best interests of a person to whom this Part applies, matters to be taken into account by the person responsible include –
  - (a) the wishes of that person, so far as they can be ascertained; and
  - (b) the consequences to that person if the proposed treatment is not carried out; and
  - (c) any alternative treatment available to that person; and
  - (d) the nature and degree of any significant risks associated with the proposed treatment or any alternative treatment; and
  - (e) that the treatment is to be carried out only to promote and maintain the health and well-being of that person; and
  - (f) any other matters prescribed by the regulations.

378 *Guardianship Act 1987* (NSW) ss 40(3), 44(2). The Tribunal must also consider the views of the person proposing the treatment and any persons responsible for the adult.

379 *Guardianship Act 1987* (NSW) s 32.

380 *Adult Guardianship Act* (NT) ss 17(2)(d), 21(8); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(8); *Guardianship and Administration Act 1995* (Tas) ss 43(1)(b), 45(1)(c); *Guardianship and Administration Act 1986* (Vic) s 42H(2); *Guardianship and Administration Act 1990* (WA) s 63(1). Also, *Guardianship and Management of Property Act 1991* (ACT) s 70(1)(c).

5.32 The Victorian legislation includes a provision in similar terms. It additionally provides for the person responsible to take into account the wishes of any nearest relative or other family members of the adult.<sup>381</sup>

5.33 The legislation in the ACT and Tasmania also includes a similar list of factors for the Tribunal to consider when deciding whether particular treatment is in the adult's best interests.<sup>382</sup>

## ISSUES FOR CONSIDERATION

5.34 The inclusion of the Health Care Principle in the guardianship legislation raises some issues for consideration in relation to its content and application.

### The role and purpose of the Health Care Principle

5.35 A threshold issue to consider is what role the Health Care Principle should have in Queensland's legislation.

5.36 When the Powers of Attorney Bill 1997 (Qld) was introduced into Parliament, the Health Care Principle was described, together with the General Principles, as the 'philosophical cornerstone' of the legislation.<sup>383</sup> The Explanatory Notes to the Bill explained that:<sup>384</sup>

These principles are directed to the way in which decisions in health matters and special health matters should be made by an attorney and others. They include provisions from existing legislation—that *power should be exercised in the way which is least restrictive of the adult's rights* and reflect internationally recognized concepts. (original emphasis)

381 *Guardianship and Administration Act 1986* (Vic) s 38(1). However, if the adult is likely to be capable of giving consent within a reasonable time and objects to a relative or other family member being involved in such decisions, the relative or family member is taken not to be the nearest relative or family member of the adult: s 38(2).

382 *Guardianship and Management of Property Act 1991* (ACT) s 70(3); *Guardianship and Administration Act 1995* (Tas) s 45(2). Those provisions are in like terms and provide for the Tribunal to consider:

- the adult's wishes;
- what would happen if it were not carried out;
- what alternative treatments are available;
- whether the treatment can be postponed because better treatments may become available; and
- for a transplantation of tissue — the relationship between the two people.

383 See the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3690 (Hon Denver Beanland, Attorney-General and Minister for Justice); 22 April 1998, 837 (Hon Matthew Foley). Also see the second reading speech and debate of the Guardianship and Administration Bill 1999 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 December 1999, 6079 (Hon Matthew Foley, Attorney-General and Minister for Justice), 12 April 2000, 781 (Dr Lesley Clark).

384 Explanatory Notes, Powers of Attorney Bill 1997 (Qld) 37.

5.37 As noted above, the inclusion of the Health Care Principle in the guardianship legislation gave effect to the Queensland Law Reform Commission's 1996 recommendation. This was intended to strike a balance between the need to ensure that adults who are unable to make their own health care decisions do not miss out on necessary treatment, and the need to protect such adults against unnecessary or inappropriate treatment. The Commission considered the legislation should specify criteria for the exercise of authority to make substituted health care decisions for an adult.<sup>385</sup>

### **The United Nations Convention**

5.38 As noted in Chapter 3, the United Nations Convention, which entered into force in 2008, is the most recent international statement of the human rights of people with disabilities, including people with mental or intellectual disabilities.<sup>386</sup> The Convention is based on a number of principles, including 'respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.<sup>387</sup>

5.39 Article 12 of the Convention provides that persons with disabilities are to be given necessary support to exercise their legal capacity and that such measures must respect 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 circumstances, apply for the shortest time possible and be subject to regular review.

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385 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Draft Report (1995) [9.7.2].

386 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006. The United Nations Convention entered into force on 3 May 2008. Australia has ratified the Convention.

387 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 3. There are eight guiding principles set out in article 3:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

5.40 The Convention also provides, among other things, that every human being has the inherent right to life, and that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.<sup>388</sup>

5.41 One issue to consider is whether the Health Care Principle should reflect the principles of the United Nations Convention dealing with the exercise of a person's legal capacity. The Commission's preliminary view is that any revision of the Health Care Principle should be guided by the objective of consistency with the United Nations Convention.

### **General or specific**

5.42 An issue to consider is whether the Health Care Principle should provide specific and detailed criteria for substitute health decisions, or whether it should instead provide a general statement about the way in which such decisions should be made. This will influence choices about what the Health Care Principle should contain and how it should be applied.

5.43 Specific criteria may provide greater certainty for substitute decision-makers. It may be difficult, however, to adequately specify in advance all considerations that may be relevant in a particular situation. This may lead to greater confusion for individual decision-makers.<sup>389</sup> It may also be more difficult for individual decision-makers to remember and use a detailed list of considerations rather than a general statement or broad principle.

5.44 It may be more appropriate to keep the Health Care Principle general, rather than giving detailed guidance for particular decisions. It may be easier for decision-makers to keep in mind and adhere to a statement of the overall philosophy or spirit intended by the legislation for substitute health decisions, than to apply a detailed set of criteria each time a decision is to be made. On the other hand, this flexibility may allow decision-makers to rely on inappropriate considerations, such as their personal beliefs, when making decisions about an adult's health care.

### **Relationship with the General Principles**

5.45 An associated issue is how the Health Care Principle should relate to the General Principles.

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388 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 10 (Right to life), 25 (Health). Article 25(d) provides that health professionals are to provide care of the same quality to persons with disabilities as others, including on the basis of free and informed consent. Article 25(f) provides for the prevention of discriminatory denial of health care or health services or food and fluids on the basis of disability.

389 See, for example, the criticism that the Health Care Principle, together with the General Principles, presently provides insufficient guidance for specific decisions: M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166.

5.46 When exercising power for a health matter or special health matter, a substitute decision-maker must apply not only the Health Care Principle, but also the General Principles.<sup>390</sup>

5.47 There appears to be some overlap between aspects of the Health Care Principle and some of the General Principles. For example, both the Health Care Principle and the General Principles provide for the exercise of power in the way least restrictive of the adult's rights<sup>391</sup> and for the adult's views and wishes to be sought and taken into account.<sup>392</sup>

5.48 One issue to consider is whether there is a need for a separate Health Care Principle, or whether it can be incorporated into the General Principles. This will be partly informed by a consideration of what role the General Principles should have in the legislation. This is discussed in Chapter 4.

5.49 Incorporating the Health Care Principle into the General Principles may lessen any confusion that arises from the overlap between those provisions. On the other hand, it may be appropriate to give separate attention to the manner in which health decisions should be made since they are of a highly personal nature and may sometimes involve significant conflict and emotion.

5.50 It has also been suggested that, depending on the circumstances, some of the General Principles may not be relevant to particular health decisions.<sup>393</sup> At present, the legislation does not specify what is to happen if this occurs. An issue to consider is whether the General Principles should continue to apply to health decisions in addition to the Health Care Principle.<sup>394</sup> An alternative may be to provide that the General Principles need be applied only as far as, or to the maximum extent, possible. This issue is discussed at [4.116]–[4.117] above.

5.51 It is also noted that there may be a conflict between an aspect of the Health Care Principle and one or more of the General Principles. For example,

<sup>390</sup> *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34.

<sup>391</sup> *Powers of Attorney Act 1998* (Qld) sch 1 cl 7(3)(c), 12(1)(a); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 7(3)(c), 12(1)(a).

<sup>392</sup> *Powers of Attorney Act 1998* (Qld) sch 1 cl 7(3)(b), 12(2)(a); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 7(3)(b), 12(2)(a).

<sup>393</sup> Eg, M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 173; B White and L Willmott, 'Will You Do As I Ask? Compliance with Instructions About Health Care in Queensland' (2004) 4(1) *Queensland University of Technology Law and Justice Journal* 77, 82.

The Tribunal has emphasised different aspects of the General Principles in cases dealing with health decisions depending on the facts of each case. See, eg, *Re JD* [2003] QGAAT 14, [22]; *Re IHE* [2001] QGAAT 2, [56]. The Tribunal's failure to clearly enunciate the reasons for emphasising some aspects of the General Principles without reference to others has been criticised: M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 175–7.

<sup>394</sup> B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 68. This comment was made in the specific context of decisions to withdraw or withhold life-sustaining measures.

the ‘best interests’ test in the Health Care Principle may conflict with the substituted judgment approach set out in the General Principles.<sup>395</sup> This may lead to uncertainty about which principles are to be applied to be health decisions.<sup>396</sup>

For example, there may be clear and undisputed evidence that an adult would not have wanted to be kept alive by artificial means but, in the circumstances of the case, continued treatment was regarded as being in the adult’s best interests. A conflict of principles can arise because GP7(4) requires the tribunal to consider the principle of substituted judgment while HCP12(1)(b)(ii) refers to the adult’s best interests. The legislation does not provide guidance as to which of the Principles should have priority in determining the appropriate decision. This may raise difficulties because it means that the tribunal must make a value judgment about which Principle to give priority to in a particular situation.

5.52 At present, the legislation does not specify what is to happen if such a conflict arises. An issue to consider is whether there is a need to specify an order of priority or other hierarchy as between the Health Care Principle and the General Principles. For example, it may be appropriate for the legislation to specify that in the event of a conflict the Health Care Principle prevails.

- 5-1 What role and purpose should the Health Care Principle have in the Queensland guardianship legislation?**
- 5-2 Should the Health Care Principle be consistent with the principles of the United Nations Convention dealing with the exercise of a person’s legal capacity?**
- 5-3 Should the Health Care Principle be expressed in general terms, or more specifically to provide detailed guidance about health care and special health care decisions?**
- 5-4 Should the Health Care Principle continue to be set out as a separate provision, or should it be incorporated into the General Principles?**
- 5-5 Should the General Principles continue to apply to decisions about an adult’s health matters and special health matters in addition to the Health Care Principle?**

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However, the General Principles have been interpreted as also incorporating a ‘best interests’ test: see the Tribunal’s comments in *Re JD* [2003] QGAAT 14, [35] and *Re SD* [2005] QGAAT 71, [39] discussed at [4.24]–[4.25] above.

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L Willmott and B White, ‘Charting a course through difficult legislative waters: Tribunal decisions on life-sustaining measures’ (2005) 12 *Journal of Law and Medicine* 441, 450.

**5-6 If yes to Question 5-5, should the legislation specify an order of priority between the Health Care Principle and the General Principles and, if so, what should this be?**

### What the Health Care Principle should contain

5.53 Another issue for consideration is whether the content of the Health Care Principle remains appropriate. This will be informed by a consideration of what role the Health Care Principle should have.

#### **Least restrictive option: 12(1)(a)**

5.54 At present, the Health Care Principle provides that power for a health matter or special health matter for an adult should be exercised in the way least restrictive of the adult's rights.<sup>397</sup> This is mirrored in the health care principle of the ACT powers of attorney legislation.<sup>398</sup>

5.55 This is consistent with General Principle 7(3)(c) which provides that a person or entity performing or exercising a function or power under the legislation must do so in the way least restrictive of the adult's rights.<sup>399</sup> It is also consistent with similar principles adopted under the *Disability Services Act 2006* (Qld) and the *Mental Health Act 2000* (Qld).<sup>400</sup> It also accords with article 12 of the United Nations Convention which provides that measures relating to a person's exercise of legal capacity shall respect the person's rights, be proportional and tailored to the person's circumstances and apply for the shortest time possible.<sup>401</sup>

5.56 As noted in Chapter 4, decision-making in accordance with the least restrictive option has been recognised as an important concept underpinning

<sup>397</sup> *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(1)(a); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(1)(a). This previously applied under the *Intellectually Disabled Citizens Act 1985* (Qld) reprint 2B, s 26(5A). See [5.26] above.

<sup>398</sup> *Powers of Attorney Act 2006* (ACT) sch 1 cl 1.11(1)(a).

<sup>399</sup> *Powers of Attorney Act 1998* (Qld) sch 1 cl 7(3)(c); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 7(3)(c).

<sup>400</sup> Section 19(3)(b) of the *Disability Services Act 2006* (Qld) provides that, when using disability services, people with a disability have the right to receive services in a way that results in the minimum restriction of their rights and opportunities. Section 9 of the *Mental Health Act 2000* (Qld) provides that a power or function under the Act relating to a person who has a mental illness must be exercised or performed so that the person's liberty and rights are adversely affected only if there is no less restrictive way to protect the person's health and safety or to protect others, and any adverse effect on the person's liberty and rights is the minimum necessary in the circumstances.

<sup>401</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12(4).

substitute decision-making for adults with impaired capacity. This is a reflection of the adult's right to autonomy.<sup>402</sup>

5.57 Recognition and respect for the adult's autonomy may be especially important in the context of health decisions because of the highly personal nature of such decisions. The least restrictive option principle may also be particularly important for health decisions that may have serious or lasting consequences, especially if the adult may later regain the capacity to make such decisions for himself or herself. The common law has recognised that 'the right to determine what shall be done with one's own body is a fundamental right'.<sup>403</sup>

5.58 It has been suggested, however, that it may be difficult for decision-makers to identify the rights of the adult that are relevant to a determination, particularly in the context of decisions to withdraw or withhold life-sustaining measures.<sup>404</sup> It has been suggested that this may pose particular difficulties for lay decision-makers. One such right may be the right to refuse treatment, which is referred to in clause 12(4) of the Health Care Principle, discussed at [5.92] below.

5.59 As noted earlier in this chapter, it may also be unnecessary to include a separate 'least restrictive option' principle for health decisions given the existing statement in General Principle 7(3)(c) which applies to all exercises of power for an adult.

**5-7 Should the Health Care Principle continue to provide that power for a health matter or special health matter for an adult should be exercised in the way least restrictive of the adult's rights?**

**5-8 Is there a need to give examples of, or otherwise specify, what rights of the adult may be relevant to a decision about the adult's health care or special health care?**

***Necessary and appropriate to maintain or promote health or well-being: 12(1)(b)(i)***

5.60 At present, the Health Care Principle provides that power for a health matter or special health matter should be exercised in one of two alternative circumstances only. The first of these is if the exercise of power is necessary

<sup>402</sup> R Creyke, *Who Can Decide? Legal Decision-Making For Others* (1995) 41, 267.

<sup>403</sup> *Malette v Shulman* (1990) 72 OR (2d) 417, 432 (Robins JA), cited with approval in *Re T* [1992] 4 All ER 649, 665 (Dame Butler-Sloss LJ) and in *Re B* [2002] 2 All ER 449, [19] (Dame Butler-Sloss LJ).

<sup>404</sup> M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 181, 184–5.

and appropriate to maintain or promote the adult's health or well-being.<sup>405</sup> This is similar to the health care principle in the ACT powers of attorney legislation.<sup>406</sup> The legislation in New South Wales also includes a similar requirement.<sup>407</sup>

5.61 This is also consistent with the *Mental Health Act 2000* (Qld). General Principle 8(h) of that Act provides that treatment provided under that Act 'must be administered to a person who has a mental illness only if it is appropriate to promote and maintain the person's mental health and well-being'.<sup>408</sup> It is also consistent with the Australian Medical Association's Code of Ethics which provides that the doctor should 'consider first the well-being of [the] patient'.<sup>409</sup>

5.62 Such a principle may help prevent unnecessary or unwarranted treatment being given to an adult, especially if the adult may subsequently regain the capacity to make his or her own treatment decisions. This also appears to reflect the least restrictive option principle and the adult's autonomy.

**5-9 Should the Health Care Principle continue to provide that power for a health matter or special health matter for an adult should be exercised only if the exercise of power is necessary and appropriate to maintain or promote the adult's health or well-being?**

**Best interests: 12(1)(b)(ii)**

5.63 As noted above, the Health Care Principle presently provides that power for a health matter or a special health matter should be exercised in one of two alternative circumstances only. The second of these is if the exercise of power is, in all the circumstances, in the adult's best interests.<sup>410</sup> This is

<sup>405</sup> *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(1)(b)(i); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(1)(b)(i).

<sup>406</sup> *Powers of Attorney Act 2006* (ACT) sch 1 cl 1.11(1)(b)(i). This principle provides that an individual is entitled to have decisions about health care matters made by an attorney only if the exercise of power is, in the attorney's opinion, necessary and appropriate to maintain or promote the individual's health and well-being.

<sup>407</sup> *Guardianship Act 1987* (NSW) ss 32(b), 40(3), 44(2). Those sections require the decision-maker to have regard to the need to ensure that treatment is carried out for the purpose of promoting and maintaining the adult's health and well-being.

<sup>408</sup> *Mental Health Act 2000* (Qld) s 8(h). 'Treatment' is defined as 'anything done, or to be done, with the intention of having a therapeutic effect on the person's illness' and includes measures taken to address the symptoms of a disease such as the provision of artificial hydration and nutrition: *Mental Health Act 2000* (Qld) s 10 sch 2 Dictionary; and *Adult Guardian v Langham* [2006] 1 Qd R 1, [17], [32].

<sup>409</sup> Australian Medical Association, *Code of Ethics* (2004), editorially revised 2006, [1.1](a) <<http://www.ama.com.au/web.nsf/tag/amacodeofethics>> at 7 August 2008.

<sup>410</sup> *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(1)(b)(ii); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(1)(b)(ii).

consistent with the common law and with the position in many of the other Australian jurisdictions.<sup>411</sup>

5.64 The best interests principle was added to the Health Care Principle by the *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld). It appears to have been included in the legislation to provide a basis for decisions about the withdrawal or withholding of life-sustaining measures which might not be justified as necessary and appropriate to maintain or promote the adult's health or well-being. In particular, it seems to have been addressed to circumstances in which intervention 'would be futile and unlikely to have any effective benefit to the person'.<sup>412</sup>

5.65 It is noted, however, that in considering the application of the Health Care Principle to the withdrawal or withholding of life-sustaining measures, the Tribunal had previously given a wide interpretation to the words 'promote or maintain the adult's health or well-being':<sup>413</sup>

This term cannot mean simply that a power can only be exercised if it improves the person's life. This term must be read to mean if the health care will be of some *benefit* to the person and therefore in the person's best interests.

5.66 The inclusion of a best interests principle (whether in the statute or by common law) may inappropriately widen the circumstances in which consent to health care for an adult can be given. At present, any health decisions could be made on the basis of the best interests principle. However, there may be some health decisions that should not be made, even if they could be said to be in the adult's best interests.

5.67 It is noted that in Tasmania, which adopts a best interests approach, the legislation specifies that, when determining if the treatment is in the adult's best interests, the decision-maker must take into account that the treatment is to be carried out only to promote and maintain the health and well-being of the adult.<sup>414</sup> A similar approach is adopted in Victoria.<sup>415</sup>

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411 See [5.4], [5.31] above.

412 See the parliamentary debate of the Guardianship and Administration and Other Acts Amendment Bill 2001 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 6 December 2001, 4336 (Hon Rodney Welford, Attorney-General and Minister for Justice). Also see Explanatory Notes, Guardianship and Administration and Other Acts Amendment Bill 2001 (Qld) 6.

413 *Re RWG* [2000] QGAAT 49, [69]. Also [82]. Also see *Re AX* [2000] QGAAT 4, [45]; *Re TM* [2002] QGAAT 1, [154]. Prior to the amendments made by the *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld), the Health Care Principle did not apply to special health care which, at that time, included the withdrawal and withholding of life-sustaining measures. Nevertheless, the Tribunal had held that the Health Care Principle should be applied in relation to special health care to the greatest extent possible: *Re RWG* [2000] QGAAT 49, [71]; *Re AX* [2000] QGAAT 4, [40]; *Re TM* [2002] QGAAT 1, [153].

414 *Guardianship and Administration Act 1995* (Tas) s 43(2)(e).

415 *Guardianship and Administration Act 1986* (Vic) s 38(1)(f). Under that provision, the decision-maker must consider 'whether' the treatment is only to promote and maintain the adult's health and well-being.

5.68 The best interests approach has also been criticised as paternalistic<sup>416</sup> and as being ‘at odds’ with the underlying philosophy of the legislation and the General Principles.<sup>417</sup>

5.69 It has also been argued that the best interests test is inadequate in guiding decisions about the withdrawal or withholding of life-sustaining measures. The test ‘is susceptible to the “picking and choosing” of factors (especially where there is inconsistency) that might equally support either of the two possible conclusions’.<sup>418</sup> It also raises the discomfoting question whether it can properly be said that being allowed to die is in a person’s best interests.<sup>419</sup> An approach which expressly focuses on the adult’s views and wishes may be more appropriate for such decisions.<sup>420</sup>

5.70 An issue to consider is whether the Health Care Principle should continue to include a best interests test. If so, a related issue is whether the best interests test should continue to apply generally to all health decisions, or should be limited so that it applies to particular types of decisions only, such as those involving the withdrawal or withholding of life-sustaining measures.

5.71 If a best interests test remains in the Health Care Principle, another issue to consider is whether the meaning of ‘best interests’ should be clarified. At present, the legislation does not define ‘best interests’ and does not specify what matters should be considered in determining whether a decision is in the adult’s best interests. Nor does the legislation specify from whose perspective the adult’s best interests should be assessed: the adult’s, the health provider’s or the decision-maker’s.<sup>421</sup>

416 Eg, Scottish Law Commission, *Incapable Adults*, Report No 151 (1995) [2.50]; South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) 84–5.

417 M Howard, ‘Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform’ (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 172, 188.

418 P MacFarlane, ‘What is food? Withdrawal of nutrition and hydration and other matters’ (2003) 24 *Queensland Lawyer* 135, 141.

419 Ibid; M Howard, ‘Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform’ (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 185. See, eg, *Re TM* [2002] QGAAT 1, [165].

420 For example, the Australian Medical Association suggests that decisions to withdraw or withhold life-sustaining treatment should be undertaken in collaboration with the medical practitioner and having regard to the patient’s known values and goals regarding end of life care: Australian Medical Association, *Position Statement: The Role of the Medical Practitioner in End of Life Care* (2007) [9.3], [9.5] <<http://www.ama.com.au/web.nsf/doc/WEEN-76L9US>> at 7 August 2008. Other approaches to this issue have also been suggested: eg, P MacFarlane, ‘What is food? Withdrawal of nutrition and hydration and other matters’ (2003) 24 *Queensland Lawyer* 135, 141–2; and NL Cantor, ‘Twenty-Five Years After *Quinlan*: A Review of the Jurisprudence of Death and Dying’ (2001) 29 *Journal of Law, Medicine & Ethics* 182, 192–3.

The Commission will examine the law relating to the withholding and withdrawal of life-sustaining measures later in stage two. See [1.7] above.

421 M Howard, ‘Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform’ (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 181.

5.72 In the absence of legislative guidance, the Tribunal has applied the common law.<sup>422</sup> The common law best interests test is applied to children and to adults who are unable to provide consent to treatment.<sup>423</sup>

5.73 It involves a balancing exercise, dependent on the facts of each individual case. Medical opinion is not determinative.<sup>424</sup> It involves 'a welfare appraisal in the widest sense'<sup>425</sup> encompassing 'every kind of consideration capable of impacting on the decision':<sup>426</sup>

These include, non-exhaustively, medical, emotional, sensory (pleasure, pain and suffering) and instinctive (the human instinct to survive) considerations.

5.74 The courts have also suggested it would be undesirable to attempt to set bounds to what is relevant in making a best interests determination.<sup>427</sup>

5.75 In *Re HG*, the Tribunal in Queensland gave the following explanation of its approach:<sup>428</sup>

422 *Re HG* [2006] QGAAT 26, [89]. Also *Re MC* [2003] QGAAT 13, [56]–[61].

423 The Supreme Court has a power, known as the *parens patriae* jurisdiction, to appoint a decision-maker for a person who is unable to adequately safeguard his or her own interests. The *parens patriae* jurisdiction will be invoked when 'it is clear on the material that the order sought is positively in the interests of a child or person within the Court's protection': *Christensen v Christensen* [1999] QCA 241, [19] McMurdo P (McPherson JA, Shepherdson J concurring). See also *VJC v NSC* [2005] QSC 068, [13] (Wilson J). The *Guardianship and Administration Act 2000* (Qld) does not affect the Supreme Court's inherent jurisdiction, including its *parens patriae* jurisdiction: *Guardianship and Administration Act 2000* (Qld) s 240.

424 *R (Burke) v General Medical Council* [2005] QB 424, [116] (Munby J). Cf *Airedale NHS Trust v Bland* [1993] AC 789 which suggested that it is for the doctor to decide what is in the patient's best interests, having regard to a body of informed and responsible medical opinion; *Re F* [1990] 2 AC 1, 78 (Lord Goff); and, more recently, *Messiha v South East Health* [2004] NSWSC 1061, [25] (Howie J). In the latter case, it was said that 'it would be an unusual case where the Court would act against what is unanimously held by medical experts as an appropriate treatment regime'.

425 *R (Burke) v General Medical Council* [2005] QB 424, [116], [213](d) (Munby J).

426 *An NHS Trust v MB* [2006] EWHC 507 (Fam), [16](v) (Holman J). Also see *R (Burke) v General Medical Council* [2005] QB 424, [116], [213](d) (Munby J). For example, Nicholas J of the New South Wales Supreme Court held that the factors relevant to a best interests determination in a case involving the donation of blood stem cells by an intellectually disabled adult to his brother included the patient's wishes, the risks to the patient involved in the treatment, including side-effects, and the patient's relationship with the brother: *Northern Sydney and Central Coast Area Health Service v CT* [2005] NSWSC 551, [26]–[28].

The test was summarised in *Portsmouth Hospitals NHS Trust v Wyatt* [2005] 1 WLR 3995, [87], a case involving a declaration as to the withdrawal of mechanical ventilation from a prematurely born infant, hospitalised since birth, with chronic respiratory and kidney problems and severe, permanent brain damage:

The judge must decide what is in the child's best interests. In making that decision the welfare of the child is paramount, and the judge must look at the question from the assumed point of view of the patient (*In re J* [1991] Fam 33). There is a strong presumption in favour of a course of action which will prolong life, but that presumption is not irrebuttable (*In re J*). The term 'best interests' encompasses medical, emotional, and all other welfare issues (*In re A* [2000] 1 FLR 549). The court must conduct a balancing exercise in which all the relevant factors are weighed (*In re J*) and a helpful way of undertaking this exercise is to draw up a balance sheet (*In re A*).

427 *Portsmouth Hospitals NHS Trust v Wyatt* [2005] 1 WLR 3995, [88], citing *Re S* [2001] Fam 15, 30 (Thorpe LJ).

428 *Re HG* [2006] QGAAT 26, [92]. Both *Portsmouth Hospitals NHS v Wyatt* [2005] 1 WLR 3995 and *An NHS Trust v MB* [2006] EWHC 507 (Fam), cited by the Tribunal, are decisions relating to children.

The approach of the Tribunal in trying to determine the question of what is actually in HG's best interests is very similar to the approach taken by the medical experts in trying to determine the question of good medical practice. The Tribunal must weigh up a series of factors and essentially decide which side of the balance sheet has the greatest number of entries. This is very much the approach the English Court of Appeal has been taking in recent cases. In *Wyatt v Portsmouth Hospital NHS*, the Court stated that the test of best interests meant balancing all the conflicting considerations to see where the final balance of best interest lies. The Court indicated that the term 'best interests' is used in the widest possible sense and includes every possible kind of consideration including medical, emotional, sensory and instinctive. This approach was also recently endorsed in the decision of *An NHS Trust v MB (a child)*. [notes omitted]

5.76 *Re HG* involved the question whether consent should be given to the withdrawal of artificial hydration.<sup>429</sup> The Tribunal held that the matters relevant to determining what is in the adult's best interests include the following:<sup>430</sup>

- (a) what is regarded as good medical practice in the circumstances of the case which would require a consideration of matters including:
  - (i) the seriousness of the adult's medical condition;
  - (ii) the adult's prospect of recovery;
  - (iii) whether the proposed treatment is of therapeutic value to the adult;
  - (iv) a consideration of the benefits versus the burdens of treatment.
- (b) the effect of treatment on the adult's dignity; and
- (c) the views and wishes of the adult.

5.77 An issue to consider is whether such matters should be specified in the legislation. In Tasmania and Victoria, for example, the legislation specifies a number of matters to be taken into account in determining the adult's best interests.<sup>431</sup> These are set out at [5.31] and [5.32] above.

5.78 The present lack of legislative guidance about what 'best interests' means has been criticised. In particular, concern has been expressed that lay decision-makers, who cannot be expected to know the common law, are left to

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A consent to the withdrawal or withholding of a life-sustaining measure will operate only if the adult's health provider reasonably considers the commencement or continuation of the measure would be inconsistent with good medical practice: *Guardianship and Administration Act 2000* (Qld) s 66A(2). Good medical practice is defined to mean good medical practice for the medical profession in Australia having regard to the recognised medical standards, practices and procedures, and the recognised ethical standards, of the medical profession in Australia: *Guardianship and Administration Act 2000* (Qld) sch 2 cl 5B.

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*Re HG* [2006] QGAAT 26, [93].

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*Guardianship and Administration Act 1995* (Tas) s 43(2); *Guardianship and Administration Act 1986* (Vic) s 38(1).

rely on their own value judgments.<sup>432</sup> The common law best interests approach has been subject to similar criticism.<sup>433</sup>

5.79 Some of these concerns may be addressed by including a list of factors in the legislation that the decision-maker must consider in making a best interests determination.

**5-10 Should the Health Care Principle continue to provide that one of the circumstances in which power for a health matter or special health matter for an adult may be exercised is if the exercise of power is, in all the circumstances, in the adult's best interests?**

**5-11 If yes to Question 5-10, should the best interests test apply in respect of all health decisions, or only in respect of some health decisions (and, if so, which types of decisions)?**

**5-12 If yes to Question 5-10, should 'best interests' be defined in some way? For example, should the legislation set out a list of factors to be considered in determining whether an exercise of power is in the adult's best interests, such as any one or more of the following:**

- (a) what is regarded as good medical practice in the circumstances, including a consideration of:
 
  - (i) the seriousness of the adult's medical condition;**
  - (ii) the adult's prospect of recovery;**
  - (iii) whether the proposed treatment is of therapeutic value to the adult;****
- (b) a consideration of the benefits versus the burdens of treatment;**

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M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 181, 185; P MacFarlane, 'What is food? Withdrawal of nutrition and hydration and other matters' (2003) 24 *Queensland Lawyer* 135, 141.

Also note the concern raised in the parliamentary debate of the Guardianship and Administration and Other Acts Amendment Bill 2001 (Qld) that the 'best interests' principle is not clearly defined and, in the context of the withdrawal or withholding of life-sustaining measures such as artificial nutrition and hydration, would 'allow others to determine that a person's life is not worth living': Queensland, *Parliamentary Debates*, Legislative Assembly, 6 December 2001, 4334 (Mrs Liz Cunningham), quoting from correspondence received from the Queensland Right to Life movement.

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Eg, *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 270–71, 272 (Brennan J); *R (Burke) v General Medical Council* [2005] QB 424, [115] (Munby J). Also see M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 172, 185, 187; P MacFarlane, 'What is food? Withdrawal of nutrition and hydration and other matters' (2003) 24 *Queensland Lawyer* 135, 139.

- (c) the effect of the treatment on the adult's dignity;
- (d) the views and wishes of the adult;
- (e) the consequences to the adult if the proposed treatment is not carried out;
- (f) any alternative treatment available to the adult;
- (g) the nature and degree of any significant risks associated with the proposed treatment or any alternative treatment;
- (h) whether the treatment can be postponed because better treatments may become available;
- (i) the views and wishes of members of the adult's support network;
- (j) other?

***Views, wishes and information from others: 12(2) and (3)***

5.80 As noted above, clause 12(1) of the Health Care Principle provides that power for a health matter or a special health matter should be exercised in one of two alternative circumstances only: first, if it is necessary and appropriate to maintain or promote the adult's health or well-being; second, if it is in the adult's best interests.

5.81 Clause 12(2) of the Health Care Principle then provides that '[i]n deciding whether the exercise of a power is appropriate', the adult's views and wishes must be sought and taken into account, and information given by the health provider must be taken into account.<sup>434</sup> The adult's views and wishes may be expressed orally, in writing or in another way, including by conduct.<sup>435</sup>

5.82 There is some doubt whether this applies to both of the circumstances set out in clause 12(1) of the Health Care Principle. It has been suggested that because of the word 'appropriate', the requirement to consider the views of the adult and the information given by the health provider arises only if the power is

<sup>434</sup> *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(2); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(2).

<sup>435</sup> *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(3); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(3).

sought to be exercised on the first of those bases.<sup>436</sup> The Health Care Principle may not, therefore, specifically require such information to be considered when exercising power on the basis of the adult's best interests.

5.83 It has been noted, however, that lay decision-makers may not make this distinction and may seek to take account of such information in any case.<sup>437</sup> It is also noted that the application of the common law to the best interests approach will require such information to be considered.<sup>438</sup> In addition, General Principle 7(3)(b) requires the adult's views and wishes to be sought and taken into account to the greatest extent practicable when exercising power for any matter.<sup>439</sup>

5.84 An issue to consider, if the best interests principle remains part of the Health Care Principle, is whether the legislation should clarify that the requirement to consider the views of the adult and the information given by the health provider applies if the power is sought to be exercised in the adult's best interests.

5.85 The legislation in New South Wales, Victoria and Tasmania requires the adult's wishes to be taken into account.<sup>440</sup> Taking account of the adult's views and wishes is also consistent with the principle of autonomy and with article 12 of the United Nations Convention which requires respect for the adult's rights, will and preferences.<sup>441</sup>

5.86 It would also seem to be a matter of practical necessity for information given by the health provider about the nature of the adult's condition and the proposed and alternative health care to be considered in every case in which power for a health matter is to be exercised. The New South Wales, Victorian and Tasmanian legislation provides, for example, for information about the proposed treatment to be considered.<sup>442</sup>

436 L Willmott and B White, 'Charting a course through difficult legislative waters: Tribunal decisions on life-sustaining measures' (2005) 12 *Journal of Law and Medicine* 441, 449; B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 67; M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 183.

437 M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 182, 183.

438 L Willmott and B White, 'Charting a course through difficult legislative waters: Tribunal decisions on life-sustaining measures' (2005) 12 *Journal of Law and Medicine* 441, 449.

439 *Powers of Attorney Act 1998* (Qld) sch 1 cl 7(3)(b); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 7(3)(b).

440 *Guardianship Act 1987* (NSW) ss 40(3)(a), 44(2)(a)(i); *Guardianship and Administration Act 1986* (Vic) s 38(1)(a); *Guardianship and Administration Act 1995* (Tas) s 43(2)(a).

441 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12(4).

442 *Guardianship Act 1987* (NSW) ss 40(3)(b), 44(2)(b); *Guardianship and Administration Act 1986* (Vic) s 38(1)(c)–(e); *Guardianship and Administration Act 1995* (Tas) s 43(2)(b)–(d).

5.87 Another issue to consider is whether the decision-maker should be required to consider the views of any other persons, such as members of the adult's family or 'support network'.<sup>443</sup> The Victorian legislation provides, for example, for the person responsible to take into account the wishes of any nearest relative or other family members of the adult.<sup>444</sup>

5.88 Clause 12(5) of the Health Care Principle already requires the Tribunal (or other relevant entity), when deciding whether to consent to special health care, to seek and take into account the views of the adult's guardian or, if there is no guardian, the adult's attorney appointed under an enduring power of attorney for health matters or, if there is no such attorney, the adult's statutory health attorney.<sup>445</sup> This is also discussed at [5.97]–[5.99].

5.89 The guardianship legislation also specifically provides that, if there are two or more persons who are guardians or attorneys for the adult, they must consult with one another.<sup>446</sup> This would seem to apply generally and so would operate in the context of health decisions for the adult.

5.90 There is currently no requirement, however, for decision-makers to consider the views of the adult's family or support network when exercising power for an adult's health matter or special health matter. As noted in Chapter 4, consultation with members of the adult's support network may provide valuable information to help with decision-making.<sup>447</sup> On the other hand, consideration of others' views may undermine respect for the adult's autonomy, particularly in the context of health decisions which are of a highly personal nature. It is important, as provided in article 12 of the United Nations Convention, to avoid conflicts of interest.<sup>448</sup>

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443 The adult's 'support network' consists of members of the adult's family, close friends of the adult and anyone else the Tribunal decides provide support to the adult: *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 (definition of 'support network').

444 *Guardianship and Administration Act 1986* (Vic) s 38(1)(b). However, if the adult is likely to be capable of giving consent within a reasonable time and objects to a relative or other family member being involved in such decisions, the relative or family member is taken not to be the nearest relative or family member of the adult: s 38(2).

445 *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(5); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(5).

446 *Powers of Attorney Act 1998* (Qld) s 79; *Guardianship and Administration Act 2000* (Qld) s 40(1).

447 Under the *Intellectually Disabled Citizens Act 1985* (Qld), which applied prior to the enactment of the guardianship legislation, the legal friend was required to take all reasonable steps to consult with the adult's relatives who provided ongoing care for the adult and to consult with persons who provided ongoing care for the adult, appropriate professional persons, and relatives of the adult or other persons who appeared to have a proper interest in the adult's well-being in order to inform himself or herself as fully as possible on matters requiring consent and the options available: *Intellectually Disabled Citizens Act 1985* (Qld) reprint 2B, s 26(5).

448 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12(4).

**5-13 Should the legislation be changed to clarify that the requirement in clause 12(2) of the Health Care Principle to take into account the views and wishes of the adult, and the information given by the health provider, must be complied with whenever power for a health matter or special health matter is exercised and not just when it is exercised under clause 12(1)(a)(i)?**

**5-14 Should the Health Care Principle be changed to require a decision-maker to take into account the views of any other persons, such as members of the adult's support network?**

***Adult's right to refuse health care: 12(4)***

5.91 At present, clause 12(4) of the Health Care Principle provides that '[t]he health care principle does not affect any right an adult has to refuse health care'.<sup>449</sup> There may be some uncertainty about why this provision was included as part of the Health Care Principle and how it is intended to operate. It has been noted, for example, that this would appear to apply only when the adult has capacity to give or refuse consent.<sup>450</sup> Alternatively, it may be that the decision-maker for an adult with impaired capacity should consider whether the adult would have refused the treatment if he or she had been able to make the decision.<sup>451</sup>

5.92 Another view is that clause 12(4) of the Health Care Principle is intended to specify one of the adult's rights to which clause 12(1)(a) refers when it provides that power for a health matter or special health matter should be exercised 'in the way least restrictive of the adult's rights'.<sup>452</sup> The reference to this in the Health Care Principle may also give some content, for health decisions, to General Principle 2 which provides for the recognition of an adult's basic human rights.<sup>453</sup> For example, in considering whether to consent to the withholding or withdrawal of artificial nutrition and hydration, the Tribunal noted in *Re HG* that:<sup>454</sup>

449 *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(4); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 2(4).

450 *Re Bridges* (2001) 1 Qd R 574, 583 (Ambrose J). This seems to be consistent with the approach adopted by the Tribunal in *Re RWG* [2000] QGAAT 49, [55]–[56].

451 See, eg, M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 182.

452 *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(1)(a); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(1)(a). This seems to have been the approach adopted by the Tribunal in *Re MC* [2003] QGAAT 13, [63].

453 *Powers of Attorney Act 1998* (Qld) sch 1 cl 2; *Guardianship and Administration Act 2000* (Qld) sch 1 cl 2.

454 *Re HG* [2006] QGAAT 26, [69].

An adult does not lose the right to have life-sustaining measures withheld or withdrawn because that adult has lost capacity to make the decision for himself or herself. In the Irish case of *In the Matter of a Ward of Court*<sup>455</sup> where the Court allowed the withdrawal of artificial nutrition and hydration it held that incapacity did not justify any reduction in the degree of legal protection to which a person was entitled. (original note)

5.93 Reference in the Health Care Principle to the adult's right to refuse health care may also direct decision-makers to its importance when considering the adult's views and wishes.<sup>456</sup>

5.94 It may also be that clause 12(4) of the Health Care Principle is intended as a signpost to other sections of the *Guardianship and Administration Act 2000* (Qld) which make provision for the adult's objection to treatment. For example, section 67 provides that, except in certain circumstances, the exercise of power for a health matter or special health matter is ineffective to give consent if the health provider knows, or ought reasonably to know, that the adult objects to the treatment.<sup>457</sup> It may be more appropriate for clause 12(4) of the Health Care Principle to be incorporated into, or relocated near, those sections.

**5-15 How does the current provision in clause 12(4) of the Health Care Principle, dealing with the adult's right to refuse health care, operate in practice?**

**5-16 Should the Health Care Principle continue to include a provision to the effect that the Health Care Principle does not affect any right an adult has to refuse health care?**

455 [1995] 1ESC 1; [1995] 21 LMR 401.

456 This seems to have been the approach adopted by the Tribunal in, for example, *Re TM* [2002] QGAAT 1, [166]–[168].

457 *Guardianship and Administration Act 2000* (Qld) s 67(1). Under s 67(2), consent is effective despite the adult's objection (other than for the removal of tissue for donation or the participation in special medical research or experimental health care or approved clinical research) if:

- the adult has minimal or no understanding of what the health care involves or why the health care is required; and
- the health care is likely to cause the adult no distress or is likely to cause the adult temporary distress that is outweighed by the benefit to the adult of the proposed health care.

Similarly, urgent health care, the withdrawal or withholding of life-sustaining measures in acute emergencies, and minor, uncontroversial health care for which consent is not ordinarily required, cannot be carried out without consent if the health provider knows, or could reasonably be expected to know, that the adult objects: *Guardianship and Administration Act 2000* (Qld) ss 63(3), 63A(2), 64(2). There are exceptions to the operation of the adult's objection to urgent health care in s 63(3) in the same terms as those in s 67(2). The legislation also provides that the Tribunal may not consent to the donation of tissue or to special medical research or experimental health care if the adult objects: *Guardianship and Administration Act 2000* (Qld) ss 69(2), 72(3)(a).

**5-17 Alternatively, should a provision to that effect be incorporated into, or relocated near, those sections of the *Guardianship and Administration Act 2000* (Qld) which deal with the effect of an adult's objection to health care?**

**Special health matters: 12(5)**

5.95 Special health matters are given a particular meaning under the guardianship legislation. They include such matters as tissue donation, sterilisation and termination of pregnancy.<sup>458</sup> Statutory health attorneys, attorneys appointed under enduring documents for health matters, and guardians are not able to give consent to special health care.<sup>459</sup> Special health care can be dealt with only under a direction made by the adult in an advance health directive, or if consent is given by the Tribunal or other relevant entity.<sup>460</sup>

5.96 Part 3 of chapter 5 of the *Guardianship and Administration Act 2000* (Qld) deals with the circumstances in which the Tribunal may give consent to special health care. It provides different criteria for different types of special health care.<sup>461</sup> This reflects that each type of special health care has its own considerations.

5.97 In addition, clause 12(5) of the Health Care Principle applies specifically to special health care. It provides that, when deciding whether to consent to special health care, the Tribunal (or other entity) must seek, and take into account, the views of the adult's guardian or, if there is no guardian, an attorney appointed under an enduring power of attorney for health matters for the adult or, if there is no such attorney, the adult's statutory health attorney.<sup>462</sup>

5.98 Because attorneys are not empowered to deal with special health matters, the Health Care Principle set out in the *Powers of Attorney Act 1998* (Qld) does not include clause 12(5). That clause is contained only in the *Guardianship and Administration Act 2000* (Qld).

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458 *Powers of Attorney Act 1998* (Qld) sch 2 cl 6, 7; *Guardianship and Administration Act 2000* (Qld) sch 2 cl 6, 7. See [5.10] above.

459 Under s 74 of the *Guardianship and Administration Act 2000* (Qld), the Tribunal may appoint a guardian to give consent to subsequent or similar special health care for an adult if the Tribunal has consented to special health care for the adult.

460 *Guardianship and Administration Act 2000* (Qld) s 65.

461 See *Guardianship and Administration Act 2000* (Qld) ss 69 (Donation of tissue), 70 (Sterilisation), 71 (Termination of pregnancy), 72 (Special medical research or experimental health care), 73 (Prescribed special health care).

462 *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(5); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(5). This was not included in the recommendations made by the Queensland Law Reform Commission in its Report, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996).

5.99 It has been suggested that the inclusion of clause 12(5) in the Health Care Principle may be confusing for guardians. Lay decision-makers may not be aware that 'special health care' has a particular meaning and may attempt to apply clause 12(5) to other decisions. For example, a guardian 'may think that because of its life-ending consequences', consent to the withdrawal or withholding of a life-sustaining measure is a 'special' health matter.<sup>463</sup>

5.100 An issue to consider is whether clause 12(5) should remain part of the Health Care Principle or whether it should be relocated to the part of the legislation that deals specifically with special health care. If clause 12(5) should remain part of the Health Care Principle, another issue to consider is whether it should include a specific reference to the definition of 'special health care'.

**5-18 Does clause 12(5) of the Health Care Principle cause any difficulties in practice?**

**5-19 Should clause 12(5) continue to be included as part of the Health Care Principle, or should it be relocated to Part 3 of Chapter 5 of the *Guardianship and Administration Act 2000* (Qld) which deals specifically with special health care?**

### Compliance and enforcement

5.101 Application of the Health Care Principle is a binding obligation. The Health Care Principle itself provides that power for a health matter or special health matter *should* be exercised in a particular way.

5.102 One issue to consider is whether there are any practical difficulties in complying with this requirement. For example, are attorneys and guardians aware of the Health Care Principle and what it requires? Are there circumstances in which it may be difficult to apply the Health Care Principle, for example, if a decision needs to be made urgently?

5.103 Another issue to consider is whether adequate provision is made in the legislation about what may happen if a person fails to apply the Health Care Principle.

<sup>463</sup>

M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 183.

5.104 As noted in Chapter 4, the guardianship legislation provides for a number of complaint and review mechanisms.<sup>464</sup> For example, the Adult Guardian has power to investigate complaints about ‘inappropriate or inadequate decision-making arrangements’ for an adult.<sup>465</sup> This may include, for example, complaints that a guardian is not applying the Health Care Principle.<sup>466</sup>

5.105 Section 43 of the *Guardianship and Administration Act 2000* (Qld) also provides that if the adult’s guardian or attorney refuses to make a decision, or makes a decision, about the adult’s health matters that is contrary to the Health Care Principle, the Adult Guardian is empowered to exercise power for the health matter.<sup>467</sup>

**5-20 To what extent, if any, are there difficulties in complying with or applying the Health Care Principle?**

**5-21 Does the guardianship legislation make adequate provision for what may happen if a person does not comply with the Health Care Principle?**

### Location of the Health Care Principle

5.106 The obligation to apply the Health Care Principle is found in specific sections of the guardianship legislation. The Health Care Principle itself is set out, near the General Principles, in the first schedule to the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). As such, the principle forms part of the legislation.<sup>468</sup>

<sup>464</sup> Tribunal decisions can be appealed to the Supreme Court; applications for review of an appointment or for orders, directions or recommendations can be made to the Tribunal or the Supreme Court; and the appointment of a guardian or administrator may be revoked by the Tribunal if the appointee is no longer competent because, for example, the appointee has neglected his or her duties or otherwise contravened the *Guardianship and Administration Act 2000* (Qld); *Powers of Attorney Act 1998* (Qld) s 110(1); *Guardianship and Administration Act 2000* (Qld) ss 164, 82(1)(c), (d), 115(1), 31(4), (5). Internal complaints processes are also available for decisions of the Adult Guardian or the Public Trustee: Department of Justice and Attorney-General, the Adult Guardian, ‘Resolution of Complaints’ <<http://www.justice.qld.gov.au/222.htm>> at 8 August 2008; The Public Trustee of Queensland, ‘Resolving Problems’ <<http://www.pt.qld.gov.au/corporate/resolve.htm>> at 8 August 2008.

<sup>465</sup> *Guardianship and Administration Act 2000* (Qld) s 180(b).

<sup>466</sup> See Guardianship and Administration Tribunal, *Guardians: Helping Adults with Impaired Decision-Making Capacity*, Fact Sheet No 2 (July 2008) 5 <<http://www.gaat.qld.gov.au/72.htm>> at 11 August 2008, as to what may happen if a guardian fails to act in accordance with the General Principles or the Health Care Principle.

<sup>467</sup> One of the Adult Guardian’s other functions is to mediate between attorneys or guardians and others, such as health providers, to resolve disputes: *Guardianship and Administration Act 2000* (Qld) s 174(2)(c).

<sup>468</sup> *Acts Interpretation Act 1954* (Qld) s 14(5).

5.107 However, an issue to consider is whether the Health Care Principle should be set out in another part of the legislation to give it greater prominence. For example, it may be appropriate to include the Health Care Principle in chapter 5 of the *Guardianship and Administration Act 2000* (Qld) which deals specifically with health matters and special health matters.

**5-22 Should the Health Care Principle, which is set out in Schedule 1 of the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld), instead be set out in another part of the legislation?**

# Chapter 6

## Decision-making capacity

INTRODUCTION .....	105
DECISION-MAKING CAPACITY.....	106
GENERAL APPROACHES FOR DEFINING DECISION-MAKING CAPACITY .....	106
THE LAW IN QUEENSLAND.....	107
The presumption of capacity .....	108
The statutory test of capacity .....	108
Declarations of capacity .....	109
THE POSITION IN OTHER JURISDICTIONS .....	110
Australia .....	110
The United Kingdom .....	113
Ireland .....	114
ISSUES FOR CONSIDERATION.....	115
The presumption of capacity .....	115
The approach to defining ‘capacity’ .....	117
The definition of ‘capacity’ .....	122
The exclusion of specific matters .....	133
Fluctuating capacity .....	135
Assessments of capacity.....	136

### INTRODUCTION

6.1 The Commission’s terms of reference direct it to review ‘the law relating to decisions about personal, financial, health matters and special health matters’ under the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).<sup>469</sup>

6.2 Queensland’s guardianship legislation provides a framework for decision-making by and for adults who have impaired decision-making capacity. In part, it provides for the making of substitute decisions for an adult who has impaired decision-making capacity. A threshold issue in reviewing the law relating to substitute decision-making is, therefore, the nature and assessment of decision-making capacity.<sup>470</sup>

6.3 This chapter focuses on general aspects of decision-making capacity, and its assessment under the guardianship legislation. Chapter 7 considers the test of capacity for executing an enduring document in Queensland.

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469 The terms of reference are set out in Appendix 1.

470 Legal and health professionals both frequently use the terms ‘capacity’ and ‘competence’ interchangeably.

## DECISION-MAKING CAPACITY

6.4 To be autonomous and capable of self-determination is a large part of what people value in terms of their freedom and independence. Part of being an adult is the ability to make decisions independently.

6.5 Adults are presumed to have capacity to make their own decisions. This includes the ability to make decisions about daily life, as well as more serious or significant decisions.

6.6 However, a person's capacity to make certain decisions may be impaired, for example, as a result of an intellectual disability, dementia or an acquired brain injury.

6.7 A person may lack capacity for some decisions, but have capacity for all others. The level of a person's capacity might also fluctuate according to particular factors such as the passage of time or presence of illness.<sup>471</sup>

## GENERAL APPROACHES FOR DEFINING DECISION-MAKING CAPACITY

6.8 There are a number of approaches used for understanding the notion of capacity. These approaches influence how capacity is assessed in practice. Three main approaches have been identified:<sup>472</sup>

- The *functional approach*: where a person has impaired capacity for a particular decision if he or she is unable to understand the nature and effects of the decision at the time the decision is to be made.
- The *status approach*: where a person lacks the requisite capacity if he or she has a certain 'status', for example, the status of being under 18 years of age, or of being a person with a particular disability or condition.
- The *outcome approach*: where a person lacks the requisite capacity if the content of his or her decision does not accord with other people's opinion of what the decision should be, or does not objectively appear to be in the person's interests.

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471 For example, the level of cognitive impairment shown by people suffering dementia may be influenced by environmental stimulus and distractions, as well as drugs, fatigue and the time of day: B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 66.

472 Eg, Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.3]–[3.5]; M Parker and C Cartwright, 'Mental Capacity in Medical Practice and Advance Care Planning: Clinical, Legal and Ethical Issues' in B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 62; New South Wales Attorney General's Department, *Are the rights of people whose capacity is in question being adequately promoted and protected?*, Discussion Paper (March 2006) 6.

6.9 The legal concept of decision-making capacity has developed consistently in the direction of the functional model.<sup>473</sup> It has been suggested that this reflects ‘the law’s support for individual self-determination and flexibility, rather than rigidly distinguishing the competent from the incompetent according to age, diagnostic status (for example, presence of mental illness), or conformity with some objective standard’.<sup>474</sup>

6.10 A number of jurisdictions where reform has occurred, including Queensland, have adopted a statutory test of decision-making capacity (or incapacity) wholly or predominantly modelled on the functional approach.<sup>475</sup> The Queensland model is discussed below.

## THE LAW IN QUEENSLAND

6.11 The guardianship legislation establishes a mechanism for decisions about personal (including health), financial and special health matters to be made for adults who do not have capacity to make such decisions for themselves. It does this by providing for certain people to make substitute decisions for the adult, including:

- informal decision-makers;
- statutory health attorneys;
- attorneys appointed by the adult in an enduring document;
- guardians or administrators appointed by the Tribunal; and
- in limited circumstances, the Adult Guardian and the Tribunal.

6.12 Substitute decision-makers have power to make decisions for an adult only if the adult has impaired capacity for the matter.<sup>476</sup> The *Guardianship and Administration Act 2000* (Qld) acknowledges ‘that an adult with impaired

473 J Devereux and M Parker, ‘Competency issues for young persons and older persons’, in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 57; Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.30]; Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.14]; South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [4.31]–[4.32].

474 J Devereux and M Parker, ‘Competency issues for young persons and older persons’, in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 57.

475 Eg, *Guardianship and Administration Act 2000* (Qld); *Mental Capacity Act 2005* (UK); *Mental Capacity and Guardianship Bill 2008* (Ireland).

476 Eg, *Powers of Attorney Act 1998* (Qld) ss 33(3), (4) (When attorney’s power exercisable), 36(1)(a), 2(c), (3) (Operation of advance health directive), 62(2) (Statutory health attorney); *Guardianship and Administration Act 2000* (Qld) ss 12(1)(a) (Appointment), 63(1)(a) (Urgent health care), 63A(1)(a) (Life-sustaining measure in acute emergency), 64(1)(a) (Minor, uncontroversial health care), 65(1) (Adult with impaired capacity—order of priority in dealing with special health matter), 66(1) (Adult with impaired capacity—order of priority in dealing with health matter), 69(1) (Donation of tissue), 70(1) (Sterilisation), 71(1) (Termination of pregnancy), 72(1) (Special medical research or experimental health care), 73(1) (Prescribed special health care), 198A (Consent to forensic examination).

capacity has a right to adequate and appropriate support for decision making'.<sup>477</sup> It also states that 'the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent'.<sup>478</sup>

### The presumption of capacity

6.13 As mentioned above, every adult is presumed to have decision-making capacity.<sup>479</sup> This presumption is fundamental to the idea of respect for autonomy. It is enshrined in one of the General Principles which must be complied with under the guardianship legislation.<sup>480</sup>

6.14 The presumption is rebuttable. This means that an adult is presumed to have capacity unless the contrary is proven by the evidence. The standard of proof required to rebut the presumption is on the balance of probabilities.<sup>481</sup>

### The statutory test of capacity

#### *The elements of the definition*

6.15 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) provide that an adult has 'impaired capacity' for a matter if the person does not have capacity for the matter:<sup>482</sup>

**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.

6.16 Under this test, capacity is specific to the particular decision or type of decision to be made.<sup>483</sup>

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

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

479 Eg, *Re Bridges* [2001] 1 Qd R 574; *Re T* [1992] 4 All ER 649, 664 (Lord Donaldson MR).

480 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 1; *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 1.

481 Eg, *Re Bridges* [2001] 1 Qd R 574, 583; *Re T* [1992] 4 All ER 649, 661 (Lord Donaldson MR).

482 *Powers of Attorney Act 1998* (Qld) s 3, sch 3 (definitions of 'impaired capacity' and 'capacity'); *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 (definitions of 'impaired capacity' and 'capacity').

483 *Aziz v Prestige Property Services Pty Ltd* [2007] QSC 265, [24] (Lyons J).

6.17 The definition of capacity reflects a functional approach to defining decision-making capacity, which focuses on a person's understanding in relation to a particular task.<sup>484</sup>

6.18 The definition includes two of the abilities which are usually considered to be required for decision-making capacity: cognitive understanding and communication.<sup>485</sup> The remaining element of voluntariness is ordinarily a separate but related requirement for the validity of a legally binding decision.<sup>486</sup>

### **Related matters**

6.19 The *Guardianship and Administration Act 2000* (Qld) acknowledges that the capacity of an adult with impaired capacity to make decisions may differ depending on:<sup>487</sup>

- the nature and extent of the impairment;
- the type of decision to be made, including its complexity; and
- the support available from members of the adult's existing support network.

6.20 The Act also acknowledges that 'the right to make decisions includes the right to make decisions with which others may not agree'.<sup>488</sup>

### **Declarations of capacity**

6.21 One of the Tribunal's functions is to make declarations about an adult's capacity.<sup>489</sup> It is also empowered to make declarations about the capacity of a

484 Commentators in this area have expressed different views about whether the concept of understanding means actual understanding or the ability to understand: see, eg, C Stewart and P Biegler, 'A primer on the law of competence to refuse medical treatment' (2004) 78 *Australian Law Journal* 325, 328; B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 64–5; J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 58.

485 The abilities that are generally agreed to be required for decision-making capacity are the abilities to (a) receive, comprehend, retain and recall relevant information; (b) integrate information received and relate it to one's situation; (c) evaluate benefits and risks in terms of personal values; (d) select an option and give cogent reasons for the choice; (e) communicate one's choice to others; and (f) persevere with the choice until the decision is acted upon: I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 175–6; and J Cockerill, B Collier and K Maxwell, 'Legal Requirements and Current Practices' in B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 27, 38–9.

486 M Parker, 'Judging capacity: paternalism and the risk-related standard' (2004) 11 *Journal of Law and Medicine* 482, 486; J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 58–9.

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

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

489 *Guardianship and Administration Act 2000* (Qld) s 82(1)(a).

guardian, administrator or attorney for a matter.<sup>490</sup> The Tribunal has power to make a declaration about capacity on its own initiative or on application.<sup>491</sup>

6.22 In making a decision under the *Guardianship and Administration Act 2000* (Qld), the Tribunal must ensure that it has all the relevant information and material before it, to the extent it considers practicable.<sup>492</sup> However, it may proceed without receiving further information if it considers that urgent or special circumstances justify it doing so or if all the active parties agree.<sup>493</sup>

6.23 A declaration about whether a person had capacity to enter a contract is, in a subsequent proceeding in which the validity of the contract is in issue, evidence about the person's capacity.<sup>494</sup>

## THE POSITION IN OTHER JURISDICTIONS

### Australia

6.24 All of the other Australian jurisdictions provide for guardianship and administration orders in relation to persons who lack the requisite capacity to make their own decisions. The test of impaired capacity for guardianship and administration differs in each jurisdiction, although there are some similarities.

#### *The test of impaired capacity*

6.25 In each of the other Australian jurisdictions, the definition of impaired capacity (or its equivalent) is based on an inability to make decisions or manage a person's affairs. Unlike Queensland, these definitions also refer to some form of 'diagnostic threshold'. That is, a person has impaired capacity if his or her capacity is impaired because of a particular disability or condition.

6.26 In South Australia, the test for impaired capacity also specifically refers to a person's ability to communicate his or her decisions.

#### *Inability to decide or to manage affairs*

6.27 In New South Wales, the legislation provides for the making of guardianship orders for 'a person who, because of a disability, is totally or partially incapable of managing his or her person'.<sup>495</sup> The relevant

<sup>490</sup> *Guardianship and Administration Act 2000* (Qld) s 146(1).

<sup>491</sup> *Guardianship and Administration Act 2000* (Qld) s 146(2).

<sup>492</sup> *Guardianship and Administration Act 2000* (Qld) s 130(1).

<sup>493</sup> *Guardianship and Administration Act 2000* (Qld) s 131.

<sup>494</sup> *Guardianship and Administration Act 2000* (Qld) s 147.

<sup>495</sup> *Guardianship Act 1987* (NSW) ss 3 (definition of 'person in need of a guardian'), 6A(1)(a), 14(1).

consideration in making financial management orders is whether a person is capable of managing his or her own affairs.<sup>496</sup>

6.28 The South Australian legislation defines ‘mental incapacity’ as ‘the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs’.<sup>497</sup>

6.29 Incapability of looking after one’s own health and safety is also one of the grounds for a guardianship order under the Western Australian legislation.<sup>498</sup>

6.30 In the Northern Territory, Tasmania, Victoria and Western Australia, the legislation applies to a person who is unable to make ‘reasonable judgments’ about his or her affairs.<sup>499</sup>

6.31 In the ACT, the legislation applies if the person’s decision-making ability is ‘impaired’ because of certain condition or state.<sup>500</sup>

#### *The diagnostic threshold*

6.32 In the ACT, the legislation applies if the person’s decision-making ability is impaired ‘because of a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness’.<sup>501</sup>

6.33 In New South Wales, Tasmania and Victoria, the legislation applies to a person with a disability.<sup>502</sup> In New South Wales, the legislation provides no further guidance as to what this means. In Tasmania, ‘disability’ means:<sup>503</sup>

any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological, physiological or anatomical structure or function) of ability to perform an activity in a normal manner.

496 *Guardianship Act 1987* (NSW) s 25G(a).

497 *Guardianship and Administration Act 1993* (SA) s 3.

498 *Guardianship and Administration Act 1990* (WA) s 43(1)(b)(i).

499 *Adult Guardianship Act* (NT) s 3(1) (definition of ‘intellectual disability’); *Guardianship and Administration Act 1995* (Tas) ss 20(1)(b), 51(1)(b); *Guardianship and Administration Act 1986* (Vic) ss 22(1)(b), 46(1)(a)(ii); *Guardianship and Administration Act 1990* (WA) s 43(1)(b)(ii).

500 *Guardianship and Management of Property Act 1991* (ACT) s 5.

501 *Guardianship and Management of Property Act 1991* (ACT) s 5.

502 *Guardianship Act 1987* (NSW) s 2 (definition of ‘person in need of a guardian’) (in contrast, a financial management order may be made if the person is ‘not capable of managing’ his or her own affairs: s 25G(a)); *Guardianship and Administration Act 1995* (Tas) ss 20(1)(a), 51(1)(a); *Guardianship and Administration Act 1986* (Vic) ss 22(1)(a), 46(1)(a)(i).

503 *Guardianship and Administration Act 1995* (Tas) s 3 (definition of ‘disability’).

6.34 In Victoria, a disability means ‘intellectual impairment, mental disorder, brain injury, physical disability or dementia’.<sup>504</sup>

6.35 In the Northern Territory, the diagnostic threshold is ‘an intellectual disability’ being a disability ‘resulting from an illness, injury, congenital disorder or organic deterioration or of unknown origin’.<sup>505</sup>

6.36 In South Australia, the legislation applies to a person who is unable to look after his or her own affairs because of ‘any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration, of the brain or mind’.<sup>506</sup>

6.37 In Western Australia, an administrator may be appointed in respect of a person with a ‘mental disability’ which includes ‘an intellectual disability, a psychiatric condition, an acquired brain injury and dementia’.<sup>507</sup>

#### *Inability to communicate*

6.38 The guardianship legislation in South Australia provides that ‘mental incapacity’ includes the inability to look after one’s own affairs as a result of:<sup>508</sup>

any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever.

6.39 This is the only Australian jurisdiction, other than Queensland, that specifically refers to a person’s ability to communicate his or her decisions as part of the test of impaired capacity.

#### ***The exclusion of certain factors***

6.40 The ACT and the Northern Territory specifically exclude certain factors from what may be taken as impaired capacity under their guardianship legislation.<sup>509</sup> For example, the ACT legislation provides that a person is not taken to have impaired decision-making ability only because the person:<sup>510</sup>

- (a) is eccentric; or
- (b) does or does not express a particular political or religious opinion; or

504 *Guardianship and Administration Act 1986* (Vic) s 3 (definition of ‘disability’).

505 *Adult Guardianship Act* (NT) ss 3(1) (definition of ‘intellectual disability’), 15(1)(a).

506 *Guardianship and Administration Act 1993* (SA) s 3 (definition of ‘mental incapacity’, para (a)).

507 *Guardianship and Administration Act 1990* (WA) ss 3 (definition of ‘mental disability’), 64(1)(a).

508 *Guardianship and Administration Act 1993* (SA) s 3 (definition of ‘mental incapacity’, para (b)).

509 *Guardianship and Management of Property Act 1991* (ACT) s 6A; *Adult Guardianship Act* (NT) s 3(3).

510 *Guardianship and Management of Property Act 1991* (ACT) s 6A (Limits on finding impaired decision-making ability). The *Powers of Attorney Act 2006* (ACT) includes a similar provision which additionally provides that a person is not taken to have impaired capacity only because he or she makes unwise decisions: s 91.

- (c) is of a particular sexual orientation or expresses a particular sexual preference; or
- (d) engages or has engaged in illegal or immoral conduct; or
- (e) takes or has taken drugs, including alcohol (but any effects of a drug may be taken into account).

## The United Kingdom

### *The test of impaired capacity*

6.41 The test of impaired capacity under the *Mental Capacity Act 2005 (UK)* combines both the functional and status approach. Section 2(1) of the Act provides that a person lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. The Act also specifies that it does not matter whether the impairment or disturbance is permanent or temporary.<sup>511</sup>

6.42 For the purposes of deciding whether a person is unable to make a decision in relation to a matter, section 3 of the Act provides the following test:

#### **3 Inability to make decisions**

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
  - (a) to understand the information relevant to the decision,
  - (b) to retain that information,
  - (c) to use or weigh that information as part of the process of making the decision, or
  - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

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*Mental Capacity Act 2005 (UK) s 2(2).*

- (a) deciding one way or another, or
- (b) failing to make the decision.

### **The exclusion of certain factors**

6.43 The *Mental Capacity Act 2005* (UK) also states that a lack of capacity cannot be established merely by reference to:<sup>512</sup>

- a person's age or appearance; or
- a condition of the person, or an aspect of the person's behaviour, which might lead others to make unjustified assumptions about the person's capacity.

## **Ireland**

6.44 In 2006, the Law Reform Commission of Ireland completed a review of vulnerable adults and the law.<sup>513</sup> Among other things, the review dealt with how the law should approach the concept of capacity to make decisions, and what structures are needed to support vulnerable persons when they come to make those decisions.<sup>514</sup>

6.45 The Mental Capacity and Guardianship Bill 2008 (Ireland) was recently introduced into the Irish Parliament.<sup>515</sup> The Bill seeks to implement the recommendations made by the Commission's review.

6.46 The proposed legislation takes a functional approach to the test of capacity. It provides that 'capacity' means 'the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made'.<sup>516</sup>

6.47 The Bill also specifies that, where a decision requires the act of a third party in order to be implemented, a person is to be treated as not having capacity if he or she is unable to communicate by any means.<sup>517</sup>

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512 *Mental Capacity Act 2005* (UK) s 2(3).

513 Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006).

514 *Ibid* [1.02].

515 The Mental Capacity and Guardianship Bill 2008 (Ireland) was introduced into the Irish Parliament on 19 February 2008 (Senator Joe O'Toole, Independent).

516 Mental Capacity and Guardianship Bill 2008 (Ireland) s 7(1).

517 Mental Capacity and Guardianship Bill 2008 (Ireland) s 7(2).

## ISSUES FOR CONSIDERATION

6.48 Capacity is an important threshold issue under the guardianship legislation because it determines whether an individual will in law have autonomy over decision-making in relation to his or her affairs. The test of capacity provides a way of identifying those persons who may need others to make a decision or decisions for them.<sup>518</sup> The presumption of capacity, the statutory definition of capacity and the application of the definition raise various issues for consideration. Consideration of these issues should take into account that impaired capacity for a person may be partial, temporary or fluctuating.

### The presumption of capacity

6.49 As mentioned above, the guardianship legislation contains a statutory statement of presumed capacity. This is consistent with the common law. The presumption is rebuttable on the balance of probabilities. The burden of proving that a person has impaired capacity falls on the person who is seeking to rebut the presumption.<sup>519</sup>

6.50 The presumption that an adult has capacity for a matter is set out in the first of the General Principles in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).<sup>520</sup> The General Principles must be complied with by a person or other entity who performs a function or exercises a power under the legislation for a matter in relation to an adult with impaired capacity.<sup>521</sup> This includes guardians and administrators, statutory health attorneys and attorneys appointed under an enduring document, the Adult Guardian, the Tribunal, and the Supreme Court (when it exercises jurisdiction under the legislation).<sup>522</sup>

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518 If a person does not meet the test of capacity, he or she has 'impaired capacity' under the legislation. A finding of impaired capacity satisfies the first criterion for the appointment of a guardian or administrator for the adult: *Guardianship and Administration Act 2000* (Qld) s 12(1)(a). A finding of impaired capacity may also trigger the exercise of decision-making power for an adult by other substitute decision-makers: see note 476 above.

519 Originally, at common law, once it had been proved that a person lacked capacity, a presumption of continuance operated: the lack of capacity was presumed to continue until the contrary was proved. However, the presumption of continuance was rejected by the English Court of Appeal in *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162. In that case, the plaintiff suffered brain damage as the result of a road traffic accident. It was contended that, where there was evidence that he was incapable of managing his property and affairs for a time, the plaintiff could rely on a presumption of continuance to avoid having to prove that he lacked capacity at a later stage. Kennedy LJ at [17] (Potter and Chadwick LJJ concurring) held that that 'if there is clear evidence of incapacity for a considerable period then the burden of proof may be more easily discharged, but it remains on whoever asserts incapacity'.

520 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 1; *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 cl 1.

521 *Guardianship and Administration Act 2000* (Qld) s 11(1).

522 See [4.11]–[4.12] above.

6.51 The way in which the presumption is applied in practice by the Tribunal, substitute decision-makers and third parties who have dealings with the adult raises some significant issues. For example, is the presumption required to be applied each time a person or entity exercises a power or performs a function under the guardianship legislation for an adult? In particular, how is the presumption to be applied if the Tribunal has previously determined that the adult has impaired capacity for the matter?

6.52 The Tribunal has power to appoint a substitute decision-maker for an adult only if it is satisfied of certain matters, including that the adult has impaired capacity for the matter.<sup>523</sup> In order to make a finding of impaired capacity, the presumption of capacity must be applied and rebutted.

6.53 If the Tribunal has made such a finding and the appointment is reviewed or the adult applies for a declaration of capacity, two approaches may be open. The first approach is that the Tribunal is required by the General Principles to apply the presumption afresh. Under this approach, the onus of proof rests on the person who alleges that the adult has impaired capacity.<sup>524</sup> The second approach is that the prior rebuttal of the presumption has the effect that in the subsequent review or application the adult must prove that he or she has capacity (to displace the prior finding of impaired capacity). This difference in approach may be critical when the weight of the evidence before the Tribunal on the subsequent review or application is finely balanced. This may be particularly the case if the adult has partial or fluctuating capacity.

6.54 Similar uncertainty may arise for substitute decision-makers or third parties who deal with the adult when the Tribunal has made a finding or declaration of impaired capacity for the adult. For example, a guardian or third party (such as a nursing home) may be uncertain whether, for each decision that needs to be made for the adult, the presumption applies or has been displaced by the earlier finding or declaration of impaired capacity. This uncertainty may be particularly acute where the adult asserts that he or she has regained capacity, and there is no evidence to suggest the contrary. It may also cause confusion in a situation where it appears unlikely that an adult will regain capacity, in which case the continued application of the presumption by the adult's substitute decision-maker may seem artificial or futile.

6.55 Another issue relates to the location of the presumption provision in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). The General Principles, which currently set out the presumption, are located in the first schedule to those Acts.<sup>525</sup> Given the fundamental

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523 See [2.34] above.

524 This approach is consistent with s 31(2) of the *Guardianship and Administration Act 2000* (Qld), which provides that the Tribunal, at the end of a review of an appointment of a guardian or administrator for an adult, must revoke its order making the appointment unless it is satisfied it would make an appointment if a new application for an appointment were to be made.

525 Note at [4.125] above, the Commission has raised the issue of whether the General Principles should be relocated in another part of the guardianship legislation.

importance of the presumption of capacity, it may be appropriate to set out the presumption in a separate substantive provision. On the other hand, it may be considered that the relocation of the provision is unnecessary, particularly given that the Act requires compliance with the General Principles.

- 6-1 How is the presumption that an adult has capacity for a matter applied in practice by the Tribunal, substitute decision-makers and third parties who have dealings with the adult?**
- 6-2 In particular, how is the presumption to be applied if the Tribunal has previously determined that the adult has impaired capacity for the matter?**
- 6-3 Should the presumption of capacity, which is set out as one of the General Principles in Schedule 1 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), instead be set out in another part of the legislation?**

### The approach to defining ‘capacity’

6.56 The test of capacity is a threshold issue in guardianship legislation because important legal consequences flow from its application. The issue of capacity determines whether an adult will in law have autonomy to make his or her own decisions.

6.57 As described in Chapter 3, the United Nations Convention recognises the fundamental human rights and freedoms of people with a disability, including people with a mental or intellectual disability. These rights include respect for inherent dignity, individual autonomy, including the freedom to make one’s own choices, and independence.<sup>526</sup> Article 12 of the Convention, which deals with the exercise of legal capacity, provides that people with disabilities are to be given any necessary support to exercise their legal capacity.<sup>527</sup> The Convention also recognises the right of people with disabilities to freedom from exploitation and abuse.<sup>528</sup> It also involves a corresponding focus on ability rather than disability.

<sup>526</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 3. Article 3 is set out at [3.10] above.

<sup>527</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12. Article 12 is set out at [3.11] above. Any measures taken in this regard must respect the rights, will and preferences of the person, be free from conflict of interest and undue influence, be proportional and tailored to the person’s circumstances, apply for the shortest possible time and be subject to regular review.

<sup>528</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 16. Article 16 is set out at [3.12] above.

6.58 One of the core considerations, therefore, when examining the merits of a particular approach for determining capacity is the impact it is likely to have on the right of an adult to self-determination. It is also necessary to consider how to achieve an appropriate balance between promoting the autonomy and rights of the adult while also safeguarding his or her interests. Setting too high a threshold for capacity will tend to weigh against the principle of self-determination, while setting the standard too low may place the adult at risk of harm.

6.59 The major models for understanding the notion of capacity are the functional approach, the status approach and the outcome approach. The lines between these different approaches are often blurred in practice.

6.60 The Queensland guardianship legislation uses the functional approach in defining capacity. One issue for consideration is whether this remains an appropriate model for defining 'capacity', or whether some other approach, or combination of approaches, is preferred.

### ***The functional approach***

6.61 The functional approach is based on the cognitive (functional) ability to make a specific decision, including a specific type of decision, at the time the decision is to be made. It focuses on the reasoning process involved in making decisions.<sup>529</sup> This encapsulates the abilities to understand, retain and evaluate the information relevant to the decision (including its likely consequences) and to weigh that information in the balance to reach a decision.<sup>530</sup>

6.62 It has been suggested that one of the advantages of the functional approach is that it 'best accommodates the reality that decision-making capacity is a continuum rather than an endpoint which can be neatly characterised as present or absent'.<sup>531</sup> In contrast to the status model, there is no requirement for the presence of a particular type of disability or condition. The question is

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529 J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 58.

530 *Re MM* [2007] EWHC 2003 (Fam) [62]–[82] (Munby J); *Re MB* [1997] 2 Fam Law R 426, 437 (Butler-Sloss LJ); *R (Burke) v General Medical Council* [2005] QB 424, [42] (Munby J); *Re C* [1994] 1 All ER 819, 824 (Thorpe J).

In *Re T* [1992] 4 All ER 649, which concerned the refusal of consent to medical treatment, Lord Donaldson stated (at 661) that:

What matters is that the doctors should consider whether at that time [the patient] had a capacity which was commensurate with the gravity of the decision which he purported to make. The more serious the decision, the greater the capacity required.

It has been suggested that this 'sliding scale approach' also takes into account the outcome of the decision: C Stewart and P Biegler, 'A primer on the Law of competence to refuse medical treatment' (2004) 78 *Australian Law Journal* 325, 333; J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 61–2. See also M Parker, 'Judging capacity: paternalism and the risk-related standard' (2004) 11 *Journal of Law and Medicine* 482, 486, where the author argues that there should be just one standard of assessment of capacity, not a standard that alters with the gravity of the decision.

531 Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.28].

whether the adult lacks capacity for making a decision about a given matter, for whatever cause and for whatever reason.<sup>532</sup>

6.63 The functional approach is said to acknowledge that ‘the presence of a particular type of disability does not necessarily involve a need for assistance’.<sup>533</sup> It also avoids any problems such as paternalism, prejudice, stigmatisation or unjustified assumptions about an adult’s level of capacity that are sometimes associated with labelling people with particular types of disabilities or conditions.<sup>534</sup> It is also consistent with the principle of least restriction for an adult in making decisions because it involves proportionate and minimal intrusion on decision-making autonomy.<sup>535</sup>

6.64 The functional approach is the most widely accepted modern capacity model. A number of jurisdictions where recent reform has occurred have wholly or partly based their statutory test of decision-making capacity (or incapacity) on this model.<sup>536</sup> The functional approach is consistent with the social model of disability which emphasises human rights and with the legal presumption of capacity. It also reflects a number of aspects of article 12 of the United Nations Convention, including the recognition of legal capacity and the principle of least restriction. Being decision and time specific, the functional approach accommodates the partial, temporary or fluctuating nature of impaired capacity that may be experienced by an adult.

6.65 The application of the functional approach in practice raises some issues for consideration. This approach is based on the general criterion of a person’s capacity to understand the nature and consequences of a particular decision. This raises the issue of including appropriate safeguards, such as the exclusion of certain factors, in the assessment process to ensure that the test is applied correctly and is therefore not overly inclusive. In addition, a literal understanding of the functional approach would require a capacity assessment to be carried out each time a particular decision needs to be made. This raises the issue whether it is necessary to continue to assess a person’s capacity if he or she has lost decision-making capacity in a particular area of decision-making and is unlikely to regain it. In this regard, the Law Commission of Ireland has suggested that a ‘common sense approach be taken to assessing capacity

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532 *Re ‘Tony’* (1990) 5 NZFLR 609, [16] (Judge Inglis).

533 South African Law Reform Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [4.33].

534 Eg, Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making for People Who Need Assistance Because of Mental or Intellectual Disability*, Discussion Paper No 38 (1992) [4.3.2].

535 *Guardianship and Administration Act 2000* (Qld) s 5(d). Also, in exercising a power under the Act, 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: *Guardianship and Administration Act 2000* (Qld) sch 1 cl 7(3)(c).

536 Eg, *Mental Capacity Act 2005* (UK); *Adults with Incapacity (Scotland) Act 2000* (Scotland); *Mental Capacity and Guardianship Bill 2008* (Ireland).

including determining when a separate functional assessment of capacity is merited'.<sup>537</sup>

### **The status approach**

6.66 In contrast to the functional approach, the status approach involves making a decision on a person's general legal capacity based on the presence or absence of certain characteristics, for example, a mental disability or other condition, rather than actual decision-making ability. This is consistent with the medical model of capacity which focuses on impairment from a medical perspective.

6.67 The status approach therefore tends to view capacity on an all-or-nothing basis. In contrast to the functional approach, it is not decision-specific; nor does it take into account that an adult with a defined disability or condition may have the capacity to make some decisions. It may also operate unfairly in relation to the issue of fluctuating capacity.

6.68 It has been suggested that, unless a person has no decision-making ability nor any real prospect of regaining capacity, the status approach is unnecessarily disabling in its effect:<sup>538</sup>

The fact that a person has a disability which commonly means that a person will not be able to make decision for themselves may signify a potential lack of capacity but it should not be decisive of the issue.

6.69 In some jurisdictions, the legislation combines the status and functional approaches.<sup>539</sup> This is the approach used in the United Kingdom.<sup>540</sup> The first step in this combined approach is to establish the presence of a 'mental disability' precondition (the status approach). The second step is to determine whether the mental disability has affected the person's ability to make a specific decision at the time the decision is to be made (the functional approach).

6.70 The purpose of a diagnostic threshold, such as a mental disability precondition, is to provide a safeguard against inappropriate interference in the lives of adults whose perceived failure to manage their affairs is attributable merely to factors such as a lack of inclination or eccentricity.<sup>541</sup> It has been suggested, however, that the inclusion of a diagnostic threshold is not an

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537 Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.71].

538 Law Reform Commission of Ireland, *Vulnerable Adults and the Law: Capacity*, Consultation Paper No 37 (2005) [2.37].

539 Eg, *Mental Capacity Act 2005* (UK) s 2; *Adults with Incapacity Act (Scotland) 2000* (Scotland). A combined approach is also evident in relation to the capacity of a child to enter into a contract.

540 Under the *Mental Capacity Act 2005* (UK), a person lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain: *Mental Capacity Act 2005* (UK) s 2(1).

541 Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.8].

appropriate safeguard.<sup>542</sup> It may have little value if there is an obvious need for intervention. It may also have the effect of limiting intervention to certain situations while not catering for others. For example, a person may have a particular disability or condition but have no need of intervention. Conversely, a person may not have a particular disability or condition but nevertheless require intervention. Another issue raised by this combined approach is that it raises the same concerns noted above about linking capacity to mental disability.<sup>543</sup>

### **The outcome approach**

6.71 The outcome approach determines capacity according to whether the person's decision conforms to normal social values (or the values of the assessor). It is possible that the likely outcome of a person's choice may indicate his or her wider understanding of the decision. It has been suggested, however, that the use of this approach as the primary approach to capacity is objectionable because 'its subjective basis tends to involve the projection of the reviewer's subjective values onto the decision of the subject'.<sup>544</sup> This may mean that a person is considered to lack capacity if he or she makes what are perceived as imprudent or unusual decisions.<sup>545</sup>

6.72 However, the mere fact that a person makes a decision which is inconsistent with conventional values, or with which the assessor disagrees, does not of itself represent a lack of capacity. In *Bailey v Warren*, Arden LJ observed that the relevant concern is:<sup>546</sup>

the quality of the decision-making and not the wisdom of a decision. A rational individual has in general the right to make an irrational decision about himself or his affairs. So if an individual was capable in law of making a decision, it will not be set aside because it was unwise or because its outcome is materially adverse to him.

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Eg, South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [4.33].

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See [6.63] above. Also see, generally, Law Commission (England and Wales), *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction*, Consultation Paper No 128 (1993) [3.10]–[3.13]. In its final Report, the Law Commission of England and Wales considered that misgivings about the use of a diagnostic threshold tended to relate to the over-use of protective powers rather than the perceived stigma which attached to the relevant definition in the legislation at that time. The Law Commission concluded that a diagnostic threshold would provide 'a significant protection and would in no sense prejudice or stigmatise those who are in need of help with decision-making': Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.8].

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Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.26].

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It has been observed that, in practice, the outcome approach sometimes is applied in the context of medical decision-making: Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.15]; Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.26]. See also note 530 above.

On one view, a person's capacity to make a decision should not be assessed in terms of the outcome of the decision. This view suggests that adults should be entitled to make decisions with which others disagree. On the other hand, it may be appropriate to consider outcomes in some circumstances. For example, a person should arguably be able to make a decision which involves little or no risk to the person or others, even if the person's decision does not conform to other's values.

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[2006] EWCA Civ 51, [118].

6.73 The guardianship legislation in several jurisdictions, including Queensland, includes measures to discount the use of the outcome approach in practice.<sup>547</sup> For example, the *Guardianship and Administration Act 2000* (Qld) acknowledges that an adult's right to make decisions 'includes the right to make decisions with which others may not agree'.<sup>548</sup>

**6-4 Should the definition of 'capacity' in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be modelled on any of the following approaches:**

- (a) a person's ability to make a specific decision, including a specific type of decision, at the time the decision is to be made (the functional approach);
- (b) some form of diagnostic threshold (for example, an intellectual impairment, mental illness, physical disability or dementia) (the status approach);
- (c) the content of a person's decision (the outcome approach);
- (d) a combination of any of the above;
- (e) some other approach?

### The definition of 'capacity'

6.74 The definition of 'capacity' of a person for a matter under the guardianship legislation requires a person to be capable of understanding the nature and effect of decisions about the matter, to freely and voluntarily make decisions about the matter and to communicate the decision in some way.<sup>549</sup> These elements are interdependent. It is only necessary for one of these elements to be absent for there to be a finding of impaired capacity.

6.75 If a person does not meet this test for a particular matter, he or she is said to have 'impaired capacity' for that matter.<sup>550</sup> This may trigger the exercise of power by, or the appointment of, a substitute decision-maker for the adult. It is very important, therefore, to make sure the test of capacity is neither too wide nor too narrow. If it is too wide, people who do not need others to make decisions for them may have their right to make decisions taken away unfairly.

<sup>547</sup> The exclusion of specific matters in determining decision-making capacity is discussed at [6.113]–[6.118] below.

<sup>548</sup> *Guardianship and Administration Act 2000* (Qld) s 5(b).

<sup>549</sup> The test is set out in full at [6.15] above.

<sup>550</sup> *Ibid.*

If it is too narrow, there may be some people who do need help with decision-making whose needs and interests are not met.

***Ability to understand the nature and effect of the decision: clause (a)***

6.76 The first part of the definition of ‘capacity’ requires that the person be capable of understanding the ‘nature and effect of decisions about the matter’. As mentioned above, this involves matters of understanding and related cognitive operations.<sup>551</sup> This reflects the common law requirement that a person must be able to understand the nature and effect of a decision when it has been explained to him or her.<sup>552</sup>

6.77 One issue for consideration is that the guardianship legislation gives limited guidance about the meaning of being unable to understand the nature and effect of decisions. In particular, the *Guardianship and Administration Act 2000* (Qld) gives no assistance about the actual mechanics of the process for assessing whether a person is capable of understanding the nature and effect of a decision about the matter.<sup>553</sup>

6.78 One way to provide such assistance may be to include a provision in the Act which sets out specific criteria for assessing a person’s ability to understand the nature and effect of decisions about the matter. For example, in the United Kingdom, the *Mental Capacity Act 2005* (UK) refers to a range of capacities involved in the process of understanding decisions. For the purposes of that Act, a person is unable to make a decision if he or she is unable to:<sup>554</sup>

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551 See [6.18], [6.61] above.

552 *Gibbons v Wright* (1954) 91 CLR 423, 438 (Dixon CJ, Kitto and Taylor JJ); *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162, [58] (Chadwick LJ); *Aziz v Prestige Property Services Pty Ltd* [2007] QSC 265 [61], [62] (Lyons J). See also, B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 63–4; J Devereux and M Parker, ‘Competency issues for young persons and older persons’, in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 57, 58.

553 The Commission, in its earlier Report in 1996, considered whether the proposed new guardianship legislation should include additional criteria for assessing a person’s decision-making capacity. These functional competences, based on similar criteria contained in the *Intellectually Disabled Citizens Act 1985* (Qld), included the competence to carry out the usual functions of daily living, the care and maintenance of oneself and one’s home environment, the ability to perform civic duties, the ability to enter into contracts, and the ability to make informed decisions concerning oneself. The Commission was not persuaded that additional criteria should be included, noting that the inclusion of criteria may result in the consideration of factors which are irrelevant to that decision: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making By and For People With a Decision-Making Disability*, Report No 49 (1996) Vol 1, 175.

554 *Mental Capacity Act 2005* (UK) s 3(1)(a)–(c). This provision is based on the recommendations made by the Law Commission of England and Wales in its review of the law relating to decision-making for adults with mental incapacity: Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.15]–[3.17]. For the purposes of deciding whether a person is ‘unable to make a decision’, the Law Commission considered the adoption of a three-part test, requiring a person to be capable of:

- understand the information relevant to the decision;
- retain that information;
- use or weigh that information as part of the process of making the decision.

6.79 This test takes into account that, in some cases, a person has the ability to understand and retain information but is unable to act on the information. This may be the case, for example:<sup>555</sup>

- in certain compulsive conditions (for example, anorexia) which cause people who are able to absorb information to arrive at decisions that are unconnected to the information or their understanding of it;
- where a person is unable, because of a delusional disorder, to believe the information relevant to the decision,<sup>556</sup> or
- where a person is unable, because of a mental or intellectual disability, to exert his or her will over the influence of a stronger person.<sup>557</sup>

6.80 The provision of specific criteria in the Act for assessing whether a person understands a decision may provide greater clarity for substitute decision-makers for people with impaired capacity and promote consistency in decision-making. On the other hand, it may be considered unnecessary to provide criteria for making such an assessment.

*The information required to assess understanding*

6.81 As mentioned above, the required level of understanding is that the person is able to understand the nature and effect of making such a decision after it is explained to him or her.<sup>558</sup>

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- comprehending and retaining information relevant to the decision (including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make that decision);
  - believing such information; and
  - using the information to arrive at a choice.

The Law Commission based this functional test for capacity on a three-stage test formulated by Thorpe J in *Re C* [1994] 1 All ER 819 and *Re B* [2002] 2 All ER 449.

The *Mental Capacity Act 2005* (UK) also includes, as a residual category of incapacity, the inability to communicate his or her decision (whether by talking, using sign language or any other means): *Mental Capacity Act 2005* (UK) s 3(1)(d). The capacity to communicate is discussed at [6.106]–[6.110] below.

555 Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.17].

556 *Eg, Re C* [1994] 1 All ER 819 (Thorpe J); *Re MM* [2007] EWHC 2003 (Fam) [81] (Munby J).

557 In Queensland, this is covered by a separate ‘freely and voluntarily’ test, not by the test of understanding. See [6.88]–[6.103] below.

558 See [6.76] above.

6.82 A requirement for information to be given about a specific decision is of particular importance when an explanation about the decision is crucial to a person's ability to understand the decision. The failure to provide adequate disclosure or time for deliberation may result in the appearance of impaired capacity.<sup>559</sup>

6.83 The General Principles which govern the operation of the guardianship legislation refer to the importance of preserving, to the greatest extent possible, an adult's right to make his or her own decision.<sup>560</sup> The General Principles also state that the adult must be given 'any necessary support, and access to information' to enable the adult to make his or her own decisions.<sup>561</sup> The legislation does not further elaborate on the amount or complexity of information that a person might need to be able to understand. One advantage of a broad requirement to provide 'any necessary support, and access to information' is that it allows a flexible approach in assessing this aspect of capacity. This is also consistent with article 12 of the United Nations Convention, which requires persons with disabilities to be given any necessary support to exercise their legal capacity.

6.84 The *Mental Capacity Act 2005* (UK) provides the following guiding principles in relation to the adult's understanding of relevant information when applying the test of capacity:<sup>562</sup>

- The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or of failing to make the decision;
- A person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to the person in a way that is appropriate to his or her circumstances (using simple language, visual aids or any other means); and
- The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent the person from being regarded as able to make the decision.

6.85 The first of these provisions clarifies that the information relevant to a decision includes information about the likely consequences of the decision. The second provision deals with the need to provide adequate and appropriate information to the person. The third provision may be relevant in the case of a person with memory difficulties or who has fluctuating capacity.

<sup>559</sup> J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 72.

<sup>560</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(2).

<sup>561</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(3)(a). Also see s 5(e).

<sup>562</sup> *Mental Capacity Act 2005* (UK) s 3(2)–(4).

6.86 It may assist an adult to make decisions if the *Guardianship and Administration Act 2000* (Qld) contained more detail about the nature and extent of the information required to be given to an adult. For example, it has been suggested that careful explanations, including simplifications and visual aids, may facilitate an adult's capacity to make a decision.<sup>563</sup>

6.87 On the other hand, it may be unnecessary to provide further guidance about the nature and extent of the information required to be given to an adult. However, even if no further provision regarding such an explanation is made in the Act, it may be desirable to relocate the requirement to give information to an adult within the definition of capacity or a related provision.

**Ability to make decisions about the matter freely and voluntarily: clause (b)**

6.88 The second part of the definition of 'capacity' in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) is the capacity to make decisions 'freely and voluntarily'. Queensland is the only Australian jurisdiction which includes an assessment of voluntariness in its statutory test of capacity.<sup>564</sup>

6.89 The Tribunal has generally considered this aspect of the definition in the context of the adult's susceptibility to another person's influence.<sup>565</sup>

6.90 In *Re ZJ*, the Tribunal noted that the 'free and voluntary aspect' of the definition of capacity under the Queensland guardianship legislation relates to volition (free will) and whether the adult's free will has been so completely overborne that he or she has an inability to make up his or her own mind.<sup>566</sup>

6.91 The Tribunal has also considered the adult's susceptibility in terms of 'undue influence'.<sup>567</sup> For example, in *Re GAG* the Tribunal observed that:<sup>568</sup>

<sup>563</sup> J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 72.

<sup>564</sup> In its original review of the guardianship laws, the Commission proposed that decision-making capacity should be assessed on the basis of the person's ability to understand the nature of a decision and to foresee the consequences of making it in a particular way or to communicate the decision in some way even though all practicable methods of communicating with the person have been attempted: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making By and For People With a Decision-Making Disability*, Report No 69 (1996) Vol 1, 174–5, 177–8, 180.

<sup>565</sup> The Tribunal has also held that the effect of a delusional disorder may cause an inability to make decisions freely and voluntarily: *Re DFS* [2006] QGAAT 41. In the United Kingdom, this is included in the test of understanding. See [6.79] above, and see *Re C* [1994] 1 All ER 819 (Thorpe J).

<sup>566</sup> [2006] QGAAT 36, [33]. See also *Re PCM* [2006] QGAAT 56, [102].

<sup>567</sup> Eg, *Re GAG* [2002] QGAAT 5, [7.3]; *Re AMH* [2004] QGAAT 2, [35]; *Re FHW* [2005] QGAAT 50, [44]; *Re WO* [2006] QGAAT 5, [33]; *Re ZJ* [2006] QGAAT 36, [33]; *Re PCM* [2006] QGAAT 56, [95]–[104].

The equitable doctrine of undue influence is discussed at [6.98] below. Note that in *Re ZJ* [2006] QGAAT 36, [33] the Tribunal noted that the equitable doctrine of 'undue influence' is legally distinct from the 'free and voluntary aspect' of the definition of 'capacity' under the guardianship legislation.

<sup>568</sup> [2002] QGAAT 5, [7.3]. See also *Re FHW* [2005] QGAAT 50, [44], in which the Tribunal observed that the test 'looks at volition and the susceptibility of an adult to undue influence'.

The Tribunal generally has interpreted [the capacity to make decisions freely and voluntarily] to mean that, when making decisions, the adult is not subject to undue influence and that the decision is indeed that of the adult and no one else.

6.92 An issue for consideration is whether it is necessary or appropriate to include the ability to make decisions freely and voluntarily ('the voluntariness element') in the definition of capacity in the guardianship legislation.

6.93 The current definition merges two conditions for legally binding decisions: competence and voluntariness.<sup>569</sup> The first condition reflects the common law requirement that a person has the necessary mental capacity for making a legally effective decision.<sup>570</sup> This standard requires that a person has the cognitive ability to understand the nature and consequences of the decision or transaction<sup>571</sup> It also requires that the person has the cognitive ability to reach a decision by weighing the relevant information in the balance.<sup>572</sup> The second condition is possibly based on equitable considerations. The absence of free choice may vitiate an otherwise valid transaction.

6.94 On one view, the test of capacity should essentially relate to cognitive ability alone. On another view, the test should include a separate assessment of voluntariness.

6.95 On the face of the current test, it is possible that a person who has cognitive capacity and is otherwise competent, but whose will is overborne, is defined as lacking capacity, and may lose decision-making autonomy.<sup>573</sup> On the other hand, the test may reflect the practical reality that, in some circumstances, the question of cognitive capacity may give rise to issues about the voluntariness of decision-making, and vice versa.<sup>574</sup> In this circumstance,

569 J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 58–9.

570 This requirement is illustrated by the making of testamentary dispositions (*Banks v Goodfellow* (1870) LR 5 QB 549), entry into marriage (*Durham v Durham* (1885) 10 PD 80) and consent to medical treatment (*Re C* [1994] 1 All ER 819). In such cases, the disposition or consent, if made without the necessary mental capacity, is void and of no effect. The position is different under contract law. For example, a person cannot enter into a legally binding contract unless he or she has the capacity to understand the nature and effect of the transaction. However, a contract made by a person without the necessary capacity is voidable against the other party to the contract if it is proven that the other party knew of the lack of capacity: *The Imperial Loan Company Ltd v Stone* [1892] 1 QB 599.

571 *Gibbons v Wright* (1954) 91 CLR 423. An adult is able to make his or her own decision if he or she is able to understand information relevant to the decision and to make a decision based on that information.

572 *R (Burke) v General Medical Council* [2005] QB 424, [42] (Munby J); *Re MB* [1997] 2 Fam Law R 426, 437 (Butler-Sloss LJ); *Re C* [1994] 1 All ER 819, 824 (Thorpe J).

573 Eg, M Parker, 'Patient Competence and Professional Incompetence: Disagreements in Capacity Assessments in One Australian Jurisdiction and their Educational Implications', (2008) 16 *Journal of Law and Medicine* 25, 28.

574 Eg, *Re FHW* [2005] QGAAT 50, [33], [48]; *Re PCM* [2006] QGAAT 56, [98]. See also M Parker, 'Patient Competence and Professional Incompetence: Disagreements in Capacity Assessments in One Australian Jurisdiction and their Educational Implications', (2008) 16 *Journal of Law and Medicine* 25, 28, in which the author suggests that the Tribunal considers 'the voluntary status of decisions in relation to the cognitive status of the person, such that a person with cognitive deficits is frequently observed to be more vulnerable to the influence of others'.

where there is a close relationship between the issues of cognitive capacity and voluntariness, the decision reached may not be the adult's 'true' decision. This may be especially the case for an adult who has a reduced or a marginal level of cognitive capacity and is reliant on others for advice or assistance.<sup>575</sup> This situation may arise, for example, where an elderly person, who has a mild cognitive disability, is susceptible to the influence of family members in relation to financial matters.

6.96 The current test of capacity also raises the question of what should be taken as a lack of freedom or voluntariness in decision-making. It may not be appropriate, for example, for a finding of impaired capacity to extend to people who choose to have certain decisions made for them in the absence of any real duress. This may arise, for example, where a person acts on the recommendation of his or her partner in buying a car.

6.97 However, the inclusion of the voluntariness element in the definition of capacity may have some practical benefits. Since the determination of a person's capacity may sometimes raise questions about coercion, it may be convenient to determine both issues together. In relation to legal decisions or transactions, the inclusion of the voluntariness element in the definition of capacity avoids the need for a person to take subsequent legal action to overturn a particular transaction or decision. Such an action may be, for example, to set aside a financial transaction on the basis of undue influence or fraud, or to revoke the appointment of a guardian or administrator. In addition, in relation to decisions that are not of a legal nature, an assessment of voluntariness may help to avoid the making of poor or unfair decisions. It also enables the issue of volition to be decided by a body that has expertise in the area of guardianship law, as well as flexibility in its proceedings and procedures. It is also noted that article 12 of the United Nations Convention provides that measures to assist persons with disabilities to exercise their legal capacity must be free of conflict of interest and undue influence.<sup>576</sup>

6.98 The equitable doctrine of 'undue influence'<sup>577</sup> applies to set aside a transaction a person who is in a more powerful position to another improperly uses his or her influence over the other person to obtain some benefit for

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575 Eg, *Re PCM* [2006] QGAAT 56, [56].

576 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12(4).

577 This doctrine was developed by the Courts of Equity to set aside property transactions brought about by one party taking advantage of the vulnerability of the other: *Allcard v Skinner* (1887) 36 Ch D 145, 182–3.

There are some relationships which by their nature raise a presumption of undue influence. In others, there is no presumption, but proof of particular aspects of the relationship may cause the presumption to be inferred: RP Meagher, JD Heydon and MJ Leeming, *Equity: Doctrines and Remedies*, (4th ed). Section 87 of the *Powers of Attorney Act 1998* (Qld) provides that, if an attorney under an enduring power of attorney or advance health directive enters into a transaction with a relation, business associate or close friend of the attorney, it is presumed that the principal was induced to enter the transaction by the attorney's undue influence.

himself, herself or a third party.<sup>578</sup> However, not all influence involves obtaining some form of benefit or disadvantage. It may be the case, for example, that a person may exercise significant influence over another person (for example, to give prudent advice) for no corresponding gain.

6.99 The presence of the voluntariness element in the test of capacity may raise concerns about the nature and scope of its application. It may therefore be desirable for the legislation to clarify the nature and scope of the free and voluntary test. It may be desirable for the legislation to clarify the nature and extent of the influence involved, if any. It may be helpful, for example, for the legislation to distinguish between improper or unfair influence and other influence. On the other hand, such attempts to define voluntariness may be too prescriptive and inflexible.

6.100 If the scope of the voluntariness element is too wide, it may interfere with an individual's right to enter into transactions as he or she chooses, even if those transactions are imprudent, unreasonable or unjust.<sup>579</sup> In the case of a legal transaction, if a recognised invalidating circumstance such as fraud or undue influence exists, an appropriate remedy may be sought in the courts.<sup>580</sup> It is noted, however, that the difficulty and expense involved in taking such action in some cases may be prohibitive. On the other hand, if the test is too narrow, it may not be sufficiently flexible to accommodate the needs and interests of adults with impaired capacity.

6.101 If the voluntariness element is retained, a related issue for consideration is whether the guardianship legislation should include criteria for determining whether a person has the capacity to make decisions freely and voluntarily. It may be relevant to consider factors such as the circumstances in which the decision was made (for example, whether the adult made the decision in the presence of another person who may otherwise exercise influence over him or her), the existence of a pattern of coercion, the adequacy

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*Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711, 720 (Hodges J); *Watkins v Combes* (1922) 30 CLR 180, 194 (Isaacs J) quoting *Poosathurdi v Kanappa CheHair* (1919) LR 47 IA, 1: 43 Madras, 546 (Lord Shaw). The focus of undue influence is on the sufficiency of consent in the sense that the will of the other party is not free and voluntary because it is overborne: M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) 31.

In *Watkins v Combes* (1922) 30 CLR 180, 193–4, Isaacs J quoted the observation of Lord Shaw in *Poosathurdi v Kanappa CheHair* (1919) LR 47 IA, 1: 43 Madras, 546:

It is a mistake ... to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point 'influence' alone has been made out. Such influence may be used widely, judiciously and helpfully. But ... more than mere influence must be proved so as to render influence, in the language of the law, 'undue'. It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying on his authority or aid.

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See, in relation to legal transactions, *Brusewitz v Brown* [1923] NZLR 1106, 1109 (Salmond J); *Louth v Diprose* (1992) 175 CLR 621, 631 (Brennan J).

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A transaction entered into as a consequence of undue influence may be set aside: RP Meagher, JD Heydon and MJ Leeming, *Equity: Doctrines and Remedies* (4th ed 2002) [15005]. Equitable compensation is also available as a remedy in undue influence: *Smith v Glegg* [2005] 1 Qd R 561, [64] (McMurdo J).

of information given about the decision or transaction and the adequacy of any payment made, if relevant. On the other hand, the provision of criteria may be unnecessary and give rise to inflexibility.

6.102 There may be other ways to deal with the issue of voluntariness in the guardianship legislation other than in the definition of capacity. One approach may be for the legislation to expressly require the Tribunal to consider the issue of voluntariness (or coercion) when determining whether there is a need to appoint a substitute decision-maker for the adult.<sup>581</sup>

6.103 Another approach may be to formulate legislative guidelines in relation to intervention when an adult is at risk of being unduly influenced.<sup>582</sup> Such guidelines, based, among other things, on the principles which underpin the legislation,<sup>583</sup> might form part of a code of practice for the guidance of persons who assess decision-making capacity. This is the approach used in the United Kingdom under the *Mental Capacity Act 2005 Code of Practice*. For example, in response to the principle that ‘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’, the Code states that:<sup>584</sup>

anyone supporting a person who may lack capacity should not use excessive persuasion or ‘undue pressure’. This might include behaving in a manner which is overbearing or dominating, or seeking to influence the person’s decision, and could push a person into making a decision they might not otherwise have made. However, it is important to provide appropriate advice and information. (note omitted)

6.104 The New South Wales Attorney-General’s Department has taken a similar approach in its *Capacity Toolkit*.<sup>585</sup>

Decisions must be made freely and voluntarily. The person making the decision must not feel pressured or deceived into making a decision they would not otherwise make.

6.105 While this approach is broader than the previous alternative, it has the advantage that it applies to capacity assessments in general, rather than being limited to determinations by the Tribunal about the appointment of guardians or

581 *Guardianship and Administration Act 2000* (Qld) s 12(1)(c). In *Re HEM* [2004] QGAAT 49, the Tribunal considered the susceptibility of the adult to influence as a factor in deciding whether the adult was in need of a guardian.

582 See [6.123]–[6.128] below.

583 Eg, General Principle 7(2) requires that the importance of preserving, to the greatest extent practicable, an adult’s right to make his or her decisions must be taken into account: *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 7(2).

584 Department for Constitutional Affairs (UK), *Mental Capacity Act 2005 Code of Practice* [2.8], <<http://www.justice.gov.uk/guidance/mca-code-of-practice.htm>> at 15 August 2008.

585 New South Wales Attorney General’s Department, *Capacity Toolkit* (2008) 71 <[http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL\\_DiversitySrvces.nsf/pages/diversity\\_services\\_s5\\_1](http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_s5_1)> at 15 August 2008.

administrators. This approach, however, is contingent upon a code of practice being developed.

***Ability to communicate the decisions in some way: clause (c)***

6.106 The third part of the definition of capacity in the guardianship legislation concerns the person's ability to communicate his or her decisions in some way. The *Guardianship and Administration Act 2000* (Qld) also provides (in a later provision relating to declarations about capacity) that, in deciding whether a person can communicate decisions in some way, the Tribunal 'must investigate the use of all reasonable ways of facilitating communication, including, for example, symbol boards or signing'.<sup>586</sup>

6.107 In South Australia and the United Kingdom, the inability to communicate forms a residual category of incapacity.<sup>587</sup> In South Australia, the legislation generally refers to an inability to communicate wishes or intentions in any manner whatsoever, while in the United Kingdom, the incapacity is more specifically described as an inability to communicate decisions, whether by talking, using sign language or any other means.

6.108 In many situations, people who have a limited ability to communicate may have developed ways of communicating their wishes to others. However, in limited circumstances, a person may have no ability to communicate his or her decisions to others. This may arise if a person is unable to make a decision and communicate it (for example, because of unconsciousness or delirium) or understands enough to make a decision but cannot communicate it (for example, because of a severe stroke).<sup>588</sup> In some cases, it may be unclear whether the person is incapable of decision-making or merely of communicating.

6.109 It is noted that physical disability alone is insufficient to attract the need for a substituted decision-maker. It is only when such a disability causes an inability to communicate at all that a person is regarded as not being able to make decisions.

6.110 One issue for consideration is whether the definition of capacity should include the requirement of an ability to communicate decisions. The advantage of taking this ability into account is that it acknowledges that the unavoidable consequence of having an inability to communicate is the loss of decision-making autonomy. The disadvantage of including communicative

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586 *Guardianship and Administration Act 2000* (Qld) s 146(3).

587 *Guardianship and Administration Act 1993* (SA) s 3 (definition of 'mental incapacity', para (b)); *Mental Capacity Act 2005* (UK) s 3(1)(d). In Ireland, the Mental Capacity and Guardianship Bill 2008 (Ireland), which was introduced into the Irish Parliament on 19 February 2008, provides that where a decision requires the act of a third party in order to be implemented, a person is to be treated as not having capacity if he or she is unable to communicate by any means: s 7(2).

588 B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 64–5.

ability in the definition is that it may raise concerns about making a finding of impaired capacity where an insufficient effort is made to understand a person or where a person's communication of a decision is misunderstood, interfered with or obstructed by others.<sup>589</sup>

6.111 Another issue is whether the current reference to the ability to communicate 'in some way' in the definition of capacity under the guardianship legislation is sufficient. As noted above, in deciding whether a person can communicate decisions in some way, the Tribunal must investigate the use of all reasonable ways of facilitating communication, including, for example, symbol boards or signing.<sup>590</sup> This appears to be consistent with article 12(3) of the United Nations Convention which provides for access by persons with disabilities to the support they may require in exercising their legal capacity.

6.112 It may be helpful to refer in the definition to some of the different ways in which a person may be able to communicate (for example, talking, using sign language or any other means). This may clarify that a person is not to be treated as unable to communicate his or her decision until all practicable steps have been taken to enable him or her to communicate it. On the other hand, it may be that the current provisions concerning the ability to communicate 'in some way' are sufficient, and no change is needed. The Commission is interested in knowing whether this aspect of the definition of capacity raises any problems in practice.

**6-5 Is the formulation of the current definition of 'capacity' in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) adequate and appropriate? If no, what specific changes should be made to the definition?**

**6-6 In relation to the first part of the definition of 'capacity' (the ability to understand the nature and effect of the decision), should the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) make provision for any of the following matters:**

**(a) the information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision;**

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For example, in some situations, cultural factors may operate so that a person, when asked to give a view about a matter to another person, gives their view in a way that appears to concur with the other person's view, regardless of whether the person holds that view: D Eades, *Aboriginal English and the Law* (1992) 51; Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*, Report (1996) 21. This characteristic is known as 'gratuitous concurrence'. This may arise, for example, if an 'unsophisticated' Indigenous person, in response to a question, appears to agree with a proposition put to him or her, regardless of whether the person truly agrees with it or even understands the proposition.

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See [6.106] above.

- (b) a person is not to be regarded as unable to understand the information relevant to a decision if the person is able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances (using simple language, visual aids or any other means);
  - (c) the fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision;
  - (d) other?
- 6-7 Should the definition of 'capacity' under *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) include the voluntariness element?
- 6-8 If yes to Question 6-7, is the current formulation of the voluntariness element (the ability to make decisions freely and voluntarily) appropriate or should the test be expressed in some other way? If so, how and why?
- 6-9 If the voluntariness element is retained, should the guardianship legislation include criteria for determining whether a person has the requisite capacity? If so, what should the criteria be?
- 6-10 Alternatively, should an assessment of voluntariness (or its equivalent) be located in another provision of the guardianship legislation instead of being included as an element of the definition of 'capacity'? If so, how should the legislation provide for such an assessment?
- 6-11 Should the definition of 'capacity' under *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) include the ability to communicate in some way?
- 6-12 Does the requirement for a person to have the capacity to communicate 'in some way' raise any problems in practice?

### The exclusion of specific matters

6.113 A person's authority and responsibility to make his or her own decisions includes the right to make good decisions and bad decisions. There are a myriad of factors which may influence the decisions a particular person makes.<sup>591</sup> The presence of certain factors such as inexperience, ignorance or

<sup>591</sup>

Eg, J McNab, 'Assessing Capacity: A practical guide for lawyers' (June 2008) *Law Society Journal* 68, 69.

unconventional behaviour may not necessarily indicate a lack of capacity.<sup>592</sup> It has been observed that a person should not be regarded as incapacitated simply because he or she makes a decision which by common standards is thought to be imprudent or unusual, unless there is evidence to the contrary.<sup>593</sup>

6.114 A provision to this effect in the guardianship legislation would be consistent with article 12 of the United Nations Convention, which provides that persons with disabilities enjoy legal capacity on an equal basis with others.

6.115 The *Guardianship and Administration Act 2000* (Qld) acknowledges that an adult's right to make decisions 'includes the right to make decisions with which others may not agree'.<sup>594</sup> The Act does not specifically exclude particular factors from being taken into account in the assessment of capacity.

6.116 The ACT and the Northern Territory specifically exclude certain factors, such as eccentricity or social values, from what may be taken as impaired capacity under their guardianship legislation.<sup>595</sup>

6.117 The Law Commission of England and Wales, in its review of the law relating to mental incapacity, also considered that a person's decision should not be disregarded because it is inconsistent with the sort of choice usually made by a person of ordinary prudence.<sup>596</sup> The *Mental Capacity Act 2005* (UK) (which was enacted in the United Kingdom following the Law Commission's review) provides that a lack of capacity cannot be established merely by reference to:<sup>597</sup>

- a person's age or appearance; or
- a condition of the person, or an aspect of the person's behaviour, which might lead others to make unjustified assumptions about the person's capacity.

6.118 It is possible that the inclusion of a provision in the *Guardianship and Administration Act 2000* (Qld) setting out particular factors which are to be disregarded for the purposes of assessing a person's capacity may help

<sup>592</sup> Eg, Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.9].

<sup>593</sup> *Re T* [1992] 4 All ER 649, 662 (Lord Donaldson), which concerned the refusal of consent to medical treatment. In that case, Lord Donaldson noted:

That his choice is contrary to what is to be expected of the vast majority of adults is only relevant if there are other reasons for doubting his capacity to decide.

<sup>594</sup> *Guardianship and Administration Act 2000* (Qld) s 5(b).

<sup>595</sup> *Guardianship and Management of Property Act 1991* (ACT) s 6A; *Adult Guardianship Act* (NT) s 3(3).

<sup>596</sup> Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.4], [3.14]. The Law Reform Commission of Ireland, in its review on vulnerable adults and the law, recommended that a person should not be regarded as lacking capacity simply on the basis of making a decision which appears unwise: Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.47].

<sup>597</sup> *Mental Capacity Act 2005* (UK) s 2(3).

safeguard the rights of adults to make valid decisions. The inclusion of such a provision would make it clear that certain factors should not be taken into account when assessing capacity. On the other hand, the current provision acknowledging that adults have a right to make decisions with which others may disagree may be considered adequate for the purposes of the Act.

**6-13 Should the *Guardianship and Administration Act 2000* (Qld) specify that certain matters should be disregarded for the purposes of assessing capacity under the Act?**

**6-14 If yes to Question 6-13, what types of matters should be disregarded?**

### Fluctuating capacity

6.119 The Queensland guardianship legislation uses the functional approach in defining capacity. This approach recognises the variable nature of capacity in relation to decision-making for particular matters.<sup>598</sup> A person may have capacity for some decisions, but not for others. A person's capacity may also fluctuate, depending on factors such as his or her mental and physical health, personal strengths, the quality of services and the types and amount of any other support he or she receives.<sup>599</sup> For example, an adult's capacity to make certain decisions may be impaired at times when he or she is under the influence of, or stops taking, certain medications.

6.120 The variable nature of decision-making is specifically recognised in the guardianship legislation. The *Guardianship and Administration Act 2000* (Qld) acknowledges that the capacity of an adult with impaired capacity to make decisions may differ depending on:<sup>600</sup>

- the nature and extent of the impairment;
- the type of decision to be made, including its complexity; and
- the support available from members of the adult's existing support network.

6.121 Fluctuating capacity poses a number of practical challenges, including those in relation to wider issues about the appointment and powers of guardians and administrators. The Tribunal's jurisdiction to make a guardianship or

<sup>598</sup> Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.5].

<sup>599</sup> New South Wales Attorney General's Department, *Capacity Toolkit* (2008) 21 <[http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL\\_DiversitySrvces.nsf/pages/diversity\\_services\\_s5\\_1](http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_s5_1)> at 15 August 2008.

<sup>600</sup> *Guardianship and Administration Act 2000* (Qld) s 5(c).

administration order for an adult will depend on whether the Tribunal considers that the adult lacks capacity for the particular matter.<sup>601</sup> The Tribunal's determination, and its effect into the future, may be complicated if the adult sometimes has capacity and sometimes does not. For example, the evidence may show that the adult is expected to regain, or lose, capacity at intermittent intervals in the future. This may raise issues about the circumstances in which guardianship and administration orders should be made and whether the terms of a guardian's or administrator's appointment should be limited in some way.<sup>602</sup>

6.122 The Commission will specifically consider the wider issues raised by fluctuating capacity when it examines the provisions under the *Guardianship and Administration Act 2000* (Qld) relating to the appointment and powers of guardians and administrators. However, at this preliminary stage, the Commission is interested to know whether the issue of fluctuating capacity raises any problems in practice, and if so, what those problems are.

**6-15 Does the issue of fluctuating capacity raise any problems in practice? If so, what are they?**

### Assessments of capacity

6.123 Impaired capacity is a threshold issue in guardianship law. The assessment of impaired capacity is a critical issue because it may lead to the making of a guardianship or administration order for the adult.<sup>603</sup>

6.124 The test of capacity is a test at law. An assessment of capacity is often carried out by medical or other health professionals in a clinical setting.<sup>604</sup> However, others, such as substitute decision-makers or third parties who deal with adults with questionable capacity, may also need to assess an adult's capacity. It is essential that those who assess capacity understand the purpose, applications and limitations of such assessments.

6.125 An ancillary issue that arises in considering whether an adult has impaired capacity for the purposes of the Queensland guardianship legislation

<sup>601</sup> *Guardianship and Administration Act 2000* (Qld) s 12(1)(a). In *Re SWV* [2005] QGAAT 68, [40], the Tribunal held that the test is whether the adult had capacity at the time of the hearing.

<sup>602</sup> Under s 12(2) of the *Guardianship and Administration Act 2000* (Qld), the Tribunal has power to appoint a guardian or administrator on the terms it considers appropriate. A guardian or administrator must exercise power as required by any such terms: *Guardianship and Administration Act 2000* (Qld) s 36. Also see s 33 as to the scope of a guardian's or administrator's authorisation.

<sup>603</sup> See [6.48] above.

<sup>604</sup> Despite the development of specific tests of competence in recent years, there is no standard assessment of capacity: J Devereux and M Parker, Competency issues for young persons and older persons, in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 70, 71.

is whether a code of practice should be developed for the guidance of persons who assess decision-making capacity.

6.126 The *Mental Capacity Act 2005* (UK) specifically requires the Lord Chancellor to prepare and issue numerous codes of practice,<sup>605</sup> including a code of practice for the guidance of persons assessing whether a person has capacity in relation to any matter.<sup>606</sup> The Code explains how the Act will operate on a day-to-day basis and offers examples of best practice to carers and practitioners. A person who is acting in a specified role under the Act in relation to a person who lacks capacity is under a duty to have regard to the code.<sup>607</sup>

6.127 In New South Wales, the Attorney General's Department has recently released a comprehensive guide book for assessing capacity called the *Capacity Toolkit*.<sup>608</sup> The *Capacity Toolkit* is designed to assist government employees, community workers, professionals, families and carers in identifying whether an individual has decision-making capacity. It provides 'information and guidance' about issues relating to capacity and capacity assessment.<sup>609</sup>

6.128 It may be helpful to those persons who have the task of assessing an adult's capacity to have a set of comprehensive guidelines for making an assessment. The availability of such guidelines may also help ensure consistency in capacity assessments.

**6-16 Should the Queensland guardianship legislation require a code of practice to be developed for the guidance of persons who assess decision-making capacity?**

605 *Mental Capacity Act 2005* (UK) s 42(1)(a).

606 Department of Constitutional Affairs (UK), *Mental Capacity Act 2005 Code of Practice* <<http://www.justice.gov.uk/guidance/mca-code-of-practice.htm>> at 15 August 2008.

607 *Mental Capacity Act 2005* (UK) s 42(4).

608 New South Wales Attorney General's Department, *Capacity Toolkit* (2008) <[http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL\\_DiversitySrvces.nsf/pages/diversity\\_services\\_s5\\_1](http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_s5_1)> at 15 August 2008.

609 *Ibid* 7.

# Chapter 7

## Capacity to make an enduring document

INTRODUCTION .....	138
THE LAW IN QUEENSLAND .....	139
Enduring documents .....	139
Capacity to make an enduring document .....	140
Capacity to revoke an enduring document .....	142
Attesting to the principal's capacity .....	143
Guidelines for witnesses .....	145
Disputes about capacity and validity .....	146
THE POSITION IN OTHER JURISDICTIONS .....	146
ISSUES FOR CONSIDERATION.....	148
The level of understanding required to appoint an attorney .....	149
An exhaustive or non-exhaustive list of factors.....	154
Relationship to the definitions of 'impaired capacity' and 'capacity' .....	155
Who should witness the principal's capacity.....	159
Steps the witness should take.....	165

### INTRODUCTION

7.1 The Commission's terms of reference direct it to review 'the law relating to decisions about personal, financial, health matters and special health matters' under the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).<sup>610</sup> The Commission is also specifically required to review the law relating to advance health directives and enduring powers of attorney.

7.2 Queensland's guardianship legislation provides a framework for decision-making by and for adults who have impaired decision-making capacity. An important part of this framework is the provision for a person to make certain decisions in advance by executing an 'enduring document' which will operate if the person's decision-making capacity subsequently becomes impaired.<sup>611</sup>

7.3 A person must have the requisite capacity to make an enduring document. The nature and assessment of a person's capacity to make an enduring document is therefore a threshold issue in reviewing the law relating to decision-making under the guardianship legislation. Other matters relating to enduring documents will be considered by the Commission later in its review.

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610 The terms of reference are set out in Appendix 1.

611 An enduring document means an enduring power of attorney or an advance health directive: *Powers of Attorney Act 1998* (Qld) s 28; *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 Dictionary (definition of 'enduring document').

7.4 This chapter outlines the test of capacity for executing an enduring document in Queensland. It also sets out the position in the other Australian jurisdictions.

## THE LAW IN QUEENSLAND

### Enduring documents

7.5 The *Powers of Attorney Act 1998* (Qld) provides for adults to formalise future substitute decision-making about certain matters for themselves by making an advance health directive or an enduring power of attorney (an 'enduring document'). A person who makes an enduring document is called a 'principal'.<sup>612</sup>

7.6 In an advance health directive, a principal may give directions about his or her future health care.<sup>613</sup> These directions can relate to some or all of the principal's health matters or special health matters.<sup>614</sup> For example, a principal may give directions about consent to particular treatment or, in certain circumstances, the withholding or withdrawal of a life-sustaining measure (in certain circumstances).<sup>615</sup>

7.7 In an enduring document, a principal may appoint one or more attorneys to make certain decisions for the principal. In an advance health directive, a principal may appoint an attorney to make decisions about the principal's health matters (other than special health matters).<sup>616</sup> In an enduring power of attorney, a principal may authorise one or more attorneys to exercise power for one or more of the principal's financial or personal (including health matters).<sup>617</sup> The principal can provide terms or information for the exercise of an attorney's power under the enduring document.<sup>618</sup>

7.8 An advance health directive and, for personal and health matters, an enduring power of attorney, operate only during a period when the principal has impaired capacity for the matter.<sup>619</sup>

<sup>612</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3 Dictionary (definition of 'principal', para (a)). In some other jurisdictions, the principal is called the 'donor': *Powers of Attorney Act* (NT) s 13; *Powers of Attorney and Agency Act 1984* (SA) s 6; *Powers of Attorney Act 2000* (Tas) s 30; *Instruments Act 1958* (Vic) s 115(1); *Guardianship and Administration Act 1990* (WA) s 104.

<sup>613</sup> *Powers of Attorney Act 1998* (Qld) s 35(1)(a).

<sup>614</sup> See [5.8], [5.10] as to what constitutes a 'health matter' and a 'special health matter'.

<sup>615</sup> *Powers of Attorney Act 1998* (Qld) s 35(2). Also see s 36(2) as to the circumstances in which a direction to withhold or withdraw a life-sustaining measure may operate.

<sup>616</sup> *Powers of Attorney Act 1998* (Qld) s 35(1)(c).

<sup>617</sup> *Powers of Attorney Act 1998* (Qld) s 32(1)(a).

<sup>618</sup> *Powers of Attorney Act 1998* (Qld) ss 32(1)(b), 35(1)(d).

<sup>619</sup> *Powers of Attorney Act 1998* (Qld) ss 33(4), 36(1)(a), (3).

7.9 Power for a financial matter given to an attorney under an enduring power of attorney is exercisable:<sup>620</sup>

- at the time specified in the enduring power of attorney; or
- if no time is specified, once the enduring power is made; or
- if the adult has impaired capacity for the matter before the time specified in the enduring power of attorney, during any or every period the adult has the impaired capacity.

### Capacity to make an enduring document

7.10 Whenever a person enters a transaction or executes a document, he or she must be legally competent to do so in order for it to be effective at law. This applies, for example, to entering contracts, making wills and consenting to medical treatment. It also applies to the execution of an enduring document.<sup>621</sup>

7.11 One aspect of the principal's competence to make an enduring document in Queensland is that the principal must be an adult (18 years or older).<sup>622</sup> The other aspect is that the principal must have the requisite mental capacity to execute the document. At common law, the necessary mental capacity to execute a document or enter a transaction is relative to the particular transaction.<sup>623</sup> It is the capacity to understand the nature and effect of the particular document or transaction when it is explained.<sup>624</sup> This common law test is mirrored under the *Powers of Attorney Act 1998* (Qld).

7.12 Sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) set out the test of capacity for making an enduring document. They provide that a principal may make an enduring document only if he or she understands certain matters.

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620 *Powers of Attorney Act 1998* (Qld) s 33(1)–(3).

621 Eg, *Dalle-Molle (by his next friend Public Trustee) v Manos* (2004) 88 SASR 193, [16] (Debelle J).

622 *Powers of Attorney Act 1998* (Qld) ss 32, 35; *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'adult').

623 *Gibbons v Wright* (1954) 91 CLR 423, 438 (Dixon CJ, Kitto and Taylor JJ).

624 *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ). In *Re K* [1988] 1 Ch 310, 316, Hoffmann J accepted the following summary of the matters that should be explained to, and understood by, the principal when making an enduring power of attorney:

First, (if such be the terms of the power) that the attorney will be able to assume complete authority over the donor's affairs. Secondly, (if such be the terms of the power) that the attorney will in general be able to do anything with the donor's property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court.

7.13 For an enduring power of attorney, section 41 provides:

**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.<sup>625</sup>
- (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters<sup>626</sup>—
  - (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;<sup>627</sup> (note added)
  - (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.

7.14 The same test applies if a principal appoints an attorney in an advance health directive.<sup>628</sup>

7.15 If an advance health directive gives directions for the principal's health care, the principal must understand a number of other things.<sup>629</sup>

7.16 Section 42 of the *Powers of Attorney Act 1998* (Qld) provides:

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625 However, under the general principles, a person is presumed to have capacity – schedule 1, section 1. (in original)

626 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. (in original)

627 It is noted that one reason a principal may want to revoke a power given to an attorney is a belief that the attorney will not act in the desired manner. However, a principal may come to such a view after the attorney has begun to act. For some enduring powers of attorney (and for advance health directives), the power will only begin once the principal has lost capacity and is therefore unable able to revoke the power.

628 *Powers of Attorney Act 1998* (Qld) s 42(2).

629 *Powers of Attorney Act 1998* (Qld) s 42(1).

## 42 Principal's capacity to make an advance health directive

- (1) A principal may make an advance health directive, to the extent it does not give power to an attorney, only if the principal understands the following matters<sup>630</sup>—
- (a) the nature and the likely effects of each direction in the advance health directive;
  - (b) a direction operates only while the principal has impaired capacity for the matter covered by the direction;
  - (c) the principal may revoke a direction at any time the principal has capacity for the matter covered by the direction;
  - (d) at any time the principal is not capable of revoking a direction, the principal is unable to effectively oversee the implementation of the direction.
- (2) A principal may make an advance health directive, to the extent it gives power to an attorney, only if the principal also understands the matters necessary to make an enduring power of attorney giving the same power.<sup>631</sup>

7.17 In Queensland, there is a statutory presumption of capacity: all adults are presumed to have capacity to make, or revoke, an enduring document.<sup>632</sup> The presumption of capacity may, however, be rebutted by satisfactory evidence to the contrary.<sup>633</sup>

### Capacity to revoke an enduring document

7.18 Under the *Powers of Attorney Act 1998* (Qld), a principal may also revoke an enduring document or a power or direction given in an enduring

<sup>630</sup> 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. (in original)

<sup>631</sup> See section 41 (Principal's capacity to make an enduring power of attorney). (in original)

<sup>632</sup> An adult is presumed to have capacity for a 'matter' which is defined to include a 'special personal matter' which includes a matter relating to 'making or revoking a power of attorney, enduring power of attorney or advance health directive': *Powers of Attorney Act 1998* (Qld) sch 1 cl 1, sch 2 cl 3(b), *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1, sch 2 cl 3(b).

Special personal matters are excluded from the types of matters for which an attorney under an enduring power of attorney or a guardian can exercise power: *Powers of Attorney Act 1998* (Qld) s 32(1)(a); *Guardianship and Administration Act 2000* (Qld) ss 12(1), sch 2 cl 2.

<sup>633</sup> *Re Caldwell* (Unreported, Supreme Court of Queensland, Mackenzie J, 6 August 1999) [13]; *Re LI* [2006] QGAAT 1, [20]; *Re DEM* [2005] QGAAT 59, [117]–[118]. The evidence must be 'relatively contemporaneous with the execution of the Power of Attorney, to raise the issue in a serious way', and the onus is on those who seek to rebut the presumption of capacity: *Re Caldwell* (Unreported, Supreme Court of Queensland, Mackenzie J, 6 August 1999) [13].

document. Generally, a principal may make a written revocation if he or she has the capacity that would be necessary to make the enduring document.<sup>634</sup>

### Attesting to the principal's capacity

7.19 Under the *Powers of Attorney Act 1998* (Qld), an enduring document must be witnessed.<sup>635</sup> The witness must sign a certificate stating that the principal, at the time of signing the document, appeared to the witness to have the capacity necessary to make the enduring document.<sup>636</sup> The witness's certificate is evidence of the principal's capacity.

7.20 The witness must be a justice of the peace, a commissioner for declarations, a notary public or a lawyer.<sup>637</sup> The witness must not be:<sup>638</sup>

- a person who signs the document for the principal;<sup>639</sup>
- the principal's attorney;
- a relation of the principal or the principal's attorney;<sup>640</sup> or
- a paid carer or a health provider for the principal (if the document gives power for a personal matter, including a health matter).

7.21 If the document is an advance health directive, the witness must be at least 21 years old and must not be a beneficiary under the principal's will.<sup>641</sup>

634 *Powers of Attorney Act 1998* (Qld) ss 47, 48. A principal may revoke an advance health directive to the extent it includes a direction about a health matter or special health matter if the principal has capacity for the relevant matter: *Powers of Attorney Act 1998* (Qld) s 48(1).

635 *Powers of Attorney Act 1998* (Qld) s 44(3)(b), (4), (5).

636 *Powers of Attorney Act 1998* (Qld) s 44(4)(b), (5)(c). The relevant forms provide for the witness to certify that the principal appeared to understand certain matters. See *Powers of Attorney Act 1998* (Qld) s 44(1), (2), forms 2, 3, 4 available at <<http://www.justice.qld.gov.au/2254.htm>> at 11 August 2008.

637 *Powers of Attorney Act 1998* (Qld) s 31(1)(a).

638 *Powers of Attorney Act 1998* (Qld) s 31(1)(b)–(e).

639 Under the *Powers of Attorney Act 1998* (Qld), an enduring document must be signed by the principal or, if the principal instructs, by an 'eligible signer' in the principal's presence. An 'eligible signer' must be at least 18 years old and can not be the witness for the enduring document or an attorney for the principal. See *Powers of Attorney Act 1998* (Qld) ss 30 (Meaning of **eligible signer**), 44(3)(a).

640 A 'relation' is defined as a spouse, a person related by blood, marriage, adoption or certain other relationships, a person on whom the first person is completely or mainly dependent (or vice versa) and a person who is a member of the same household: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 Dictionary.

641 *Powers of Attorney Act 1998* (Qld) s 31(1)(f). The requirement for the witness to be at least 21 years old was inserted as an additional safeguard to help ensure the witness's 'maturity and life experience': Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1019 (Mrs Elizabeth Cunningham).

7.22 An advance health directive must also be signed by a doctor.<sup>642</sup> The doctor must certify that the principal appeared to the doctor at the time of making the document to have the capacity necessary to make the advance health directive.<sup>643</sup> The doctor must not be:<sup>644</sup>

- the other witness of the advance health directive or a person who signs the document for the principal,<sup>645</sup>
- the principal's attorney;
- a relation of the principal or the principal's attorney; or
- a beneficiary under the principal's will.

7.23 A witness's certificate as to the principal's capacity may also need to be signed if an enduring power of attorney is revoked by the principal.<sup>646</sup>

7.24 The *Powers of Attorney Act 1998* (Qld) also includes a footnote to the effect that, if there is a reasonable likelihood of doubt about the principal's capacity to make an enduring document, it is 'advisable for the witness to make a written record of the evidence' by which the witness considered that the principal had the required understanding.<sup>647</sup>

7.25 The capacity provisions for enduring documents under the *Powers of Attorney Act 1998* (Qld) also include a footnote to the effect that a principal is presumed to have capacity under the General Principles.<sup>648</sup>

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642 This requirement was inserted in the legislation to ensure that medical advice from an independent source is received: Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1021–2 (Mr Denver Beanland).

643 *Powers of Attorney Act 1998* (Qld) s 44(6). The relevant form provides for the doctor to certify that he or she has discussed the document with the principal and that, in his or her opinion, the principal 'is not suffering from any condition that would affect his/her capacity to understand the things necessary to make this directive, and he/she understands the nature and likely effect of the health care described in this document': see *Powers of Attorney Act 1998* (Qld) s 44(2), form 4 available at <<http://www.justice.qld.gov.au/2254.htm>> at 11 August 2008.

644 *Powers of Attorney Act 1998* (Qld) s 44(7).

645 See note 639 above.

646 *Powers of Attorney Act 1998* (Qld) s 49(4)(b), (5)(c). If the principal signs the revocation himself or herself, the revocation 'may' include a witness's certificate; if the revocation is signed by a person for the principal, the revocation 'must' include a witness's certificate.

647 *Powers of Attorney Act 1998* (Qld) ss 41(2) (Principal's capacity to make an enduring power of attorney) n 43, 42(1) (Principal's capacity to make an advance health directive) n 44, 44(3)(b) (Formal requirements) n 49. A similar statement is included on the relevant forms: *Powers of Attorney Act 1998* (Qld) s 44(1), (2), forms 2, 3, 4 available at <<http://www.justice.qld.gov.au/2254.htm>> at 11 August 2008.

648 *Powers of Attorney Act 1998* (Qld) s 41(1) (Principal's capacity to make an enduring power of attorney) n 42.

## Guidelines for witnesses

7.26 The Office of the Adult Guardian has produced a set of guidelines to assist witnesses to make assessments of a principal's capacity to make an enduring power of attorney.<sup>649</sup> The Queensland Law Society has produced a set of guidelines in substantially the same terms.<sup>650</sup>

7.27 These guidelines explain the importance of conducting a private interview with the principal to determine his or her level of understanding. They suggest using open-ended rather than closed questions and that, if a principal does not understand something at first, the witness should explain the matter and ask the person about it later in the interview. The guidelines also advise that, if the principal has difficulty answering questions, it may be appropriate to seek a medical assessment for additional information about the principal's capacity. Witnesses are also advised to take notes of the steps they have taken to assess the principal's understanding. In addition, the guidelines include a list of behaviours that may indicate impaired capacity.

7.28 There are also guidelines for witnessing enduring powers of attorney set out in the handbooks produced for justices of the peace and commissioners for declarations. These guidelines explain that:<sup>651</sup>

Because [enduring powers of attorney] are so complex and deal with such critical matters as the power to make decisions about someone's personal life, extra safeguards have been built into the process.

To ensure there is no undue influence or pressure from anyone, including those accompanying the principal, the assessment of the principal's capacity is best done in private.

Anyone over 18 years of age may make an [enduring power of attorney] at any time provided that they have the capacity to understand the contents and the effect of the document. If you have any doubts about the principal's decision-making capacity, you should refuse to witness the document.

...

To check [the principal's] understanding, you may need to question the principal closely. If you do so, keep a detailed record of the questions and answers in case the [enduring power of attorney] is ever disputed. As this could occur many years later, it is essential that you keep accurate records to refresh your memory.

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649 Office of the Adult Guardian, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney* (June 2005) <<http://www.justice.qld.gov.au/files/Guardianship/capacityguidelines.pdf>> at 11 August 2008.

650 Queensland Law Society, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney*.

651 Department of Justice and Attorney-General, *The Duties of Justices of the Peace (Qualified)* (4th ed, April 2007) 43–4. Also see Department of Justice and Attorney-General, *The Administrative Duties of Commissioners for Declarations* (4th ed, February 2007) 42–4. Both these handbooks are available at <<http://www.justice.qld.gov.au/1005.htm>> at 11 August 2008.

7.29 Similar guidelines are provided in the justice of the peace and commissioner for declarations handbooks for advance health directives.

### Disputes about capacity and validity

7.30 Under the *Powers of Attorney Act 1998* (Qld), the Supreme Court and the Tribunal have power to make a declaration about a person's capacity.<sup>652</sup>

7.31 The Supreme Court and the Tribunal also have power to declare that an enduring document is invalid. One of the grounds for declaring an enduring document invalid is that the principal 'did not have the capacity necessary to make it'.<sup>653</sup> If an enduring document is declared invalid, it is taken to be void from the start<sup>654</sup> and the Court or Tribunal may itself appoint an attorney or attorneys for the principal.<sup>655</sup>

7.32 In making its decision, the Court or Tribunal may have regard to written reports by the Adult Guardian or the Public Trustee on a matter in the proceeding.<sup>656</sup> It may also make its decision on the information it has before it without receiving all relevant material if urgent or special circumstances justify it or if all the participants agree.<sup>657</sup>

## THE POSITION IN OTHER JURISDICTIONS

7.33 In each of the other Australian jurisdictions, a person may appoint an attorney under an enduring power of attorney to exercise power in relation to the person's financial matters<sup>658</sup> and, in some jurisdictions, for certain personal or health care matters<sup>659</sup> if he or she subsequently loses decision-making capacity.

7.34 In addition, the legislation in New South Wales, South Australia, Tasmania and Victoria allows a person to appoint an 'enduring guardian' to act as the person's guardian for personal and health matters if he or she loses

<sup>652</sup> *Powers of Attorney Act 1998* (Qld) ss 109A, 111.

<sup>653</sup> *Powers of Attorney Act 1998* (Qld) s 113(1), (2)(a). The other grounds on which an enduring document can be found invalid are that it does not comply with the other requirements of the Act (such as other formal requirements); or that it is invalid for another reason, for example, the principal was induced to make it by dishonest or undue influence: *Powers of Attorney Act 1998* (Qld) s 113(2)(b), (c).

<sup>654</sup> *Powers of Attorney Act 1998* (Qld) s 114.

<sup>655</sup> *Powers of Attorney Act 1998* (Qld) s 113(3).

<sup>656</sup> *Powers of Attorney Act 1998* (Qld) s 121.

<sup>657</sup> *Powers of Attorney Act 1998* (Qld) s 120.

<sup>658</sup> *Powers of Attorney Act 2006* (ACT) s 13(2); *Powers of Attorney Act 2003* (NSW) s 19; *Powers of Attorney Act* (NT) s 13; *Powers of Attorney and Agency Act 1984* (SA) s 6; *Powers of Attorney Act 2000* (Tas) ss 30(1), 31(1); *Instruments Act 1958* (Vic) s 115; *Guardianship and Administration Act 1990* (WA) s 104.

<sup>659</sup> *Powers of Attorney Act 2006* (ACT) s 13(2); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(1), (7); *Medical Treatment Act 1988* (Vic) s 5A(1)(a), (aa), (2).

decision-making capacity in the future.<sup>660</sup> This is similar to the provision in Queensland allowing an attorney to be appointed under an enduring document for health matters.

7.35 A person may execute such an enduring document only if he or she has the mental capacity to understand the nature or effect of the document.<sup>661</sup> This is a principle of Australia's common law. In the ACT, Tasmania and Victoria, the relevant legislation mirrors the common law principle by providing that a person may make an enduring power of attorney only if he or she 'understands the nature and effect' of the document.<sup>662</sup>

7.36 In addition, in the ACT, New South Wales, South Australia, Tasmania and Victoria, it is a condition for the effectiveness of an enduring document that it is signed by one or two witnesses who certify that the person making the enduring power of attorney appeared to the witness to understand the nature and/or effect of the document.<sup>663</sup> The legislation in Victoria also includes a note to the effect that '[i]t is advisable for the witness to make a written record of the evidence' by which he or she considers that the principal has the required understanding.<sup>664</sup>

660 *Guardianship Act 1987* (NSW) ss 6, 6E(1); *Guardianship and Administration Act 1993* (SA) s 25(1), (5); *Guardianship and Administration Act 1995* (Tas) s 32(1), (5); *Guardianship and Administration Act 1986* (Vic) ss 35A(1), 35B.

The *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) s 11 amends the *Guardianship and Administration Act 1990* (WA) to insert new provisions for enduring guardians and advance health directives. The Act was assented to on 19 June 2008 and will commence on a date to be proclaimed.

661 *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ). See also, eg, *Dalle-Molle (By his next friend Public Trustee) v Manos* (2004) SASR 193, [16] (Debelle J).

662 *Powers of Attorney Act 2006* (ACT) s 13(1) note 2; *Powers of Attorney Act 2000* (Tas) s 30(2)(a); *Instruments Act 1958* (Vic) s 118(1).

The *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) s 9 inserts a new s 104(1a) of the *Guardianship and Administration Act 1990* (WA) to provide that a person may create an enduring power of attorney if he or she 'has reached 18 years of age and has full legal capacity'. The Act was assented to on 19 June 2008 and will commence on a date to be proclaimed.

A similar requirement to understand the nature and effect of the document or to be of sound mind applies in relation to the making of a 'living will' giving directions about the withdrawal or withholding of life-sustaining measures: see *Medical Treatment (Health Directions) Act 2006* (ACT) s 7(3)(b); *Natural Death Act* (NT) s 4(1); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 7(1); *Medical Treatment Act 1988* (Vic) s 5(1).

663 *Powers of Attorney Act 2006* (ACT) s 22(1)(b), (2)(d); *Powers of Attorney Act 2003* (NSW) s 19(1)(c)(i), (ii); *Guardianship Act 1987* (NSW) s 6C(1)(d), (e); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(2), *Consent to Medical Treatment and Palliative Care Regulations 2004* (SA) s 4 sch 1; *Guardianship and Administration Act 1993* (SA) s 25(2)(c), sch; *Guardianship and Administration Act 1995* (Tas) s 32(2)(a), (c), sch 3 form 1; *Instruments Act 1958* (Vic) ss 123(3), (4), 125A(1)(b), 125A(2)(d); *Guardianship and Administration Act 1986* (Vic) s 35A(2)(c), sch 4 form 1.

The *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) ss 9, 11 insert new ss 104(2), 110E(1)(c), 110Q(1)(c) of the *Guardianship and Administration Act 1990* (WA) to include a requirement for two witness for an enduring power of attorney, an enduring power of guardianship and an advance health directive. The Act was assented to on 19 June 2008 and will commence on a date to be proclaimed.

664 *Instruments Act 1958* (Vic) s 118, note.

7.37 The legislation in the ACT, Tasmania and Victoria dealing with enduring powers of attorney also specifies certain criteria by which a person is taken to have the required level of understanding.<sup>665</sup> These criteria are the same as those used in the Queensland legislation. For example, section 30(3) of the *Powers of Attorney Act 2000* (Tas) provides:

**30. Creation and effect of enduring powers of attorney**

...

- (3) For the purposes of subsection (2)(a), a donor is taken to understand the nature and effect of a deed or instrument only if he or she understands the following matters:
- (a) that the donor may, in the enduring 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) that, 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) that the donor may revoke the enduring power of attorney at any time when he or she has the mental capacity to do so;
  - (e) that the power the donor has given continues even if the donor subsequently loses his or her mental capacity;
  - (f) that the donor is unable to oversee the use of the power if he or she subsequently loses mental capacity.

7.38 In addition, the ACT legislation states that, in the absence of evidence to the contrary, a person making an enduring power of attorney is presumed to have the required level of understanding.<sup>666</sup> The General Principles contained in the Queensland legislation also include a presumption of capacity.<sup>667</sup>

## ISSUES FOR CONSIDERATION

7.39 Enduring documents are intended to afford people a simple, inexpensive way to plan for their future.<sup>668</sup> However, because such documents pass decision-making power to third parties, there is an obvious potential for

<sup>665</sup> *Powers of Attorney Act 2006* (ACT) s 17; *Powers of Attorney Act 2000* (Tas) s 30(3); *Instruments Act 1958* (Vic) s 118(2).

<sup>666</sup> *Powers of Attorney Act 2006* (ACT) s 18.

<sup>667</sup> *Powers of Attorney Act 1998* (Qld) sch 1, cl 1.

<sup>668</sup> Eg, Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 83–4.

such mechanisms to be abused.<sup>669</sup> The current measures in the Queensland guardianship legislation to address such abuse include safeguards in relation to the execution of enduring documents which are aimed at ensuring that principals understand the nature and effect of the document they are executing.<sup>670</sup> One of these measures is not merely a requirement that the principal have capacity, but a requirement for the principal to actually have achieved a particular level of understanding. A related measure is the requirement for a witness to attest that the principal appeared to have the necessary understanding. However, these measures may be of limited effect unless the witness clearly understands his or her role in testing the principal's understanding.<sup>671</sup>

7.40 The inclusion of these matters in the *Powers of Attorney Act 1998* (Qld) raises some issues for consideration. Some relate to the test of capacity for making an enduring document. Others relate to the witnessing requirements.

### The level of understanding required to appoint an attorney

7.41 Sections 41(2) and 42(1) of the *Powers of Attorney Act 1998* (Qld) specify a list of particular things the principal must understand when making an enduring document (which are set out at [7.13] and [7.16] above). These describe the key features of an enduring document. Section 41(2) requires, for example, that the principal must understand that once the power for an attorney begins, the attorney will have full control over the matter, subject to the terms of the power.<sup>672</sup>

7.42 An issue to consider is whether the matters currently listed in the legislation are appropriate and whether the principal should be required to understand any additional things not specified in the list.

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669 Ibid 85. Also see, eg, the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3686 (Hon Denver Beanland, Attorney-General and Minister for Justice); Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.50]–[3.51]. Queensland research has also indicated that elderly people with enduring powers of attorney are no more protected from financial abuse than elderly people without enduring powers of attorney: A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *The Journal of Adult Protection* 20. As part of a wider research program, the authors analysed a sample of cases in which an administration order was made by the Queensland Guardianship and Administration Tribunal, and found that it was more likely that an enduring power of attorney was in place where suspected financial abuse had occurred, particularly where close family members acted as attorneys: 28.

670 These safeguards are specific to the execution of enduring documents. The guardianship legislation also contains measures designed to address the misuse of an enduring document after its execution. See, eg, *Powers of Attorney Act 1998* (Qld) ss 60, 66, 73, 116; *Guardianship and Administration Act 2000* (Qld) ss 180, 195. Also, see [2.29] above.

671 Queensland research indicates that enduring documents are sometimes being executed by principals who do not have capacity: L Willmott and L Windle, 'Witnessing EPAs: Empirical Research' (2007) 27 *Queensland Lawyer* 238, 242. Over a 12 month period, the authors examined 34 matters reviewed by the Tribunal where doubt was raised about the capacity of the principal at the time he or she completed an enduring document. In the majority of the matters examined, the EPAs were held to be invalid on the basis of incapacity of the principal: [242].

672 At common law, see *Re K* [1988] 1 Ch 310, 316 (Hoffmann J). See note 624 above.

7.43 At present in Queensland, and in the other Australian jurisdictions, the statutory test of capacity to execute an enduring document for the appointment of an attorney seems to reflect the traditional common law test. That is, the principal must understand the nature and effect of executing the instrument but need not understand the details of the decisions that might be made under the instrument.<sup>673</sup>

7.44 This threshold means that a person who experiences partial or fluctuating mental incapacity may nevertheless be able to validly execute an enduring document. It recognises that mental capacity is not always lost totally or suddenly.<sup>674</sup> This was explained in the English decision in *Re K*:<sup>675</sup>

there is no logical reason why, though unable to exercise her powers, she could not confer them upon someone else by an appropriate juristic act. The validity of that act depends on whether she understood its nature and effect and not on whether she would hypothetically have been able to perform all the acts which it authorised.

...

In practice it is likely that many enduring powers will be executed when symptoms of mental incapacity have begun to manifest themselves. These symptoms may result in the donor being mentally incapable in the statutory sense that she is unable on a regular basis to manage her property and affairs. But ... she may execute the power with full understanding and with the intention of taking advantage of the Act to have her affairs managed by an attorney of her choice rather than having them put in the hands of the Court of Protection.

7.45 It has been suggested, however, that a more restrictive test may apply.<sup>676</sup> In *Ranclaud v Cabban*, Young J of the New South Wales Supreme Court suggested that the principal must be able not just to understand the nature of the power in general terms but to understand 'what sort of things the

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*Re K* [1988] 1 Ch 310, 315–16 (Hoffmann J). Also, eg, *Re W* [2001] Ch 609, [20] (Sir Christopher Staughton); *Re 'Tony'* [1990] 5 NZFLR 609, [38]–[40], [44] (Judge Inglis); and *Re EW* (1993) 11 FRNZ 118, 120 (Judge MD Robinson). In *Re 'Tony'* [1990] 5 NZFLR 609, [39]–[40], [44], Judge Inglis held:

When [the principal] executed the enduring power of attorney what he was doing was recognising that the management of his property affairs ought to be in the hands of someone who was capable of managing them for him. He was not managing his property affairs: he was delegating their management.

...

all that was required of 'Tony' when he executed his enduring power of attorney was capacity to understand the broad essentials of an enduring power of attorney, including the understanding that he was placing his property in safe hands.

Also see R Creyke, 'Privatising Guardianship – The EPA Alternative' (1993) 15 *Adelaide Law Review* 79, 94.

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This is also recognised, for example, in the context of a person's capacity to execute a will: *Banks v Goodfellow* (1870) 5 LR QB 549, 560, 566; *Jenkins v Morris* (1880) 14 Ch D 674, 680 (Hall VC).

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[1988] 1 Ch 310, 315 (Hoffmann J).

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Eg, R Munday, 'The Capacity to Execute an Enduring Power of Attorney in New Zealand and England: A Case of Parliamentary Oversight?' (1989) 13 *New Zealand Universities Law Review* 253, 258–60. Also see *Re FAA* [2008] QGAAT 3, [43] and *Re HAA* [2007] QGAAT 6, [16], following *Ranclaud v Cabban* (1988) NSW ConvR ¶55-385, 57 548 (Young J). Also see the first instance decision cited in *Re K* [1988] 1 Ch 310, 315 (Hoffmann J), citing the first instance decision.

attorney could do without further reference to [the principal]'.<sup>677</sup> This has been interpreted as a 'more stringent', and 'unrealistic', test requiring the principal to understand all the activities the attorney might undertake.<sup>678</sup> However, *Ranclaud v Cabban* concerned the capacity required to execute a *general* power of attorney (not an enduring power of attorney).<sup>679</sup>

7.46 The Tribunal in Queensland has referred to *Ranclaud v Cabban*<sup>680</sup> in the recent decisions of *Re HAA*<sup>681</sup> and *Re FAA*<sup>682</sup> which considered the principal's capacity to make an enduring power of attorney. In those decisions, the Tribunal suggested that, in addition to the statutory test, a principal executing an enduring power of attorney must also understand:<sup>683</sup>

- the nature and extent of the assets to be managed;
- the decisions likely to be made on the principal's behalf; and
- the ability of the attorney to carry out the tasks involved.

7.47 The Tribunal has also suggested that it is relevant 'whether the person understands what has to be done and is able to give proper instructions to act on their behalf'.<sup>684</sup>

7.48 These factors may make the test of capacity higher and may raise some doubt about the strictness of the test of capacity under section 41 of the *Powers of Attorney Act 1998* (Qld). An issue to consider is whether an

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677 *Ranclaud v Cabban* (1988) NSW ConvR ¶55-385, 57 548.

678 Eg, Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report, Enduring Powers of Attorney*, Report No 47 (1988) [17]. Also, R Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 2 *Western Australia Law Review* 122, 131. However, the Victorian Law Reform Commission did not consider there to be a significant difference between the two tests: Law Reform Commission of Victoria, *Enduring Powers of Attorney*, Discussion Paper No 18 (1990) [7].

679 As noted in *Re 'Tony'* [1990] 5 NZFLR 609, [34]–[35], there is a 'clear distinction' between general and enduring powers of attorney:

[The enduring power of attorney] was invented to overcome the common law rule that a power of attorney terminates in the event of the donor ceasing to have mental capacity. The common law rule is based on the proposition that an agent can have no more authority to act than his principal has, so that if the principal loses mental capacity the agent's authority ceases. The purpose, therefore, of the statutory creation of enduring powers of attorney ..., was to provide for cases where a person wished to anticipate his incapacity by appointing an attorney whose authority would endure despite the mental incapacity of the donor.

680 (1988) NSW ConvR ¶55-385, 57 548 (Young J).

681 [2007] QGAAT 6.

682 [2008] QGAAT 3.

683 *Re HAA* [2007] QGAAT 6, [16]; *Re FAA* [2008] QGAAT 3, [43]. Also see *Re LCG* [2003] QGAAT 15, [92] in which the Tribunal considered 'that one of the important elements in relation to executing an [enduring power of attorney] is an understanding by the adult of the extent of the assets to which the [enduring power of attorney] relates'.

684 *Re DEM* [2005] QGAAT 59, [123].

understanding of these additional factors should be required and whether the statutory test should be clarified.

7.49 For example, one of the matters the principal must understand when giving directions in an advance health directive is ‘the nature and likely effects of each direction in the advance health directive’.<sup>685</sup> By giving directions in an advance health directive, the principal is anticipating particular decisions about his or her health matters so that an understanding of the directions is necessary. This can be contrasted with the appointment of an attorney, which does not necessarily involve the anticipation of specific decisions.

7.50 However, a principal may ‘provide terms or information’ for the exercise of an attorney’s power under an enduring document.<sup>686</sup> To the extent that an enduring document gives specific instructions about exercising a power, the principal may need to have an understanding of the nature and likely effects of the instruction.

7.51 The test of capacity to make an enduring document for the appointment of an attorney requires a balance.<sup>687</sup>

While there is an obvious need to protect the donor from unscrupulous exploitation, much of the potential advantage of an enduring power could be eroded if too high a standard of capacity were to be imposed for its valid execution.

7.52 A test that is too high may reduce the availability of enduring documents as a self-help expedient, especially to people who experience partial or fluctuating mental incapacity.<sup>688</sup> It may be especially important, for example, to allow a person whose mental capacity is only beginning to deteriorate, or who experiences fluctuating capacity, to take advantage of the opportunity to make advance appointments before his or her mental capacity further declines.<sup>689</sup> This approach would accord respect for individual autonomy and be consistent with a functional or issue-specific model of capacity. It would also accord with article 12 of the United Nations Convention which provides that appropriate

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685 *Powers of Attorney Act 1998* (Qld) s 42(1)(a). This is consistent with the common law test of capacity to refuse consent to medical treatment: see *Re C* [1994] 1 All ER 819, 824 (Thorpe J).

686 *Powers of Attorney Act 1998* (Qld) ss 32(1)(b), 35(1)(d).

687 P Cooper, ‘Enduring Powers of Attorney’ (1991) *The Queensland Lawyer* 144, 148. Also see Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 96.

688 Eg, South Australia Government, *Planning Ahead: Your Health, Your Money, Your Life*, Issues Paper (2007) 9. Also see FMB Reynolds, *Bowstead and Reynolds on Agency* (17th ed, 2001) [10-009].

689 Eg, R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 94; M Brown and S Jarrad, ‘Putting “the powers” in place: Barriers for people with memory loss in planning for the future’ (2008) 15 *Journal of Law and Medicine* 530, 530.

measures should be taken ‘to provide access by persons with disabilities to the support they may require in exercising their legal capacity’.<sup>690</sup>

7.53 On the other hand, a test that is too low may allow a principal to be pressured or lulled into executing an enduring document when he or she does not really understand the import of doing so. The importance of ensuring that measures relating to the exercise of legal capacity are ‘free of conflict of interest and undue influence’ is recognised in article 12 of the United Nations Convention.<sup>691</sup> A lower threshold may also lead to more complexity in assessments of a person’s level of understanding if he or she experiences periods of partial or fluctuating mental incapacity.<sup>692</sup>

7.54 Apart from the test of capacity, there are other measures in the *Powers of Attorney Act 1998* (Qld) to help ensure that a person does not take advantage of an enduring document which the principal was pressured or lulled into making. One such safeguard is the witnessing requirement. Dishonest inducement or undue influence is also a ground for finding an enduring document invalid.<sup>693</sup> Another measure is the offence of dishonestly inducing a person to make an enduring document.<sup>694</sup> However, the effectiveness of these measures may depend on a number of factors, including whether the witness takes sufficient steps to establish the principal’s capacity.<sup>695</sup>

7.55 At present, the list of matters in section 41(2) for the appointment of an attorney is introduced by the word ‘includes’, leaving it open to require the principal to understand things that are not included in the statutory list. This may include those matters noted above. An issue to consider, therefore, is whether the test should include such matters. If so, a further issue to consider is whether those things should be specified in the legislation. Alternatively, it may be that the statutory test should specifically exclude those matters.

690 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12(3). It would also accord with the recognition of older persons’ rights of autonomy and dignity as evident in the United Nations, *Principles for Older Persons*, GA Res 46/91, 16 December 1991.

691 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12(4).

692 Eg, L Willmott and L Windle, ‘Witnessing EPAs: Empirical Research’ (2007) 27 *Queensland Lawyer* 238, 240; Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.78].

693 *Powers of Attorney Act 1998* (Qld) s 113(2)(c).

694 *Powers of Attorney Act 1998* (Qld) s 61.

695 See, eg, A-L McCawley et al, ‘Access to assets: Older people with impaired capacity and financial abuse’ (2006) 8(1) *The Journal of Adult Protection* 20, 30. Despite these measures, Queensland research indicates that enduring documents are sometimes being executed by principals who do not have capacity: L Willmott and L Windle, ‘Witnessing EPAs: Empirical Research’ (2007) 27 *Queensland Lawyer* 238, 242. Over a 12 month period, the authors examined 34 matters reviewed by the Tribunal where doubt was raised about the capacity of the principal at the time he or she completed an enduring document. In the majority of the matters examined, the EPAs were held to be invalid on the basis of incapacity of the principal: [242].

- 7-1** Are the matters currently listed in section 41 and 42 of the *Powers of Attorney Act 1998* (Qld) appropriate, or should they be changed or clarified in any way?
- 7-2** Are there any other matters, in addition to those listed in section 41 of the *Powers of Attorney Act 1998* (Qld), that the principal should be required to understand when making an enduring document for the appointment of an attorney? For example, should the principal be required to understand any of the following:
- (a) the nature and extent of the assets to be managed (where power is conferred for financial matters);
  - (b) the decisions likely to be made on the principal's behalf and, if so, should the principal be required to understand the decisions to the extent that the principal would be able to make those decisions himself or herself at the time of executing the document; or
  - (c) the ability of the attorney to carry out the tasks involved; or
  - (d) other?
- 7-3** If yes to Question 7-2, should the principal be required to understand those matters in each case, or only to the extent the enduring document contains specific instructions for the exercise of an attorney's power?
- 7-4** If yes to Question 7-2, should these matters be specifically included in the legislation?
- 7-5** If no to Question 7-2, should any of these matters be specifically excluded from the legislation?

### **An exhaustive or non-exhaustive list of factors**

7.56 A related issue is whether the statutory test should be exhaustive.

7.57 As noted above, section 41(2) of the *Powers of Attorney Act 1998* (Qld) provides that the factors the principal must understand when appointing an attorney under an enduring document 'includes' those matters in the list. The legislation leaves it open, therefore, to require the principal to understand other

things that are not included in the list. This is similar to the legislation in the ACT and Victoria.<sup>696</sup>

7.58 In contrast, the list of matters in section 42(1) of the *Powers of Attorney Act 1998* (Qld) that the principal must understand when giving directions under an advance health directive is not introduced by the word 'includes'.

7.59 An issue to consider is whether the list of factors set out in the statute (whether in its present form, or with particular additions or exclusions) should be exhaustive.

7.60 An exhaustive, or closed, list may provide greater certainty for persons wishing to make an enduring document, for those advising them and for witnesses who must certify that the principal has the required level of understanding.

7.61 On the other hand, it may be appropriate to maintain flexibility in the test of capacity. There may be matters which cannot be foreseen in advance that should form part of the test. The common law test recognises, for example, that the requisite mental capacity to enter a transaction is relative to the nature of the transaction.<sup>697</sup>

**7-6 Should the lists of factors that the principal must understand in sections 41(2) (for the appointment of attorneys) and 42(1) (for giving directions in an advance health directive) of the *Powers of Attorney Act 1998* (Qld) be exhaustive or non-exhaustive?**

### Relationship to the definitions of 'impaired capacity' and 'capacity'

7.62 The guardianship legislation deals with substitute decision-making in two main ways. One is to provide a scheme for adults to make their own arrangements for decision-making by executing an enduring document. The other is to provide for the Tribunal to appoint a substitute decision-maker for an adult who is found to have impaired decision-making capacity for the relevant matter.<sup>698</sup>

<sup>696</sup> *Powers of Attorney Act 2006* (ACT) s 17; *Instruments Act 1958* (Vic) s 118(2).

<sup>697</sup> *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ). Also see, eg, *Crago v McIntyre* [1976] 1 NSWLR 729, 749–50 (Holland J) in which it was held that a higher test of mental capacity was required for the execution of a *general* power of attorney containing special terms which had been executed in aid of a deed of settlement for the transfer of assets that was executed at the same time.

<sup>698</sup> A related method of providing for substitute decision-making is the provision for a statutorily authorised person to make health decisions for an adult who has impaired decision-making capacity for the matter (statutory health attorneys): *Powers of Attorney Act 1998* (Qld) s 62. As to the range of substitute decision-makers provided for under the guardianship legislation, see generally *Guardianship and Administration Act 2000* (Qld) s 9.

7.63 These two approaches start from different bases:<sup>699</sup>

A prerequisite to setting up an [enduring power of attorney] arrangement is that the principal is competent. Criteria, therefore, are to test competence, not incompetence. The reverse is generally the case in guardianship where the absence of, or decline in, mental faculties is the trigger for formal hearings. The statutory test is, therefore, to determine whether the person is incapable.

7.64 At the time of *making* an enduring document, the question is not one of impaired capacity but of capacity. The question of impaired decision-making capacity arises when it is a trigger for the enduring document's commencement. As noted above, some enduring documents will only come into operation during a period when the principal has impaired capacity for the matter.<sup>700</sup>

7.65 As described earlier, sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) require the principal to understand the nature and effect of the enduring document, and set out a list of matters the principal must understand in order to meet this test.

7.66 Both the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) also include a test of 'impaired capacity'. This test applies, among other things, in determining whether a guardian or administrator should be appointed for an adult.<sup>701</sup> It also applies in determining whether an enduring document has commenced.<sup>702</sup>

7.67 Impaired capacity, for a person for a matter, is defined to mean that 'the person does not have capacity for the matter'.<sup>703</sup> Capacity is then defined as follows:<sup>704</sup>

**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.

7.68 There appears to be some uncertainty about how this definition of capacity, which applies in determining impaired capacity, relates to the test for making an enduring document. Sections 41 and 42 do not include a specific

699 R Creyke, 'Privatising Guardianship – The EPA Alternative' (1993) 15 *Adelaide Law Review* 79, 92–3.

700 See [7.8] above.

701 *Guardianship and Administration Act 2000* (Qld) s 12(1)(a).

702 *Powers of Attorney Act 1998* (Qld) ss 33(3), (4), 36(1)(a), (3).

703 *Powers of Attorney Act 1998* (Qld) s 3, sch 3 Dictionary; *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 Dictionary. The legislation contains a presumption of capacity: see note 23 above.

704 *Powers of Attorney Act 1998* (Qld) s 3, sch 3 Dictionary; *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 Dictionary.

requirement that the principal have ‘capacity’ as defined elsewhere in the legislation.<sup>705</sup> Nor is the general capacity definition referred to in section 113(2). That section provides that one of the grounds for finding that an enduring document is invalid is if the principal did not have ‘the capacity necessary to make it’. It includes a cross-reference to sections 41 and 42, but not to the general capacity definition.<sup>706</sup>

7.69 One view, therefore, is that the general definition of capacity is not relevant for the making of an enduring document. This approach has been adopted in some of the Tribunal’s decisions.<sup>707</sup> For example, the Tribunal stated in *Re TGD*:<sup>708</sup>

In order to execute an enduring power of attorney a principal must have capacity to understand the nature and effect of an enduring power of attorney and the relevant test for capacity in this regard is contained in section 41 of the *Powers of Attorney Act 1998*.

7.70 An alternative view, however, is that the general capacity definition applies *in addition* to sections 41 and 42. It has been argued, for example, that the effect of section 42 is to provide a non-exhaustive list of matters that an adult must understand when making an advance health directive in order to satisfy the first element of the general definition of capacity.<sup>709</sup> This interpretation would avoid any potential awkwardness from having two separate tests of capacity. The Tribunal has also taken this approach in some of its decisions.<sup>710</sup> For example, in *Re FAA*, the Tribunal stated the following:<sup>711</sup>

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705 The heading of the sections includes the word ‘capacity’. Section 41(1) also includes a footnote referring to the presumption of capacity in General Principle 1.

706 *Powers of Attorney Act 1998* (Qld) s 113(2)(a), n 82.

707 Eg, *Re AED* [2004] QGAAT 9, [15]; *Re TGD* [2005] QGAAT 16, [58]; *Re SR* [2005] QGAAT 19, [8]–[10]; *Re HAA* [2007] QGAAT 6, [6]–[8]. As to the Commission’s two recommended tests of capacity for making an enduring document and for the appointment of a guardian or administrator, see Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 96–7, 174, 180 and Vol 2 (Draft Legislation) cl 13(1), 34(1), 36, 76(1), 79, 117(1)(c), sch 1 pt 1.

708 [2005] QGAAT 16, [58].

709 L Willmott, B White and M Howard, ‘Refusing Advance Refusals: Advance Directives and Life-Sustaining Medical Treatment’ (2006) 30 *Melbourne University Law Review* 211, 218. The authors suggest that the alternative interpretation that s 42 is the only provision that is relevant to the question of a principal’s capacity to make an advance health directive ‘would result in the legislation containing two different tests for capacity, an outcome unlikely to have been intended by the legislature’. However, on a different interpretation, one test relates to the determination of impaired capacity when the question is whether or not an attorney’s power to decide for the adult is enlivened, while the other relates to the formal requirements for validly executing an enduring document. There is another, subtle but significant, distinction between the two tests: paragraph (a) of the general definition of capacity refers to an adult being *capable* of understanding the nature and effect of a decision while sections 41 and 42 require the principal to have an *actual* understanding.

710 Eg, *Re FAA* [2008] QGAAT 3, [16]–[18]. Also see, eg, *Re HVG* [2005] QGAAT 33, [69]; *Re MV* [2005] QGAAT 46, [56] in which the Tribunal applied the ‘freely and voluntarily’ test.

711 [2008] QGAAT 3, [16]–[18].

Essential to the application for an order about an Enduring Power of Attorney, namely its validity, is the determination of the capacity of FAA (the principal) on 3 March 2006, the day it was made.

In this respect, Schedule 3 of the *Powers of Attorney Act 1998* defines capacity in the same terms as the *Guardianship and Administration Act 2000*.

The *Powers of Attorney Act 1998* also sets out what constitutes an understanding of the nature and effect of an Enduring Power of Attorney.

On this view, all three elements of the general definition of capacity would have to be satisfied in addition to the test in sections 41 and 42 to make an enduring document. One of those elements is that the principal must be capable of freely and voluntarily making decisions about the matter. However, this element seems to be provided for already in the context of making an enduring document.<sup>712</sup> It is a ground for finding an enduring document invalid if the principal was induced to make an enduring document by dishonesty or undue influence.<sup>713</sup> This is expressed as a separate ground to the ground that the principal did not have the capacity necessary to make the enduring document. It is also an offence under section 61 of the *Powers of Attorney Act 1998* (Qld) to dishonestly induce a person to make an enduring document.

7.71 An issue to consider is whether the relationship between the definition of capacity for a matter which applies for the test of impaired capacity, and the test for making an enduring document in sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) should be clarified and, if so, what that relationship should be.

**7-7 In addition to the level of understanding the principal must have under sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld), should there be a requirement that the principal must have ‘capacity’ within the meaning of the general definition of capacity set out in schedule 3 of that Act?**

**7-8 If so, how should this requirement relate to the matters in sections 41 and 42 of that Act? For example, should sections 41 and 42 apply as specific matters the principal must understand in order to satisfy the first element of the general definition of capacity set out in schedule 3?**

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The Tribunal has generally considered the ‘freely and voluntarily’ aspect of the definition of ‘capacity’ in the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) in the context of the adult’s susceptibility to another person’s influence. However, the Tribunal has also held that the effect of a delusional disorder may cause an inability to make decisions freely and voluntarily: *Re DFS* [2005] QGAAT 75 [41].

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*Powers of Attorney Act 1998* (Qld) s 113(2)(c).

## Who should witness the principal's capacity

7.72 The *Powers of Attorney Act 1998* (Qld) requires enduring documents to be signed by a witness who certifies that the principal appeared to have the capacity necessary to make the enduring document. Similar requirements apply in most of the other Australian jurisdictions.

7.73 An issue to consider is whether the current witnessing requirements strike an appropriate balance. The witnessing requirements are intended as an important safeguard against exploitation of the principal.<sup>714</sup> In particular, the requirement for an independent witness is considered a critical safeguard.<sup>715</sup> However, such requirements, if too strict, may act as a barrier to the use of enduring documents.<sup>716</sup> There is a tension between minimising the expense and complexity of making an enduring document and protecting principals who may be vulnerable to pressure from others.<sup>717</sup>

### Lawyers, justices of the peace etc

7.74 One issue to consider is whether, in addition to being independent, the witness should also be a person with particular qualifications, as is currently required in Queensland. Similar requirements also apply in many of the other jurisdictions.<sup>718</sup>

7.75 The requirement for a witness to be a justice of the peace, commissioner for declarations, notary public or lawyer was included in the legislation in Queensland to ensure the involvement of 'a completely independent and qualified person'.<sup>719</sup> This may be appropriate to emphasise the serious nature of an enduring document and its legal consequences.<sup>720</sup>

<sup>714</sup> See the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3686 (Hon Denver Beanland, Attorney-General and Minister for Justice).

<sup>715</sup> Eg, Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 105; R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 98. Also see the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3686–7 (Hon Denver Beanland, Attorney-General and Minister for Justice).

<sup>716</sup> Hon RD Nicholson, 'Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability' (1995) 2 *Journal of Law and Medicine* 270, 282.

<sup>717</sup> R Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 21 *Western Australian Law Review* 122, 134.

<sup>718</sup> Eg, *Powers of Attorney Act 2006* (ACT) s 21(3); *Powers of Attorney Act 2003* (NSW) s 19(2); *Guardianship Act 1987* (NSW) s 5 (definition of 'eligible witness', para (a)); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(2), 4 (definition of 'authorised witness'); *Guardianship and Administration Act 1993* (SA) ss 25(2)(c), 3(1) (definition of 'authorised witness'); *Powers of Attorney and Agency Act 1984* (SA) s 6(2)(a); *Instruments Act 1958* (Vic) s 125(3); *Medical Treatment Act 1988* (Vic) s 5A(2)(a); *Guardianship and Administration Act 1986* (Vic) s 35A(2)(c)(iv).

<sup>719</sup> See the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3686–7 (Hon Denver Beanland, Attorney-General and Minister for Justice).

<sup>720</sup> Eg, Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 106.

Lawyers and justices of the peace are also accustomed to witnessing legal documents.

7.76 On the other hand, the requirement to involve a lawyer may increase the costs of executing an enduring document. For example, it may be difficult for some people to locate, or pay for the services of, such a person.<sup>721</sup> It has also been suggested that both lawyers<sup>722</sup> and justices of the peace<sup>723</sup> may sometimes take insufficient steps, or lack appropriate training, to adequately assess a person's capacity to make an enduring document. However, this may be more of an educative issue than a legislative one.

7.77 In New Zealand, there is no requirement for the witness to an enduring power of attorney to have a particular qualification.<sup>724</sup> The Law Commission of New Zealand recommended, however, that in certain circumstances a solicitor should witness an enduring power of attorney, namely, if the attorney is not the principal's spouse or de facto partner, if the principal is 68 years or older, or if the principal is a patient or resident in a 'hospital, home or other institution'.<sup>725</sup> It considered that:<sup>726</sup>

Limiting the circumstances in which the procedure will be required should catch most donors needing the protections that we propose, while avoiding such expense as would otherwise be incurred were that protection to be imposed in situations not in the defined class.

## Doctors

7.78 Another issue to consider is whether an enduring document should be witnessed by a doctor. At present, an advance health directive must be witnessed by a lawyer or justice of the peace *and* by a doctor. In contrast, there

<sup>721</sup> Eg, R Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 21 *Western Australian Law Review* 122, 134–5.

<sup>722</sup> Eg, L Willmott and L Windle, 'Witnessing EPAs: Empirical Research' (2007) 27 *Queensland Lawyer* 238, 242. Also, eg, *Re TGD* [2005] QGAAT 16, [22], [38]; *Re DEM* [2005] QGAAT 59, [52], [58]; *Re RJE* [2005] QGAAT 4, [57](f); and *Re EW* (1993) 11 FRNZ 118, 123–4 (Judge MD Robinson).

<sup>723</sup> Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.92]; South Australian Government, *Planning Ahead: Your Health, Your Money, Your Life*, Issues Paper (2007) 31.

<sup>724</sup> *Protection of Personal and Property Rights Act 1988* (NZ) s 95(1).

<sup>725</sup> Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [27]. The Law Commission of New Zealand noted that, in practice, problems associated with a lack of understanding or inability to resist pressure from others had not arisen frequently where the attorney is the principal's spouse (including de facto partner): [19]. In relation to the choice of 68 years as the age limit, the Law Commission of New Zealand commented, at [22], that:

Whatever age we propose is likely to attract taunts that we are purporting to impose an age of statutory senility, but under our proposed regime there does need to be certainty. We think that 68 years is an appropriate age. Speaking generally most people at this age still retain their mental faculties but by that age are likely to have been led, as a result of such lifestyle changes as retirement and of the intimations of mortality inseparable from the ageing process, to make testamentary and other arrangements including, under the current practice, the grant of enduring powers of attorney.

<sup>726</sup> Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [22].

is currently no requirement for an enduring power of attorney to be witnessed by a doctor.

7.79 Having two witnesses, rather than one, may provide added protection against exploitation. The legislation in the ACT, Tasmania and Victoria provides for two independent witnesses (although neither witness is required to be a medical practitioner).<sup>727</sup> In Ireland, both a solicitor and a medical practitioner must witness an enduring power of attorney.<sup>728</sup> On the other hand, a requirement for two independent witnesses, both with particular qualifications, may be a significant barrier to the availability of enduring documents.<sup>729</sup>

7.80 If it is appropriate to require the involvement of a doctor, another issue to consider is what role the doctor should have. At present, the legislation provides for the doctor to attest to the principal's understanding when making an advance health directive.<sup>730</sup> The relevant form for making an advance health directive provides, in slightly different terms, for the doctor to certify that he or she has discussed the document with the principal and that, in the doctor's opinion, the principal 'is not suffering from any condition that would affect his/her capacity to understand the things necessary to make this directive, and he/she understands the nature and likely effect of the health care described in this document'.<sup>731</sup>

7.81 The current requirement suggests that the doctor's role is to provide a medical opinion of the principal's capacity. It has been argued, however, that such a requirement should not be mandatory. While it may be a wise precaution in circumstances in which the principal's capacity is in some doubt, a mandatory requirement for a doctor's certificate as to the principal's capacity

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727 *Powers of Attorney Act 2006* (ACT) s 19(2); *Powers of Attorney Act 2000* (Tas) s 30(2)(b); *Guardianship and Administration Act 1995* (Tas) s 32(2)(c); *Instruments Act 1958* (Vic) s 123(3); *Medical Treatment Act 1988* (Vic) s 5A(2)(a); *Guardianship and Administration Act 1986* (Vic) s 35A(2)(c).

728 *Powers of Attorney Act 1996* (Ireland) s 5; *Enduring Powers of Attorney Regulations 1996* (Ireland) s 3. The Law Reform Commission of Ireland recommended that the requirement for an enduring power of attorney to be witnessed by a registered medical practitioner should continue to apply: Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [4.12].

729 Eg, Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 106, 108. Also note that the Law Commission (England and Wales) specifically considered but rejected the possibility of requiring both a lawyer and a doctor to witness a 'continuing power of attorney' on the basis of concerns raised by respondents that such a requirement 'would present practical difficulties and force donors to incur extra costs': Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [7.27].

Doctors may also be reluctant to perform this role because such a consultation would take considerable time and may involve expense for the patient which may not be rebatable under Medicare.

730 *Powers of Attorney Act 1998* (Qld) s 44(6).

731 See *Powers of Attorney Act 1998* (Qld) s 44(2), form 4 available at <<http://www.justice.qld.gov.au/2254.htm>> at 12 August 2008.

may involve unwarranted expense and an affront to the principal's dignity.<sup>732</sup> It would seem to be an unnecessary burden to require a professional medical judgment of the principal's capacity in every case.<sup>733</sup>

7.82 An informal approach in seeking a professional opinion of the principal's capacity is consistent with the various guidelines for witnessing enduring documents.<sup>734</sup> It is also consistent with the current Queensland legislation which includes a footnote to the effect that, if there is doubt about the principal's capacity, it is advisable for the witness to make a record of the evidence on which his or her assessment was based.<sup>735</sup> This could include the opinion of a doctor. This may lend weight to the witness's statement as evidence of the principal's capacity.

7.83 It has also been suggested that a doctor may not be in the best position to assess a principal's understanding of legal matters.<sup>736</sup>

7.84 A requirement for a doctor to witness the principal's capacity may also seem to confuse the doctor's proper role in witnessing an advance health directive.

7.85 In its Report in 1996, the Queensland Law Reform Commission considered whether the legislation should require a certificate from a medical practitioner to the effect that the principal had discussed the content of the directive with the doctor. The Commission considered a mandatory requirement to this effect would introduce too much complexity and should not apply.<sup>737</sup> It said, however, that:<sup>738</sup>

the advantage of such a requirement would be to promote communication between patients and practitioners about future health care in the event of a patient's loss of decision-making capacity and to help ensure that patients are aware of the medical implications of the instructions they have given. Further,

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732 Eg, Law Reform Commission of Hong Kong, *Enduring Powers of Attorney*, Report (2008) [3.7]–[3.8], [3.14]; Scottish Law Commission, *Incapable Adults*, Report No 151 (1995) [3.18]; Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse*, Report No 88 (2003) [53]. The Law Reform Commission of Hong Kong recommended that the requirement for an enduring power of attorney to be signed by a registered medical practitioner be removed from the legislation in that jurisdiction. Both the Scottish Law Commission and the Alberta Law Reform Institute specifically rejected the inclusion of a requirement for a doctor's certification of the principal's capacity to make an enduring power of attorney. The Law Commission (New Zealand) similarly rejected such a requirement: Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [25].

733 Eg, Hon RD Nicholson, 'Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability' (1995) 2 *Journal of Law and Medicine* 270, 282.

734 See [7.26]–[7.29] above.

735 See [7.24] above.

736 Eg, see the comments referred to in South African Law Reform Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [7.59]; and Scottish Law Commission, *Incapable Adults*, Report No 151 (1995) [3.18].

737 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making By and For People with a Decision-Making Disability*, Report No 49 (1996) Vol 1, 356–7.

738 *Ibid* 356.

knowledge that the contents of the directive had been discussed with a practitioner would be likely to increase the willingness of other health care providers to comply with the directive.

7.86 The current requirement was included in the legislation to provide for the involvement of medical advice. When the inclusion of this requirement was debated in Parliament, the then Attorney-General stated that it 'was always intended that a person making an advance health directive should consider the desirability of doing so in consultation with his or her doctor'.<sup>739</sup>

7.87 This has special importance in the context of an advance health directive because the principal, in such a document, may give specific directions about his or her health care including such matters as the withdrawal or withholding of life-sustaining measures. To give such directions, the principal would need to have an understanding of what treatment options are available and what they would involve. This is consistent with the obligation of a doctor to inform his or her patient when seeking consent to treatment.<sup>740</sup> It would also be consistent with the Australian Medical Association's position statement that, when engaged in developing an advance care plan, the doctor should ensure the patient is fully informed and has had 'an adequate opportunity to receive advice on various health care options'.<sup>741</sup>

7.88 At present, the legislation requires the doctor to certify the principal's understanding of all of the matters listed in section 42(1) of the *Powers of Attorney Act 1998* (Qld). This includes 'the nature and likely effects of each direction', but it also includes other matters about the operation of the directive itself (such as when the principal may revoke a direction). This raises the issue of whether the doctor's involvement in witnessing an advance health directive should be clarified. That is, it may be more appropriate for a doctor to certify that he or she has discussed the content of the document with the principal, rather than also to certify that the principal has the necessary capacity to make the directive.

7.89 Another issue to consider is whether the legislation should provide for a doctor's involvement in relation to any other enduring documents. Such a requirement may be appropriate for an enduring power of attorney that deals with health matters. As well as empowering an attorney to make decisions about the principal's health care, a principal may include information or terms for the exercise of the attorney's power.<sup>742</sup> In those circumstances, a doctor's involvement in explaining the effect of such matters may be prudent.

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739 Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1021 (Hon Denver Beanland, Attorney-General and Minister for Justice).

740 Eg, *Rogers v Whitaker* (1992) 175 CLR 479.

741 Australian Medical Association, *The Role of the Medical Practitioner in Advance Care Planning* (2006) [3.6].

742 *Powers of Attorney Act 1998* (Qld) ss 32(1)(b), 35(1)(d).

### **A minimum age requirement**

7.90 The *Powers of Attorney Act 1998* (Qld) provides that, if the document is an advance health directive, the witness must be at least 21 years old. An issue to consider is whether this requirement is necessary and, if so, whether it should also apply for an enduring power of attorney.

7.91 The 21 year minimum age requirement for advance health directives appears to have been included in the legislation to help ensure the witness has an appropriate level of 'maturity and life experience'.<sup>743</sup> However, the present requirement for the witness to be a justice of the peace, a commissioner for declarations, a notary public or a lawyer may be sufficient to help ensure the maturity of the witness.<sup>744</sup>

**7-9 To what extent, if any, are there difficulties with the current witnessing requirements for enduring documents?**

**7-10 Should the current requirement for enduring documents to be witnessed by a justice of the peace, a commissioner for declarations, a notary public or a lawyer:**

- (a) continue to apply in all circumstances; or**
- (b) be changed so that it applies in particular circumstances only and, if so, in what circumstances); or**
- (c) be removed altogether?**

**7-11 Should the current requirement for witnessing by a doctor continue to apply to advance health directives?**

**7-12 If yes to Question 7-11, what should the doctor be required to do? For example, should the legislation require that the doctor attest to the principal's capacity to make the advance health directive? Or should the doctor be required to certify that he or she has discussed the content of the directive with the principal?**

<sup>743</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1019 (Mrs Elizabeth Cunningham).

<sup>744</sup> To qualify to hold office as a justice of the peace, commissioner for declarations or lawyer, a person must be at least 18 years and must also meet other requirements (such as having attained certain qualifications or undertaken particular training): *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(1); *Legal Profession Act 2007* (Qld) s 30(1). Generally, a notary public in Queensland will be a legal practitioner: see P Zabrud, *Principles of Notarial Practice* (2005) 31; *Halsbury's Laws of Australia* (at 12 August 2008) Legal Practitioners, 'Notaries' [250-1735]; *Bailleau v The Victorian Society of Notaries* [1904] P 180, 184-5.

**7-13 Should the requirement for witnessing by a doctor be extended to apply to an enduring power of attorney that deals with health matters?**

**7-14 Should the current requirement for a witness to be at least 21 years old:**

- (a) continue to apply for advance health directives;**
- (b) be extended to apply to an enduring power of attorney that deals with health matters; or**
- (c) be extended to apply to all enduring powers of attorney; or**
- (d) be removed altogether?**

### Steps the witness should take

7.92 In New South Wales, an enduring power of attorney must include a certificate signed by a witness to the effect that the witness explained the effect of the document to the principal and that the principal appeared to understand its effect.<sup>745</sup> In Scotland and Ireland, the witnessing solicitor is to certify that 'after interviewing' the principal, the solicitor is satisfied the principal understood the relevant matters to make the enduring power of attorney.<sup>746</sup> Similarly, in the United Kingdom, the witness must confirm that he or she has discussed the contents of the 'lasting power of attorney' with the principal and has done so without the attorney being present.<sup>747</sup>

7.93 In Queensland, the *Powers of Attorney Act 1998* (Qld) does not presently require a witness to explain the import of the enduring document to the principal. However, the approved form for an advance health directive requires the witnessing doctor to certify that he or she has discussed the document with the principal.<sup>748</sup>

<sup>745</sup> *Powers of Attorney Act 2003* (NSW) s 19(1)(c)(i), (ii).

<sup>746</sup> *Adults with Incapacity (Scotland) Act 2000* (Scotland) ss 15(3)(c)(i)(ii), 16(3)(c)(i)(ii); *Powers of Attorney Act 1996* (Ireland) s 5; *Enduring Powers of Attorney Regulations 1996* (Ireland) s 3.

<sup>747</sup> *Mental Capacity Act 2005* (UK) s 9(2)(b), sch 1 pt 1 cl 1(1)(a); *The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007* (UK) s 5, sch 1 pt 1 form LPA PA. The Law Commission (New Zealand) also recommended that in those circumstances in which a solicitor is required to witness an enduring power of attorney, the solicitor should be required to certify that he or she advised the principal on the matters of which the principal must understand. This was considered an appropriate safeguard given concerns that, in practice, principals were not always being advised about certain matters: Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [21], [27].

<sup>748</sup> *Powers of Attorney Act 1998* (Qld) s 44(2), form 4 available at <<http://www.justice.qld.gov.au/2254.htm>> at 15 May 2008.

7.94 The guidelines produced by the Office of the Adult Guardian and the Queensland Law Society and those included in the handbooks for commissioners of declarations and justices of the peace also advise that the witness should interview the principal to determine the principal's capacity.<sup>749</sup> They also suggest that if the principal is at first unable to correctly answer questions about the document, the witness should give an explanation and ask about the matters later in the interview.<sup>750</sup>

7.95 An issue to consider is whether the giving of an explanation to the principal, or the asking of questions of the principal to test his or her understanding, should remain a matter for the witness's discretion, having regard to such guidelines, or whether it should be mandated under the legislation.

**7-15 Should the *Powers of Attorney Act 1998 (Qld)* be changed to include an express requirement for the witness to an enduring document to:**

- (a) give an explanation to the principal of the matters he or she must understand to execute the enduring document; or**
- (b) interview the principal about the matters he or she must understand to execute the enduring document?**

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Office of the Adult Guardian, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney* (4th ed, April 2005) 2 <<http://www.justice.qld.gov.au/files/Guardianship/capacityguidelines.pdf>> at 12 August 2008; Queensland Law Society, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney*; Department of Justice and Attorney-General, *The Duties of Justices of the Peace (Qualified)* (2007) 44, 47 <<http://www.justice.qld.gov.au/1005.htm>> at 12 August 2008; Department of Justice and Attorney-General, *The Administrative Duties of Commissioners for Declarations* (4th ed, February 2007) 44, 47 <<http://www.justice.qld.gov.au/1005.htm>> at 12 August 2008.

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Office of the Adult Guardian, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney* (June 2005) 3 <<http://www.justice.qld.gov.au/files/Guardianship/capacityguidelines.pdf>> at 12 August 2008; Queensland Law Society, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney* 4.

# Appendix 1

## Terms of reference

**A review of the law in relation to the General Principles, the scope of substituted decision-making, the role of the support network, adequacy of investigative powers, health and special health matters, and other miscellaneous matters, under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998***

1. I, LINDA LAVARCH, Attorney-General and Minister for Justice, having regard to—
  - the need to ensure that the General Principles continue to provide an appropriate balance of relevant factors to protect the interests of an adult with impaired capacity;
  - the need to ensure that the powers of guardians, administrators and other officers or bodies established by the legislation are sufficiently extensive to protect the interests of an adult with impaired capacity;
  - the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts;
  - the need to ensure that adults are not deprived of necessary health care because they have impaired capacity;
  - the need to ensure that adults with impaired capacity receive only treatment that is necessary and appropriate to maintain or promote their health or wellbeing, or that is in their best interests;
  - the need to ensure that the confidentiality provisions that apply to the proceedings and decisions of the Guardianship and Administration Tribunal and other decisions under the *Guardianship and Administration Act* strike the appropriate balance between protecting the privacy of persons affected by the Tribunal's proceedings and decisions and promoting accountability of the Tribunal;
  - the fact that some parents of a person with impaired capacity (whether or not an adult), may wish to make a binding direction, appointing a guardian or administrator for a matter for the adult, that applies if the parents are no longer alive or are no longer capable of exercising a power for a relevant matter for the adult;

refer to the Queensland Law Reform Commission (the Commission), for review pursuant to section 10 of the *Law Reform Commission Act 1968*—

- (a) the law relating to decisions about personal, financial, health matters and special health matters under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* including but not limited to:
- the General Principles;
  - the scope of personal matters and financial matters and of the powers of guardians and administrators;
  - the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation;
  - the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework;
  - the processes for review of decisions;
  - consent to special medical research or experimental health care; and
  - the law relating to advance health directives and enduring powers of attorney; and
  - the scope of the decision-making power of statutory health attorneys; and
  - the ability of an adult with impaired capacity to object to receiving medical treatment; and
  - the law relating to the withholding and withdrawal of life-sustaining measures;
- (b) the confidentiality provisions of the *Guardianship and Administration Act 2000*;
- (c) whether there is a need to provide protection for people who make complaints about the treatment of an adult with impaired capacity;
- (d) whether there are circumstances in which the *Guardianship and Administration Act 2000* should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.

2. In performing its functions under this reference, the Commission is asked to prepare, if relevant, draft legislation based on the Commission's recommendations.
3. The Commission is to provide a report to the Attorney-General and Minister for Justice on the confidentiality provisions by June 2007, and a report on all other matters by the end of 2008.

**The Hon Linda Lavarch MP**  
**Attorney-General and Minister for Justice**

## **Appendix 2**

### **Membership of the Reference Group**

The Reference Group is chaired by the Honourable Justice Roslyn Atkinson, Chairperson of the Queensland Law Reform Commission. The membership of the Reference Group as at September 2008 is:

Ms Pam Bridges, Residential Care Project Officer, Aged Care Queensland Incorporated

Mrs Pat Cartwright, Manager, Community Visitor Program

Mr Jeff Cheverton, Executive Director, Queensland Alliance

Mr Mark Crofton, Official Solicitor to the Public Trustee

Ms Jennifer Cullen, Chief Executive Officer, Brian Injury Association of Queensland

Dr Chris Davis, Director, Geriatric Medicine and Rehabilitation, The Prince Charles Hospital (nominee of the Australian Medical Association (Queensland))

Ms Margaret Deane, Chief Executive Officer, Queensland Aged and Disability Advocacy Inc

Ms Sandra Eyre, Director, Policy Branch, Policy, Planning & Resourcing Division, Queensland Health

Ms Susan Gardiner, President, Guardianship and Administration Tribunal

Ms Marianne Gevers, Vice-President, Alzheimer's Australia (Qld) Inc

Ms Michelle Howard, Public Advocate

Ms Susan Masotti, Legal Officer, Strategic Policy, Department of Justice and Attorney-General

Ms Glenda Newick, Director, Legal Policy, Disability Services Queensland

Mr Michael O'Neill, Chief Executive, National Seniors

Ms Dianne Pendergast, Adult Guardian

Mr Graham Schlecht, Executive Director, Carers Queensland

Ms Vera Somerwil, Queensland State Chair, National Seniors

Mr Phil Tomkinson, President, Queensland Parents of People with a Disability

Mr Ken Wade, Systems Legal Advocacy, Queensland Advocacy Inc

Professor Lindy Willmott, Faculty of Law, Queensland University of Technology

Ms Alison Wolff, Manager, Community Advocacy and Support Unit, Endeavour Foundation

## Appendix 3

# Jurisdictional comparison of the General Principles

The following table shows the general principles that are to be applied by a person in the exercise of functions and/or the performance of powers under the guardianship legislation in each of the Australian jurisdictions.<sup>751</sup> In some jurisdictions, the principles apply to certain decision-makers only, such as the relevant Tribunal, guardians, administrators or attorneys under an enduring power of attorney.<sup>752</sup> Where relevant, this is indicated in the table. In some jurisdictions, particular principles are required to be given priority or paramount consideration. This is also indicated in the table.

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751 *Guardianship and Management of Property Act 1991* (ACT) s 4; *Guardianship Act 1987* (NSW) s 4; *Adult Guardianship Act* (NT) s 4; *Guardianship and Administration Act 2000* (Qld) s 11, sch 1 pt 1 and *Powers of Attorney Act 1998* (Qld) s 76, sch 1 pt 1; *Guardianship and Administration Act 1993* (SA) s 5; *Guardianship and Administration Act 1995* (Tas) s 6; *Guardianship and Administration Act 1986* (Vic) s 4(2).

752 *Powers of Attorney Act 2006* (ACT) s 44, sch 1; *Adult Guardianship Act* (NT) s 20; *Guardianship and Administration Act 1993* (SA) s 5(c); *Guardianship and Administration Act 1995* (Tas) ss 27, 57; *Guardianship and Administration Act 1986* (Vic) ss 28, 49; *Guardianship and Administration Act 1990* (WA) ss 4, 51, 70.

Principle	Queensland	ACT	New South Wales	Northern Territory	South Australia	Tasmania	Victoria	Western Australia
<b>Presumption of capacity</b>	✓							✓ (Tribunal only)
<b>Same human rights</b>	✓							
<b>Individual value</b>	✓	✓ (enduring attorneys only)						
<b>Valued role as member of society</b>	✓	✓ (enduring attorneys only)						
<b>Participation in community life</b>	✓	✓	✓	✓ (guardians only)		✓ (guardians only)	✓ (guardians only)	✓ (guardians & administrators only)
<b>Encouragement of self-reliance</b>	✓	✓	✓	✓ (guardians only)		✓ (guardians & administrators only)	✓ (guardians & administrators only)	✓ (guardians & administrators only)
<b>Maximum participation in decision-making or least restrictive option</b>	✓	✓ (enduring attorneys only)	✓	✓	✓	✓	✓	✓ (Tribunal, guardians & administrators only)
<b>Adult's views and wishes/ substituted judgment</b>	✓	✓	✓	✓	✓ Paramount principle	✓	✓	✓ (Tribunal, guardians & administrators only)
<b>Consistent with care and protection</b>	✓	✓ (enduring attorneys only)			✓			✓ (guardians & administrators only)
<b>Maintenance of supportive relationships</b>	✓	✓ (enduring attorneys only)	✓					✓ (guardians & administrators only)

Principle	Queensland	ACT	New South Wales	Northern Territory	South Australia	Tasmania	Victoria	Western Australia
<b>Involvement of family in decisions</b>		✓ <i>(enduring attorneys only)</i>						
<b>Consultation with carers</b>		✓						
<b>Maintenance of environment and values</b>	✓	✓	✓					✓ <i>(guardians &amp; administrators only)</i>
<b>Least disturbance to informal arrangements</b>					✓ <i>(Tribunal only)</i>			
<b>Appropriate to circumstances</b>	✓							
<b>Confidentiality</b>	✓	✓ <i>(enduring attorneys only)</i>						
<b>(Best) interests</b>		✓	✓ Paramount principle	✓		✓	✓	✓ Primary principle <i>(Tribunal, guardians &amp; administrators only)</i>
<b>Act as advocate</b>				✓ <i>(guardians only)</i>		✓ <i>(guardians only)</i>	✓ <i>(guardians only)</i>	✓ <i>(guardians &amp; administrators only)</i>
<b>Protection from neglect, abuse, exploitation</b>			✓	✓ <i>(guardians only)</i>		✓ <i>(guardians only)</i>	✓ <i>(guardians only)</i>	✓ <i>(guardians &amp; administrators only)</i>
<b>Community encouraged to apply principles</b>	✓		✓					

