

Queensland
Law Reform Commission

**Shaping Queensland's
Guardianship Legislation:
A Companion Paper**

WP No 65
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HAVE YOUR SAY

The Commission would like to hear your comments, ideas and suggestions about the General Principles and the Health Care Principle, and the concept of capacity under the guardianship legislation. You can tell us what you think by writing to us. Alternatively, you can contact the Commission by email or telephone, or you can make a time to meet with one of our staff.

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The closing date for submissions is 12 December 2008.

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Unless there is a clear indication from you that you wish your submission, or part of it, to remain confidential, submissions may be subject to release under the provisions of the *Freedom of Information Act 1992* (Qld).

Any information you provide in a submission will be used only for the purpose of the Commission's review. It will not be disclosed to others without your consent.

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CHAPTER 1: THE COMMISSION'S GUARDIANSHIP REVIEW

The Attorney-General has asked the Queensland Law Reform Commission to review parts of Queensland's guardianship legislation. This review is being done in two stages.

Stage one

In stage one, the Commission looked at the rules of confidentiality under the guardianship legislation. The Commission concluded stage one with the publication of its final report, called *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, at the end of 2007. The Report made a number of recommendations for changes to the law. In response to the Commission's Report, the Queensland Government has introduced the Guardianship and Administration and Other Acts Amendment Bill 2008 (Qld) into the Queensland Parliament. The Bill proposes to implement most of the Commission's recommendations.

A copy of the Commission's Report can be obtained by contacting the Commission or visiting the Commission's guardianship website at [http://www.qlrc.qld.gov.au/guardianship/index.htm](http://www qlrc qld gov au /guardianship/index.htm).

Stage two

In stage two, the Commission is looking more widely at the guardianship legislation.

Because there are many parts to the legislation, the Commission has decided to look at the issues in different Discussion Papers. The Discussion Papers are designed to help the Commission consult with the community.

The first Discussion Paper, called *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, has now been written. It looks at some of the key provisions which give shape to the guardianship legislation:

- the General Principles and the Health Care Principle; and
- the concept of ‘capacity’.

The other aspects of the guardianship legislation and procedural issues in the operation of the guardianship system will be considered in another Discussion Paper.

The Commission is to give a final report on stage two, with recommendations for change, to the Attorney-General by the end of 2008.

This Companion Paper

A central part of the guardianship legislation is the set of General Principles and the Health Care Principle which must be followed when decisions for, or about, an adult are made. Together with the idea of ‘capacity’ and how it is defined and assessed, the principles give shape to the legislation.

The Commission has written the first Discussion Paper to help it consult with members of the community on these issues. The Commission especially wants to hear from people who are affected by the guardianship legislation.

A copy of the Discussion Paper can be obtained by contacting the Commission or visiting the Commission’s guardianship website at <http://www qlrc.qld.gov.au/guardianship/index.htm>.

This Companion Paper is designed as a guide to the Discussion Paper. It provides a short description of the law and issues and asks what you think. The Discussion Paper is a much longer document because it sets out the current law and issues in more detail. You might like to read these documents together, or separately.

CHAPTER 2: AN OVERVIEW

Adults usually make their own decisions — from simple, day-to-day decisions to complex and serious decisions. Decision-making autonomy (the right to make one's own decisions) is an important part of being an adult. When a person's ability to make decisions is taken away, the person's sense of who they are may be affected.

However, a person's capacity to make decisions can be impaired for some (or all) types of decisions for some (or all) of the time. This may be a result of an intellectual disability, an acquired brain injury or dementia, for example.

Substitute decision-making

Adults with impaired decision-making capacity may need assistance to make decisions. Usually, this is done informally within the adult's support network, for example, of family and friends. Sometimes, it may be necessary to formalise decision-making processes. For example, there may be no one available who can make a decision or there might be a disagreement about what decision should be made. The guardianship legislation provides a framework for formal decision-making.

In Queensland, the guardianship legislation is the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). It applies when an adult has impaired capacity for certain matters. It allows for substitute decision-makers to make decisions on an adult's behalf. A substitute decision-maker for an adult could be:

An informal decision-maker

Someone who is member of the adult's support network, including a family member or close friend of the adult.

A statutory health attorney

The adult's spouse, carer, close friend or relation or, if no one else is available, the Adult Guardian.

<i>An attorney</i>	A person who is appointed by the adult, while the adult has capacity, in a legal document called an enduring power of attorney or an advance health directive.
<i>A guardian</i>	A person who is appointed by the Guardianship and Administration Tribunal to make personal or health decisions for the adult.
<i>An administrator</i>	A person who is appointed by the Guardianship and Administration Tribunal to make financial decisions for the adult.
<i>The Guardianship and Administration Tribunal</i>	In limited situations, the Tribunal can make decisions for an adult. The Tribunal is like a court, but is less formal.

Types of decisions

The guardianship legislation applies to certain types of decisions. Those decisions may relate to personal, health or financial matters:

Personal matters are things like where we live, who we live with, where we work, and what sort of lifestyle we have.

Decisions about an adult's personal matters can be made by an attorney who was appointed by the adult under a legal document called an enduring power of attorney. The Tribunal can also appoint a guardian to make decisions about an adult's personal matters. This is called 'guardianship'.

Health matters are a type of personal matter. They include decisions about what medical treatment we will receive.

Adults can make decisions about their health matters by making a legal document called an advance health directive while they have capacity. Or, adults can appoint an attorney to make decisions about their health matters under an enduring power of attorney. Otherwise, decisions about an adult's health care can be made by a statutory health attorney or by a guardian who is appointed by the Tribunal. The Tribunal can also make decisions about some types of health matters.

Financial matters include our day-to-day financial decisions (like paying bills), buying and selling property, making investments and entering into contracts.

Financial decisions can be made by an attorney who was appointed by the adult under an enduring power of attorney before the adult had impaired capacity. The Tribunal can also appoint an administrator to make decisions about an adult's financial matters. This is called 'administration'.

Queensland's guardianship agencies

An important part of Queensland's guardianship system is the role played under the legislation by a number of agencies. There are five main agencies, each with a different role:

The Guardianship and Administration Tribunal

The Tribunal is like a court but is less formal. It has the authority to appoint guardians and administrators for adults with impaired capacity and can give substitute decision-makers directions or advice about what to do. The Tribunal also has power to make decisions for an adult about certain types of health care.

The Adult Guardian

This is an independent official whose role is to protect the rights and interests of adults with impaired capacity. One way the Adult Guardian does this is by investigating complaints about neglect, exploitation or abuse of an adult. The Adult Guardian may also be appointed by the Tribunal to be a guardian for an adult. If there is no one else who can, the Adult Guardian may also give consent to health care for an adult.

The Public Advocate

This is another independent official. The Public Advocate's role is to promote and protect the rights of adults with impaired capacity, and to monitor and review the provision of services and facilities for adults with impaired capacity. This means working for the improvement of the systems in our society that are used by adults with impaired capacity, rather than working on behalf of individual adults.

The Community Visitor Program

This is a network of people who visit certain facilities where adults with impaired capacity, and adults with mental or intellectual impairments, live or receive services. The community visitors report on the standards maintained at the facilities in order to promote the rights and interests of the adults who stay or go there.

The Public Trustee

The Public Trustee provides a range of trustee services to the community. Sometimes, the Public Trustee is appointed by the Tribunal as an administrator for an adult. In this role, the Public Trustee can make decisions about the adult's financial matters.

A more detailed overview of the guardianship system is contained in Chapter 2 of the Discussion Paper.

CHAPTER 3: THE UNITED NATIONS CONVENTION

All people have human rights, including people with disabilities. Recently, the United Nations drew together all the rights of people with disabilities, including people with mental or intellectual disabilities in a new Convention. In May 2008, the Australian Government made a commitment to follow and uphold the Convention.

The Convention is called the *Convention on the Rights of Persons with Disabilities*. You can find a copy on the United Nations website at <http://www.un.org/disabilities/>

The Convention contains a number of articles (or sections) covering many topics. Article 3 of the Convention sets out some key principles, including:

- respect for one's inherent dignity, the freedom to make one's own choices and the independence of people;
- non-discrimination, respect for difference and acceptance of people with disabilities as part of human diversity and humanity;
- full and effective participation and inclusion in society;
- equality of opportunity and equality between men and women; and
- accessibility.

Article 3 of the Convention provides:

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.

The Convention also deals with the exercise of a person's legal capacity. Article 12 provides that people with disabilities enjoy legal capacity on an equal basis with others and are to be given necessary support to exercise their legal capacity. These 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 provides:

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 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.

Article 16 of the Convention also provides for the protection of people with disabilities from exploitation, violence and abuse. It 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.

What do you think?

- Q1. The Commission thinks that its review of the guardianship legislation, and any changes to it, should be guided by the new United Nations Convention. Do you agree?

CHAPTER 4: THE GENERAL PRINCIPLES

The guardianship legislation contains a set of 11 General Principles. People who make decisions for, or about, an adult with impaired capacity are required to apply these principles when making decisions. The Guardianship and Administration Tribunal and the Adult Guardian are also required to apply the principles.

The General Principles provide that all adults are presumed to have capacity and set out a number of matters that must be taken into account when making decisions for or about an adult:

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.
- (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 under 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 under 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 or Island custom), must be taken into account.

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.

The General Principles are discussed in Chapter 4 of the Discussion Paper. It asks the following questions about the General Principles.

What role should the General Principles have?

The General Principles may fulfil many roles: an affirmation of human rights, a set of decision-making guidelines, a safeguard against inappropriate decision-making, and education. At the moment, the principles seem to perform a mix of these roles. It may be better if

the General Principles provided a general statement of key points. Alternatively, the principles could set out a detailed list of guidelines for decision-makers.

Should a new set of General Principles be written?

At present, the General Principles are simple in some parts and more complex in others. They cover a range of matters under eleven main headings. Some of the principles may not be appropriate. Some may be better included in other parts of the legislation. Depending on their role, it might be a good idea to start again and write a new set of principles. This might be guided by the statements contained in the new United Nations Convention.

Should any of the General Principles be made clearer?

Some of the General Principles may be confusing or vague and need to be made clearer. For example, General Principle 7 requires a decision-maker to taken the adult's views and wishes into account. It also requires the adult's care and protection to be considered. These two requirements may conflict with one another. It might be useful for the legislation to say whether, or when, one of these is more important than the other.

Should any new General Principles be added?

The legislation in some of the other Australian States and Territories includes different principles to Queensland. It may be useful to include some new principles in Queensland's legislation (although this might lead to more complexity). These might include:

- *A best interests or similar test.* The best interests test requires decisions to be made for the adult's welfare or benefit. However, it may be unclear what factors should be taken into account to decide what is in a person's best interests. Decision-makers might rely too much on their own values. A different option is to include a test that requires decision-makers to act 'in the adult's interest'. This means they should prefer the adult's interests to their own or those of another

person. This test may make the legislation's focus on the promotion of the rights and interests of adults more obvious.

- *An obligation to consult families and carers.* Consultation may provide valuable information to help with decision-making and would take into account the important role that carers and others play in adults' lives. On the other hand, consideration of the views of families and carers may shift the focus away from the adult's views and interests.
- *An obligation to act as the adult's personal advocate,* which might help to boost the adult's rights and interests, but could make the role of a substitute decision-maker harder.
- *Consideration of the financial and lifestyle impact of decisions.* It may be important for people who make decisions about an adult's personal or health matters to take financial considerations into account. It might also be important for a financial decision-maker to take into account the impact of decisions on the adult's lifestyle choices. For example, buying property may impact on the adult's day-to-day spending on social activities.
- *An obligation to protect the adult from neglect, abuse or exploitation.* This may help protect adults from harm (although there are already provisions about this elsewhere in the legislation).
- *Consideration of the adult's existing informal arrangements* when the Tribunal decides whether to appoint a guardian or administrator for an adult.

How should conflicts between different General Principles be resolved?

Sometimes, the application of different principles may suggest different conclusions. At present, the legislation does not say what a decision-maker should do if this happens. It might be helpful if the legislation made one of the principles more important than the others or put the principles in an order of priority.

Are there any difficulties in complying with the General Principles?

Following the General Principles might be difficult if some of them are not related to the decision, or if decisions need to be made quickly. It may be helpful if decision-makers were required to apply the principles only so far as they possibly can. For example, this might mean that if one of the principles does not make sense in a particular situation, the decision-maker would not have to struggle to make it fit. Another question to think about is whether the legislation should say what happens if a person does not comply with the principles.

Should the Principles apply to informal decision-makers?

Generally, informal decision-makers are not required to follow the General Principles. It might be important for the legislation to require or encourage informal decision-makers to apply the principles.

Informal decision-makers are members of the adult's support network, including family members and close friends.

Should the General Principles be relocated?

The General Principles are currently set out in a separate section at the back of the guardianship legislation. They are still part of the law, but it might be better to locate them in another part of the legislation to show their importance under the legislation.

What do you think?

- Q2. What role should the General Principles have?
- Q3. Should a new set of General Principles be written?
- Q4. Should any of the General Principles be made clearer?
- Q5. Should any new General Principles be added?
- Q6. How should conflicts between different General Principles be resolved?

- Q7. Are there any difficulties in complying with the General Principles?
- Q8. Should the General Principles apply to informal decision-makers?
- Q9. Should the General Principles be relocated?

CHAPTER 5: THE HEALTH CARE PRINCIPLE

In addition to the General Principles, the guardianship legislation includes a Health Care Principle. It sets out the way in which health decisions for an adult are to be made.

The Health Care Principle provides that a decision-maker should exercise power for an adult's health matters (or special health matters) in the way that is least restrictive of the adult's rights, and only if it is either:

- necessary and appropriate to maintain or promote the adult's health or wellbeing; or
- in the adult's best interests.

Health matters mean general health care and treatment by a health provider.

Special health matters include things like tissue donation, sterilisation and termination of pregnancy.

The Health Care Principle also says that the adult's views and wishes must be taken into account. It also requires decision-makers to take into account the information that is given by the health provider about the adult's health care and treatment.

The Tribunal must also take into account the views of the adult's guardian or attorney (if there is one) or statutory health attorney when it makes decisions about special health matters.

The Health Care Principle also refers to the adult's right to refuse treatment.

The Health Care Principle provides:

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 wellbeing; or
 - (ii) is, in all the circumstances, in the adult's best interests.

Example of exercising power in the way least restrictive of the adult's rights—

If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

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

The Health Care Principle is discussed in Chapter 5 of the Discussion Paper. It asks the following questions about the Health Care Principle.

What role should the Health Care Principle have?

The Health Care Principle balances the need to make sure that adults do not miss out on necessary health care, and the need to protect adults against unnecessary or inappropriate treatment. To do this, the Health Care Principle could:

- provide a general statement of core values, which may be easier to follow; or
- set out detailed guidelines for making health decisions, which may provide more certainty.

How should the Health Care relate to the General Principles?

It may be simpler if the Health Care Principle were included as part of the General Principles. On the other hand, the special nature of health decisions may justify a separate Health Care Principle.

At present, the legislation requires decision-makers to apply both the Health Care Principle and the General Principles when they make health decisions. However, these sets of principles may sometimes conflict with one another. Decision-makers may not know which principle to follow. For health decisions, it might be easier if the Health Care Principle were given priority over the General Principles.

What should the Health Care Principle contain?

There are several parts to the Health Care Principle. It is important to ask whether each of those parts should be included and whether they need to be made clearer. They are:

- *The least restrictive option.* The Health Care Principle provides that a decision-maker should exercise power for an adult's health matters (or special health matters) in the way that is least restrictive of the adult's rights. This shows respect for the adult's basic rights, which may be especially important for health decisions. This principle might mean, for example, that, if it is available, it may be better for care to be given in the adult's home instead of in a hospital. Including some examples in the legislation might show decision-makers how to apply this principle.
- *When power for a health matter (or special health matter) should be exercised.* The Health Care Principle provides that a decision-maker should exercise power for an adult's health matters (or special health matters) only if:
 - it is necessary and appropriate to maintain or promote the adult's health or well-being; or
 - it is in the adult's best interests.

The first of these may help prevent unnecessary or inappropriate treatment being given to the adult, but may be too limiting. The second of these is more flexible, but may be too wide or unclear. Including a list of things for decision-makers to consider may help them decide what is in the adult's best interests.

- *Consideration of the adult's views and wishes and information from the health provider.* The Health Care Principle requires a decision-maker to take into account the adult's views and wishes, and information from the health provider about the adult's health care and proposed treatment. However, this seems to apply in some situations only. It may be useful to make it clear that this requirement applies to all health

decisions. It may also be a good idea to require decision-makers to consider the views of others, such as members of the adult's support network. The adult's support network includes family members, close friends and any one else who is recognised by the Tribunal as someone who gives support to the adult.

- *Adult's right to refuse treatment.* The Health Care Principle refers to the adult's right to refuse treatment. It may be unclear how this principle should be applied in practice. It might be better to move it to another part of the legislation. For example, there are other parts of the legislation that say what happens when an adult objects to treatment.
- *Consideration of others' views when the Tribunal consents to special health care.* The Health Care Principle provides that the views of the adult's guardian or attorney (if there is one) must be taken into account when deciding whether to consent to special health care. This applies to the Tribunal only, which alone has power to consent to special health care. Guardians and attorneys cannot usually give consent to special health care. Guardians or attorneys who follow the Health Care Principle may not realise that this part of the principle does not apply to them.

Are there any difficulties in complying with the Health Care Principle?

There may be practical difficulties for decision-makers in following the Health Care Principle. Another thing to think about is whether the legislation should say what happens if a person does not comply with the principle.

Should the Health Care Principle be relocated?

The Health Care Principle is currently included in a separate section at the back of the guardianship legislation. It still forms part of the law, but it might be better to move it to another part of the legislation to show its importance. For example, it may be better to move the

Health Care Principle to the part of the legislation that deals with health matters.

What do you think?

- Q10. What role should the Health Care Principle have?
- Q11. How should the Health Care Principle relate to the General Principles?
- Q12. What should the Health Care Principle contain?
- Q13. Are there any difficulties in complying with the Health Care Principle?
- Q14. Should the Health Care Principle be relocated?

CHAPTER 6: DECISION-MAKING CAPACITY

Adults are presumed to have capacity to make their own decisions, but their capacity may sometimes be impaired. Adults with impaired capacity may need assistance in making decisions so that their needs and interests are properly met.

The guardianship legislation includes a three-part definition of 'capacity':

capacity, for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

If a person does not meet this test for a particular matter, he or she is said to have 'impaired capacity' for that matter. 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. If it is too narrow, there may be some people who do need help with decision-making whose needs and interests are not met. It is also important to keep in mind that impaired capacity may be partial, temporary or fluctuating.

Chapter 6 of the Discussion Paper asks a number of questions about the concept of decision-making capacity.

How is the presumption of 'capacity' applied in practice?

The legislation says that a person is taken to have capacity unless someone shows that the person's capacity is impaired. This is called the 'presumption of capacity' and is one of the General Principles of

the legislation. It is not clear how the presumption should apply in practice.

For example, does the presumption need to be applied every time a person exercises a power or performs a function under the legislation for an adult? What happens if the Tribunal has previously decided that the adult has impaired capacity for the matter? Another question to think about is whether the presumption should stay in the General Principles or be moved to another part of the legislation to show its importance under the legislation.

What approach should the definition of ‘capacity’ be based on?

The definition of capacity is based on the functional approach. This looks at the reasoning processes that are used in making decisions. It asks whether the person is capable of making a particular decision at the time the decision needs to be made. It is different from other approaches that might be used. One of these approaches is the status approach, under which a person has impaired capacity if he or she has a certain status, such as being a person with a particular disability or condition. Another approach is the outcome approach, under which a person has impaired capacity if the content of the person’s decision does not match up with other people’s opinions. Sometimes, the functional and status approaches are used together.

A question to think about is whether the definition of capacity should be based on any one or any combination of those approaches.

Does the definition of capacity need to be changed in some way?

There are three parts to the current definition of capacity. It is important to consider whether each of those parts should be included and whether they need to be made clearer. They are:

- *Being capable of understanding the nature and effect of the decision.* This relates to a person’s ability to understand the decision. However, the legislation does not say what things this might involve. It may be helpful for the legislation to include some factors to be taken into account to decide if a person meets this test. For example, this might include

understanding information about the decision and using that information to make the decision.

The legislation also requires an adult to be given any necessary information to enable him or her to make the decision. It may also be useful for the legislation to give more guidance on what type of information or explanation should be given.

- *Being capable of making decisions freely and voluntarily.* This relates to a person's ability to make decisions without being unduly influenced by another person. A person who has difficulty in making decisions may be at risk of being pressured into making a decision he or she would not otherwise make. Because of this, it may be convenient to assess the ability to understand the decision alongside the ability to make the decision freely and voluntarily. In some cases, the inclusion of the voluntariness requirement in the test of capacity also avoids the need for a person to take court action to overturn a decision after it has been made. It may be helpful for the legislation to say whether this requirement is limited to unfair influence only. There may also be another way to deal with voluntary decision-making in the legislation other than in the test of capacity. For example, it might be contained in legislative guidelines to assist people in assessing capacity.
- *Being capable of communicating the decision in some way.* If a person is wholly unable to communicate decisions, the person is regarded as not being able to make decisions. A person may have some ability to communicate decisions, but need special assistance from others to do so. It may be helpful for the legislation to include examples of some of the ways in which a person might be able to communicate, like using sign language.

Should certain matters be excluded from the determination of capacity?

The right to make decisions includes the right to make good decisions and bad decisions, and decisions with which others may not agree. Certain factors, such as inexperience or unusual decision-making, do not necessarily indicate that a person has impaired capacity. It may be helpful for the legislation to say that a person should not be taken to have impaired capacity simply because the person makes unusual, strange or unwise decisions.

Does fluctuating capacity raise any problems in practice?

A person may have capacity for some matters, but not for others. A person's capacity might also fluctuate so that he or she has capacity at some times, but not at others. This might depend on the person's mental or physical health, his or her personal strengths and the sort of support or services the person receives.

Fluctuating capacity may raise difficulties for decision-making under the legislation. For example, it may be difficult for the Tribunal to decide whether or not the adult has impaired capacity, or whether to appoint a guardian or administrator, if the adult's capacity varies on different occasions. It might also be difficult for a guardian or administrator to know when to make decisions for an adult if the adult's capacity fluctuates.

The Commission will look at these issues when it examines the provisions of the legislation about the appointment and powers of guardians and administrators. However, the Commission is interested to know, at this early stage, whether fluctuating capacity raises any problems in practice and, if so, what those problems are.

Should there be a code of practice for assessing decision-making capacity?

It is important for people who assess capacity, like health professionals and substitute decision-makers, to understand when and how to make capacity assessments. Some jurisdictions have made codes or guidelines for people who make capacity

assessments. Perhaps a similar code of practice should be required under Queensland's guardianship legislation.

What do you think?

- Q15. How is the presumption of 'capacity' applied in practice?
- Q16. On what approach should the definition of 'capacity' be based?
- Q17. Does the definition of capacity need to be changed in some way?
- Q18. Should certain matters be excluded from the determination of capacity?
- Q19. Does fluctuating capacity raise any problems in practice and, if so, what are they?
- Q20. Should there be a code of practice for assessing decision-making capacity?

CHAPTER 7: CAPACITY TO MAKE ENDURING DOCUMENTS

Adults can make some decisions in advance in case they lose decision-making capacity. The guardianship legislation allows adults to make an enduring power of attorney or an advance health directive (these are called 'enduring documents') to do this. These documents will come into effect if the adult's capacity to make decisions becomes impaired.

An enduring power of attorney allows adults to appoint attorneys to make decisions about their personal, health or financial matters. An advance health directive allows adults to give directions about their future health care and to appoint attorneys to make health care decisions for them.

An attorney is a substitute decision-maker appointed by an adult in an enduring document. An attorney must be at least 18 years old. Enduring documents are a type of legal document.

There is a need to balance the availability of enduring documents as an affordable and simple way for adults to plan for their future, and the need to make sure these documents are not misused to take advantage of adults.

To make an enduring document, the legislation requires that the person (called the 'principal') understands the nature and effect of the document.

A principal is a person who makes an enduring document.

The legislation provides that, when a person appoints an attorney, the person must also understand the following things:

- that the person may specify or limit the power that is given to the attorney and may give instructions about how the attorney is to exercise power;
- when the attorney's power begins;
- that once the attorney's power for a matter begins, the attorney will have power to make, and will have full control over, decisions about that matter, subject to any terms or limitation included in the enduring document;

- that the person may revoke the enduring document at any time that he or she has capacity to make such a document;
- that the power given to the attorney in the document will continue even if the person's capacity becomes impaired; and
- that at any time that the person is not capable of revoking the document, the person will be unable to oversee its use.

The legislation also provides that, when a person makes an advance health directive which gives directions about the adult's health care, he or she must understand the following:

- the nature and likely effects of each direction in the document;
- that a direction will operate only while the person has impaired capacity for the matter;
- that the person may revoke a direction at any time that he or she has capacity for the matter; and
- that at any time that the person is not capable of revoking a direction, the person will be unable to oversee its implementation.

The tests of capacity for making an enduring document are set out in sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld):

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.
- (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters—
 - (a) the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
 - (b) when the power begins;

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

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—
 - (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.

The legislation also requires an enduring document to be witnessed by another person. The witness must certify that the person making the document understands the nature and effect of the document. The witness must be a justice of the peace, a commissioner for declarations, a notary public or a lawyer.

A witness is present when a person signs an enduring document. The witness states that the person understands the document. The witness does this by putting his or her signature on the document.

For an advance health directive the witness must be at least 21 years old. Advance health directives must also be witnessed by a doctor. The person's attorney, paid carer, health provider, or relative cannot witness the document.

Chapter 7 of the Discussion Paper asks several questions about the test of capacity to make an enduring document and the witnessing requirements.

What level of understanding should be required to appoint an attorney?

The legislation includes a list of matters that a person must understand to appoint an attorney in an enduring document. In general, the legislation requires the person to understand the nature and effect of making the document.

It has also been suggested that the person might need to understand some more specific matters as well. These might include the nature and extent of the person's property that is to be managed by the attorney, the decisions that are likely to be made by the attorney, and the attorney's ability to carry out his or her tasks. This would make it harder to satisfy the test. It may be useful for the legislation to say exactly what matters are included in the test.

Should the legislation include *all* the factors that need to be understood?

At present, it is open for the Tribunal to require a person to understand other matters that are not included in the test set out in the legislation. This flexibility recognises that every case is different,

but having a set list of factors may make the test clearer and easier to apply in practice.

Should the test that applies when determining impaired capacity also apply when making an enduring document?

The legislation requires that, to make an enduring document, the person must understand the nature and effect of the document. It sets out a list of matters that must be understood in order to meet this test.

The legislation also includes a test of impaired capacity which applies, among other things, when deciding whether a substitute decision-maker has power to make decisions for an adult. The impaired capacity test rests on the definition of 'capacity'. As explained earlier, 'capacity' means that the person is capable of understanding the nature and effect of decisions about the matter, of freely and voluntarily making decisions about the matter, and of communicating the decisions in some way. A person who does not meet this test is said to have 'impaired capacity'.

The test of capacity and the test for making an enduring document seem to be aimed at separate things. It has been suggested, however, that this is unclear and that a person may need to satisfy both tests. It may be helpful if the legislation said whether both tests apply and, if so, how this should work in practice.

Who should witness an enduring document?

The legislation requires enduring documents to be signed by a witness who certifies that the person making the document appeared, at the time of making the document, to understand its nature and effect. It is important to strike a balance between looking after the person's interests and keeping down the expense and difficulty of making an enduring document. This raises the following questions:

- *Should the witness be a justice of the peace or lawyer etc?* At present, the legislation requires the witness to be a justice of the peace, a commissioner for declarations, a notary public or a lawyer. This emphasises the serious nature of enduring documents, but may sometimes increase the costs of making an enduring document. Perhaps this requirement should apply in certain situations only.
- *Should doctors be involved in witnessing enduring documents?* At the moment, the legislation requires advance health directives to be witnessed by a doctor. The doctor must certify that the person making the document understands the nature and effect of making it. Since advance health directives deal with a person's health matters, it is important that the person understands all of the available medical treatment options when making such a document. It may be better if the doctor were required to discuss the content of an advance health directive with the person, rather than to give a medical opinion of the person's capacity.

At present, advance health directives need to be witnessed by a doctor, but enduring powers of attorney do not. It might be useful for enduring powers of attorney that deal with health matters to be witnessed by a doctor.

- *Should the witness be of a minimum age?* The legislation currently requires the witness for an advance health directive to be at least 21 years old. This helps to ensure the maturity of the witness. It may also be important to include this requirement for enduring powers of attorney. On the other hand, the requirement for the witness to be a justice of the peace or lawyer etc may be sufficient.

Should the witness be required to give an explanation to the principal?

The witness will need to test a person's understanding of the nature and effect of an enduring document, so that the witness can sign the document. The witness may need to give the person an explanation of the things he or she must understand and to interview the person

to test the person's understanding. This is recommended in the Guidelines produced by the Office of the Adult Guardian and the Queensland Law Society and in the Handbooks for justices of the peace and commissioners for declarations. It may be better if this were part of the legislation instead of the guidelines.

What do you think?

- Q21. What level of understanding should be required to appoint an attorney?
- Q22. Should the legislation include *all* the factors that need to be understood?
- Q23. Should the test that applies when determining impaired capacity also apply when making an enduring document?
- Q24. Who should witness an enduring document?
- Q25. Should the witness be required to give an explanation to the principal?