



Factsheet: *Guardianship law reforms 2020*

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Background

On 30th November 2020, key reforms to Queensland's guardianship system come into effect. Queensland's guardianship system is based upon the premise that everyone has the capacity to make their own decisions until proven otherwise. For adults who do not have the capacity to make their own decisions, substitute decision-makers can be appointed under the legislation. The legislation also provides safeguards against abuse and offers remedies for when substitute decision-makers fail to comply with their legal duties.

Over the last decade, there has been much discussion around the adequacy of legal protections afforded to adults with impaired decision-making capacity. The growing awareness of elder abuse within our community has only heightened these concerns. Consequently, the changes introduced in the *Guardianship and Administration and Other Legislation Amendment Act 2019* (Qld) represent a significant strengthening of the legal protections currently in place. Changes span the *Guardianship and Administration Act 2000*, the *Powers of Attorney Act 1998* and the *Public Guardian Act 2014*.

Of particular significance is the further entrenchment of the Convention on the Rights of Persons with Disabilities (CRPD) into the legislation's general principles and healthcare principles. This reflects a broader trend at the state level which is increasingly recognising the importance of a human rights framework. The extent to which the reforms achieve their desired outcome and offer greater protection to adults with impaired decision-making capacity however, remains to be seen.

So what then, has changed?





Changes to the forms

- There are new *Enduring Power of Attorney* (EPOA) and *Advanced Health Directive* (AHD) forms which must be used after 30th November 2020.
- The forms are easier to understand and provide more information.
- The EPOA form explicitly recommends obtaining independent legal advice prior to completing the form.
- The views, wishes and preferences of the adult are afforded greater significance, with section 2 of the EPOA and section 3 of the AHD asking the adult to provide information they want the attorney to consider when making decisions on their behalf.
- Adults can nominate specific people to be notified when decisions are made under enduring documents, including written records and accounts for financial decisions.

Changes to the eligibility criteria for attorneys

- A maximum of four attorneys under an EPOA can be appointed jointly.
- An attorney must have capacity for a matter and must not have been a paid carer for the adult during the 3 years prior to their appointment. This does not include someone receiving a carer's pension and is largely aimed at support workers who are paid a wage to care for the adult.
- An attorney under an AHD must not be a service provider for a residential service where the adult resides (already prohibited under an EPOA).
- A statutory health attorney cannot be a service provider for a residential service where the adult resides *or* a health provider for the adult. This means that a doctor cannot act as a statutory health attorney and sign an ACAT consent form on behalf of a patient who does not have an informal substitute decision maker to provide consent on their behalf.

New human rights focus

- The 'general principles' and 'healthcare principles' have been redrafted to be more consistent with the Convention on the Rights of Persons with Disabilities and are now located at the beginning of the relevant Acts to signify the need for a more principled approach that is consistent with human rights.
- Increased recognition of the role that **support** plays in determining an adult's capacity.
- A person acting as a statutory health attorney must apply the 'general principles' of the legislation.
- The Queensland Civil and Administrative Tribunal (QCAT) must, to the greatest extent possible, seek and take into account the **views, wishes and preferences** expressed or demonstrated by an adult when carrying out functions under the guardianship legislation.
- In deciding whether an individual is capable of communicating a decision in some way, QCAT must investigate the use of all reasonable methods of communication, for example symbol boards or signing.





New rights for adults with impaired decision-making capacity

- If an attorney, administrator or guardian (or former attorney, administrator or guardian) has failed to comply with their duties under the guardianship legislation, an adult or their estate can be **awarded compensation** by QCAT for any loss that has occurred. Previously, QCAT could not award compensation for the actions of *former* attorneys, administrators or guardians once the instrument had been revoked, for example upon the death of the adult or upon the revocation of the instrument.
- If a person (testator) gifts an item of property in a will but the property is sold or disposed of prior to the testator's death, the proceeds will no longer fall to the residue of the estate but will go to the intended beneficiary. This is referred to as a **legislative exception to the legal concept of ademption**. An example is if someone leaves a house to a specific person in their will, but the house is sold prior to their death in order to fund their care in a nursing home. The proceeds of the sale will still go to the intended beneficiary rather than going to the estate to be divided among the residual beneficiaries.

New responsibilities for substitute decision-makers

- An attorney, administrator or guardian must have prospective authority from a court or tribunal to enter into a **conflict transaction** on behalf of an adult, unless the adult has authorised a conflict transaction in an EPOA. QCAT can retrospectively authorise a conflict transaction but until such time, the attorney, administrator or guardian has acted in contravention of their legal duty not to enter into a conflict transaction.

Clarification regarding capacity

- An adult has **capacity to make an enduring document** if they understand the nature and effect of the document and are capable of making it freely and voluntarily. This is a **different test of capacity than the general test of capacity** used for decisions about personal, health or financial matters. For personal, health or financial decisions, the adult must understand the nature and effect of a decision, be capable of making the decision freely and voluntarily *and* must be capable of communicating the decision in some way.
- Every time QCAT or the Supreme Court make a decision about an adult's capacity, they must presume that the adult has capacity for the matter until the contrary is proven.

New capacity assessment guidelines

- New guidelines have been developed to assist people who undertake assessments of an adult's capacity under Queensland's guardianship laws.
- The guidelines clarify that an adult cannot be found to lack capacity until all practical steps have been taken to **provide the adult with the support and information needed to make the decision**.
- The guidelines provide practical tips and advice on how and when to complete capacity assessments.





New rights and responsibilities for QCAT

- QCAT can appoint an administrator for a **missing person** where they are satisfied that the person is missing and that without an administrator, the person's financial interests will be significantly adversely affected. Previously, it was difficult to rebut the presumption that a missing person was alive, as a person is not presumed to be dead until they have been missing for seven years.
- In addition to being able to award compensation for the actions of former attorneys, administrators and guardians, QCAT can order an attorney, administrator or guardian to file records and audited accounts of their dealings on behalf of an adult and **account for any profits** accrued as a result of their failure to comply with their duties under the legislation.
- Clarification that QCAT can **remove the Public Guardian** as an adult's guardian if there is another appropriate person available to appoint, such as a member of the adult's support network.

New rights and responsibilities for the Public Guardian

- The Public Guardian can **investigate** a complaint that an adult was subject to abuse, neglect or exploitation even **after the death** of an adult.
- A visit by the community visitor scheme can now be requested by a guardian, administrator, statutory health attorney, advocate or an interested person (now defined as 'a person who has a sufficient and genuine concern for the rights and interests of the other person').
- The Public Guardian can determine who receives a copy of an investigation report and what information they receive.

Other key changes

- Enduring documents made **interstate or in New Zealand** will now be recognised as valid under Queensland law.
- There is increased **protection for whistle-blowers** who disclose confidential information if they honestly believe on reasonable grounds, that the information shows a breach of the legislation, that an adult has been subject to abuse, neglect or exploitation or if the information would help in the assessment or investigation of a complaint. It is an indictable offence for a person to take reprisal and cause (or attempt or conspire to cause) detriment to another person because, or in the belief that they have or intend to disclose, such information.

This is not an exhaustive list. Some of the other changes represent minor amendments to the wording of the legislation to clarify issues of practice that were already occurring.

To access the new forms, [click here](#)

To access the new capacity guidelines, [click here](#)

To read more about the reforms, [click here](#)

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