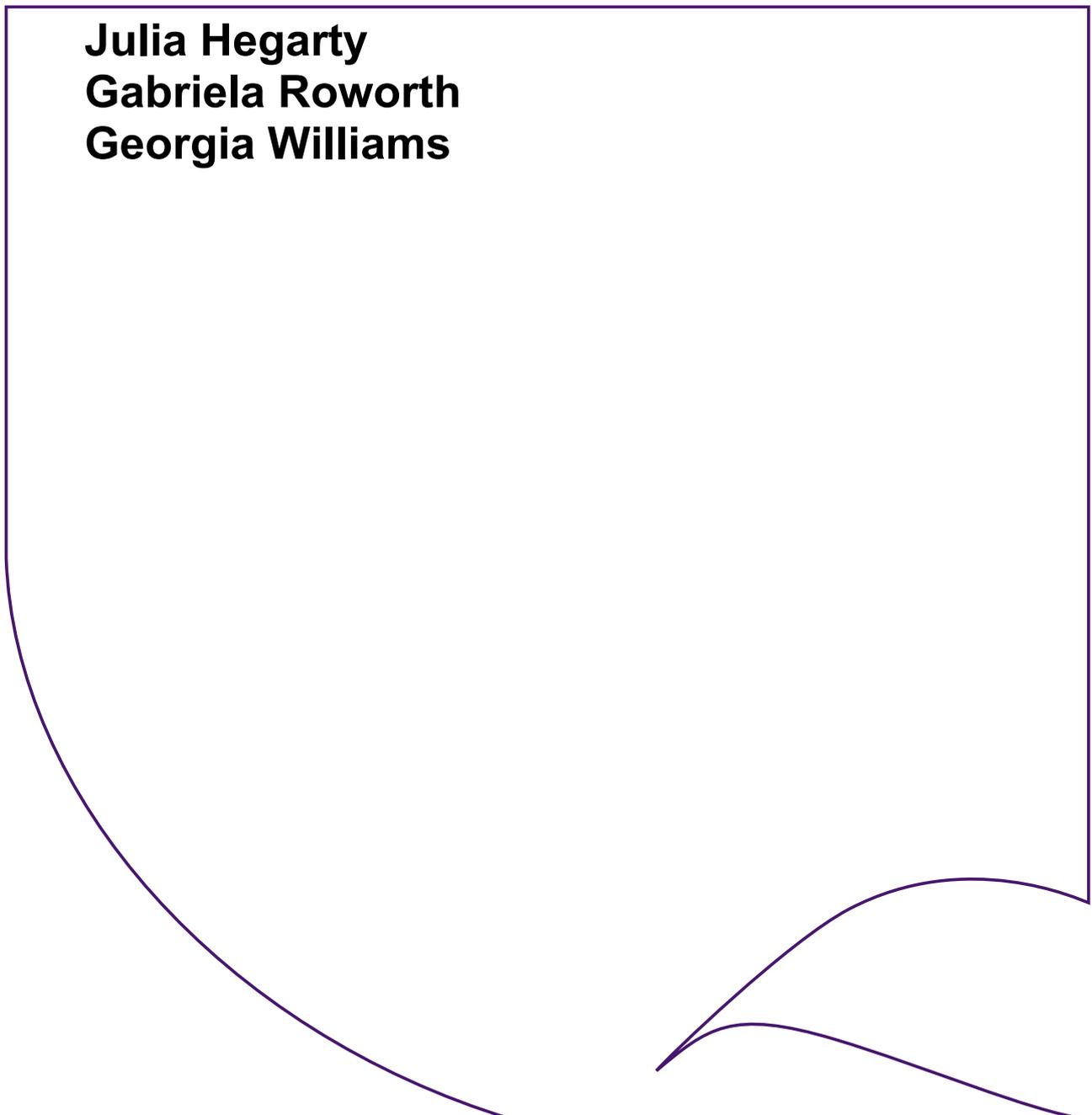


Transitioning into Adulthood

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About the Authors

This report on Transitioning into Adulthood was researched and authored by UQ law students **Julia Hegarty, Gabriela Roworth, and Georgia Williams** under the academic supervision of Director of the Pro Bono Centre **Mandy Shircore**. This report on Transitioning into Adulthood was prepared for and on behalf of Autism Queensland, a Not-For-Profit who delivers quality services and supports for people living with autism. Student researchers and Mandy Shircore undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession.

The UQ Pro Bono Centre and student researchers thank Autism Queensland for allowing us to contribute to its vital work.

About this Document

The document was created for the purpose of being used by Autism Queensland staff to assist in providing support for families and individuals with autism navigate the transition into adulthood.



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Table of Contents

About the Authors	2
About this Document.....	2
Disclaimer.....	2
1. Executive Summary.....	5
2. Methodology.....	5
3. Capacity – Generally.....	6
3.1 Elements of Capacity	6
3.2 Factors that influence capacity	7
3.3 Gillick Competence.....	8
4. Transitioning to Adulthood.....	9
4.1 Turning 18.....	9
4.2 Who determines capacity?.....	10
4.3 Disputing capacity	10
5. Transition ages and the law.....	11
6. Decision-making for person with impaired capacity	12
6.1 Guardianship – General Principles.....	12
7. Formal Decision-making	12
7.1 When to consider appointing a formal Guardian or Administrator	13
7.1.1 Family Conflict Between Informal Decision-Makers	13
The Adult Overestimates their Financial Management Capability	13
7.1.3 The Adult is Exhibiting Potentially Harmful Behaviour.....	14
7.2 Role of the Public Guardian	14
7.2.1 Role.....	14
7.2.2 Purpose.....	14
7.2.3 Statutory functions, obligations, and powers	14
7.2.4 What the Public Guardian cannot do	14
7.2.5 The Public Guardian and adults with impaired decision-making capacity.....	14
7.3 Role of the Public Trustee (Qld).....	15
7.4 Making Applications	15
7.4.1 General	15
7.4.2 Urgent Appointments	16
7.4.3 Appointments for Restrictive Practices	17
7.4.4 Appointments for Special Health Matters	18
7.5 Guidelines.....	19
7.5.1 General Principles.....	19
7.5.2 Health Care Principles	20
7.6 Removing guardians/ administrators	20
5.6.1 Making Review Applications.....	20
5.6.2. The Review/Removal Process	21
5.6.3. Removal Due to a Mistaken Legal Decision	22

8. Human rights	<i>Error! Bookmark not defined.</i>
9. Resources	22
9.1 Caxton Resources – Queensland Law Handbook	22
9.1.1 Disability and the Law	22
9.1.2 Laws Relating to Individual Decision Making	22
9.2 Youth Advocacy Centre Inc.	23
9.2.1 What are rights	23
9.2.2 When Can I	23
10. Conclusion	23

1. Executive Summary

This report provides an overview of the laws to be considered when a young person with autism spectrum disorder transitions to adulthood.

The report notes that generally parents are able to make most decisions for and on behalf of their young children. As children mature a parents decision making ability diminishes. Health decisions, for example, may be made by a Gillick competent child, without parental interference.

Parents of children with autism spectrum disorder may be very used to making decisions for and on behalf of their child. However, when the young person reaches adulthood it must be considered whether the young person has capacity to make their own decisions and to live more independently.

This report provides an overview of the test of capacity and how it applies in Queensland. It notes that for all adults the starting point is that capacity is presumed, unless proven otherwise. It notes that the Queensland Capacity Guidelines should be followed in assessing capacity.

Where it is considered that a young person does not have capacity, the report notes that informal arrangements can be entered into or continued, whereby family or some other guardian or support person assists the young adult with decision making. This can include families, carers continuing the arrangements that were in place for decision-making prior to the young person reaching adulthood.

If it is not appropriate that an informal arrangement be continued (for example where there is family conflict or possible abuse etc) then the Report provides as overview of the process involved in seeking a formal appointment of an administrator and / or guardian.

Finally at the end of this report there are links to resources. What may be of particular interest to Autism Queensland are the resources that provide guidance to young people, parents and carers in developing transition plans for young people with autism.

Should Autism Queensland wish to produce a similar resource, it should be noted that the UQ Pro Bono Centre, would be happy to assist.

2. Methodology

We undertook a scan of the literature and relevant resources around competency, capacity, and decision making. and relevant resources. Relevant resources are included at the end of the document. Additionally, we looked at legislation, particularly the *Guardianship and Administration Act 2000* (Qld), and the role of the Office of the Public Guardian.

Our research entailed finding relevant articles and research on what constitutes competency and capacity, including an Australian Law Reform Commission report regarding competency under the law. In addition to academic articles, we utilised the website of the Office of the Public Guardian and the websites of community legal centres.

Information regarding formal decision-making was gathered directly from the *Guardianship and Administration Act 2000 (Qld)*. Further case law was researched through the Supreme Court Library Queensland.

3. Capacity – Generally

The law recognises an individual's right to make their own choices and control their own lives. The capacity to make these choices is presumed, unless proven otherwise.

Under the *Guardianship and Administration Act 2000 (Qld)* and the *Powers of Attorney Act 1998 (Qld)*, capacity, for a matter, means a 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 decision in some way.

The general test of capacity is applied when assessing capacity for decisions about personal, health or financial matters. Examples include:

- Personal matters such as care, welfare, services received, day-to-day activities (from clothes to food choices);
- Health matters such as GP visits, procedures, services for physical and / or mental conditions; and
- Financial matters such as everyday expenses (bills like rent, phone, electricity), withdrawing money from a bank, investing, purchasing property.

3.1 Elements of Capacity

The three elements of capacity are:

1. Understanding the nature and effect of decisions;
2. Freely and voluntarily making decisions about the matter; and
3. Communicating the decision in some way.

Understanding the nature and effect of decisions

An individual must be able to understand the information relevant to the decision, the main options associated with the decision, and the consequences of the various options.

First, as long as the individual in question has an understanding of the information needed to make the decision long enough for the decision to be made, they are taken to have

‘understood’. Further, they do not need a complex understanding of all the facts pertaining to the decision; rather they need a basic understanding of the key features of the information relevant to the decision being made. The more complex the decision is, the more understanding that is required.¹

Second, the individual must be able to understand and weigh up the consequences of different options. They should be able to identify the advantages and disadvantages of the available options and show an understanding of the consequences following the chosen option. It is important here not to necessarily equate a perceived bad decision with impaired capacity; the focus is to assess the ability to make a decision rather than the decision made.

Freely and voluntarily making decisions about the matter

The individual must be able to make a decision free from undue influence, interference, pressure or coercion. These circumstances impact the voluntariness of a decision made by an individual in question.

There are several risk factors that must be considered:

- Any family conflict, particularly divorced parents;
- Threats such as withdrawing care, support, living facilities, etc; and
- Sudden gifts.

Communicating the decision in some way

It is crucial to acknowledge that individuals with autism spectrum disorder may have different ways of communicating their decisions to others. Communication may occur through sign language or symbol boards. A language interpreter might be necessary for those with limited English. Having a support person may also better facilitate communication. It is important to assess how the individual prefers to communicate.

3.2 Factors that influence capacity

An individual’s capacity to make a decision cannot be determined by age alone. It depends on:

1. The maturity of the individual;
2. His or her social development, including his or her relational style with authority and cultural and religious background; and
3. His or her sense of self.

Importantly, while intellectual and cognitive impairments may impact an individual’s decision-making ability, this does not necessarily mean they lack capacity at all.

¹ Queensland Capacity Assessment Guidelines 2020

An individual's capacity also depends on the particular decision that needs to be made, its complexity and the gravity of the consequences.² An individual may be able to make decisions regarding their day-to-day activities or where they live but may not have the capacity to consent to things such as particular medical treatments or financial matters.

Capacity is also time specific. For example, a particular medication may have a side effect that means an individual cannot validly make a decision at a particular time of day.

Overall, an adult cannot be treated as incapable unless all practicable steps are taken to ascertain capacity. An adult should be supplied with the support necessary to express their decision. For example, an individual may be non-verbal and require support to communicate through body language, facial expressions and diagrams.

3.3 Gillick Competence

In Australia, the law presumes individuals have capacity to make decisions for themselves at 18 years old. However, some minors may develop the capacity to make decisions about their health care before reaching adulthood.

Since children have evolving capacity to make decisions, the Courts may use a legal test to assess a minor's ability to make a decision and give consent. The High Court of Australia has said 'pending the attainment of full adulthood, legal capacity varies according to the gravity of the particular matter and the maturity and understanding of the particular young person'.³

A child's ability to give consent is found when they 'achieve a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'.⁴ This is called 'Gillick competence'⁵ and is primarily used to assess competency to consent to medical decisions.

Factors that may be considered to determine if a child is capable of giving consent include:

1. Age;
2. Insight into nature of the treatment;
3. Understanding of a treatment's possible side effects;
4. Intelligence;
5. Attitude;
6. Personality; and
7. Health.⁶

² <https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/68-decision-making-by-and-for-individuals-under-the-age-of-18/research-on-capacity/>

³ *Department of Health and Community Services (NT) v JWB* (1992) 175 CLR 218, 293

⁴ <https://www.avant.org.au/Resources/Public/Children-and-consent/>

⁵ *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112

⁶ <https://www.avant.org.au/Resources/Public/Children-and-consent/>

A similar test has been used by Courts when considering the competence of a minor with respect to terminating migration detention. The Full Court of the Federal Court listed additional factors which a Court may consider when determining the competence of a child including:

1. Isolation;
2. English language skills;
3. Schooling; and
4. Access to resources and administrative barriers.⁷

4. Transitioning to Adulthood

Unless otherwise determined, parents are the legal guardians of their children. This means that they can make most decisions for and on behalf of their children.⁸ However, it must be noted that as a child matures their ability to make decisions on their own behalf increases. The table at 4.1 provides a snapshot of the general ages at which young people can legally make decisions about aspects of their life or undertake certain activities and the age at which they can be held responsible for aspects of their own conduct.

As noted above Gillick competency is the test used to determine whether a child can consent to medical treatment.

4.1 Turning 18

Once a young person turns 18 years of age, they are considered an adult under the law. This means they have the ability to make decisions, the same as all adults.

Some young people may require support and assistance to make certain decisions. This may be due to autism and difficulties with thinking, problem solving or maturity. Often parents or another member of a young adult's support network provide this ongoing assistance. Informal decision makers (such as family) are recognised under Queensland guardianship laws. However even informal decision makers are required to apply the general principles as outlined in the *Guardianship Act*. These general principles are discussed in section 6.1.

Therefore, it is important to note that decisions should not be made for or on behalf of a young adult unless it is considered that the young person does not have capacity to make the decision. This is because an adult is presumed to have capacity to make their own decisions unless incapacity for that particular decision is established. Making decisions on behalf of a young adult with capacity could also breach their human rights.

⁷ B and B v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 ALR 604, [379]

⁸ *Department of Health and Community Services (NT) v JWB* (1992) 175 CLR 218

4.2 Who determines capacity?

The Queensland Capacity Assessment Guidelines should be followed in making a capacity assessment. As per the Capacity Assessment Guidelines anyone can carry out a capacity assessment. This includes family members and support people. It must be noted that an assessment is just an opinion and can be challenged. The Queensland Civil and Administrative Tribunal (QCAT) or Supreme Court can make a formal declaration or finding about an adult's capacity.

A cognitive test or examination may be required from a qualified health professional to assess capacity.

4.3 Disputing capacity

If the young adult, or someone assisting the young adult is concerned that the young adult's right to make their own decision is not being respected, an assessment can be sought from a qualified health professional.

Should someone dispute the young person's capacity to make decisions, they can apply to QCAT for a declaration or finding of capacity. An appointment can be made for a formal decision-maker (see section 6).

5. Transition ages and the law

At 10	<ul style="list-style-type: none"> You can be charged and taken to court if the police believe you broke the law
At 12	<ul style="list-style-type: none"> You must agree before your parents can change and register a different surname
At 13	<ul style="list-style-type: none"> You can get a part-time job (subject to certain requirements)
At 15	<ul style="list-style-type: none"> You can get your own Medicare card You can get a full-time or part-time job if you have completed year 10 or have a certificate III or IV You can get Youth Allowance if regarded as independent
At 16	<ul style="list-style-type: none"> You can have sex with another person who is also 16 or older, if they agree You can get a learner driving permit You can enrol to vote Presumed to have capacity to make decisions about sex and reproductive health
At 17	<ul style="list-style-type: none"> You can get a provisional driver licence
At 18	<ul style="list-style-type: none"> You are an adult under the law You must vote You can get married without anyone's permission You can be held responsible for any agreement you make
At any age	<ul style="list-style-type: none"> You can open a bank account You can apply for your own Australian passport You can get legal advice You can give evidence at court You can complain about government departments and their staff (police, teachers, child safety officers) or any other agencies you have contact with You can see a doctor and get medical advice and ask to have information about you kept confidential (but this may not happen in certain circumstances particularly if the doctor thinks you are at risk of harm)

6. Decision-making for person with impaired capacity

6.1 Guardianship – General Principles

The Guardianship Act sets out a number of general principles that must be applied by any person or entity acting on behalf of someone with impaired decision-making capacity.

These include:

1. An adult is presumed to have capacity to make their own decisions unless incapacity for that particular decision is established⁹
2. An adult's inherent dignity and worth, and equal and inalienable rights, must be recognised and taken into account
3. Empowering an adult to exercise the adult's human rights and fundamental freedoms
4. The importance of maintaining an adult's existing supportive relationships must be taken into account
5. The importance of maintaining an adult's cultural and linguistic environment and set of values, including religious beliefs, must be taken into account
6. An adult's privacy must be taken into account and respected
7. An adult's right to liberty and security on an equal basis with others must be taken into account
8. An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.¹⁰

7. Formal Decision-making

Formal Decision-Making in Queensland is Governed by the *Guardianship and Administration Act 2000 (Qld)* ('The Act'). Once a person with Autism becomes an adult, it may be necessary to consider formal decision-making procedures for their financial and health-care needs.

Formal decision-making occurs when a Guardian or Administrator, who is appointed by the Queensland Civil and Administrative Tribunal ('QCAT') makes a decision in behalf of an adult with impaired capacity. Guardians are appointed by QCAT to make decisions relating to healthcare and personal matters. Administrators are appointed by QCAT to make decisions in relation to financial matters. The mere existence of an intellectual disability is not, in and of itself, grounds for making a Guardianship or Administration order.¹¹

Under the Act, an adult has impaired capacity if they are incapable of¹²:

⁹ Guardianship Act s 11; s 11B(3)

¹⁰ Guardianship Act s 11B

¹¹ *Re TM* [2021] WASAT 92 [30]

¹² *ibid* Sch 4.

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

A person's ability to communicate decisions is assessed using all reasonable ways of facilitating communication, such as symbol boards or sign language.¹³

7.1 When to consider appointing a formal Guardian or Administrator

Generally, decision-making on behalf of an adult with impaired capacity may occur on an informal basis by members of the adult's existing support network.¹⁴ However, informal arrangements may be ineffective, or insufficient in certain circumstances. Below is a non-exhaustive list of commonly occurring circumstances that lend themselves to the appointment of a formal decision-maker.

7.1.1 Family Conflict Between Informal Decision-Makers

The Tribunal has previously found that a high level of conflict between an adult's parents during a marital separation can cause informal decision-making to be impractical and put the adult at risk of inappropriate treatment.¹⁵ Animosity between an Applicant and members of the adult's support network can cause an informal decision-maker to be unsuitable for formal appointment.¹⁶ Moreover, if an informal decision-maker for the adult is standing on behalf of the adult in other related proceedings (such as an Application for a Protection Order), an independent third party to be a more appropriate decision maker in certain circumstances.¹⁷

7.1.2 The Adult Overestimates their Financial Management Capability

In some circumstances, an adult may wish to control their own finance, but lack the ability to do so without negatively impacting their interests. In such a case, it may be necessary to appoint a formal Administrator to adequately protect to adult's interests.

The Tribunal has previously appointed formal decision-makers for adults who could not retain and work with information about financial affairs, nor anticipate the consequences of certain financial decisions.¹⁸ Moreover, an adult's inability to appreciate the range of options for financial action to respond to decision-making needs (particularly complex financial matters) is relevant to the appointment of a formal Administrator.¹⁹ Further, some financial institutions may require legally authorised persons to implement decisions on behalf of another adult.²⁰

¹³ *ibid* s 146(3).

¹⁴ *Guardianship and Administration Act 2000 (Qld)* s 9(2)(a).

¹⁵ *Re AM* [2015] WASAT 87 [181].

¹⁶ *ibid*.

¹⁷ *Re MD* [2017] QCAT 246.

¹⁸ *Re DJS* [2012] QCAT 576 [8].

¹⁹ *ibid*.

²⁰ *ibid* [15].

7.1.3 The Adult is Exhibiting Potentially Harmful Behaviour

Where an adult exhibits aggressive or self-harming behaviour, it may be necessary to appoint a formal Guardian for the use of restrictive practices (see Part 5.4.3). Such an appointment allows for a member of the person's support network, or a disability service provider to administer certain procedures with the goal of protecting the adult's interests.²¹ As people with Autism reach the age of eighteen (18), it is important to consider the need for such practices in light of their newly-gained legal status as an adult.

7.2 Role of the Public Guardian

7.2.1 Role

The Office of the Public Guardian (OPG) is an independent statutory office established to protect the rights, interests, and wellbeing of adults with impaired decision-making capacity, and children and young people in the child protection system (foster care, kinship care and residential care) and at other visitable sites such a youth detention centre, disability service or mental health facility.²²

7.2.2 Purpose

The purpose of OPG is to advocate for the human rights of our clients. This includes advocating for access to services, independence and the ability to make choices.

7.2.3 Statutory functions, obligations, and powers

The Public Guardian Act 2014 and Guardianship and Administration Act 2000 set out the OPG's legislative functions, obligations and powers.

7.2.4 What the Public Guardian cannot do

The Office of the Public Guardian does not manage a person's money and cannot make any decisions regarding money or finances.

7.2.5 The Public Guardian and adults with impaired decision-making capacity

For adults with impaired decision-making capacity, the OPG:

- makes personal, health and legal decisions (not related to property or finance) if the Public Guardian is their guardian or attorney;
- investigates allegations of abuse, neglect or exploitation;

²¹ *Guardianship and Administration Act 2000 (Qld)* s 80R.

²² <https://www.publicguardian.qld.gov.au/about-us/our-purpose>

- advocates and mediates on behalf of adults with impaired decision-making capacity; and
- educates the public on the guardianship and attorney systems.

7.3 Role of the Public Trustee (Qld)

The Public Trustee is a statutory authority that helps to make decisions that enhance the dignity, rights and interests of Queenslanders. It provides a free will-making service, offers to make enduring power of attorneys, provides deceased estate management, and can be appointed as the financial administrator for people who have impaired capacity. The Public Trustee also can help to manage investments and trusts for beneficiaries who are minors or have a disability.²³

7.4 Making Applications

7.4.1 General

An application for the appointment of a Guardian or Administrator must be made to QCAT by the adult to whom the decision-making concerns, or another interested person.²⁴ To be considered eligible for appointment as a Guardian, the applicant must²⁵:

- Be over 18 years of age; and
- Not be a paid carer or healthcare provider for the adult.

To be considered eligible for appointment as an Administrator, the applicant must²⁶:

- Be over 18 years of age; and
- Not be a paid carer or healthcare provider for the adult; and
- Never have been declared bankrupt.

The adult concerned in the application will be notified by QCAT at least seven (7) days before the hearing of the application²⁷. Applications must be made for decision-making in relation to a specific matter.²⁸ Therefore, the Applicant cannot pre-emptively make an application before the need for formal decision-making arises.²⁹ Upon hearing the application, the Tribunal may make an order for the appointment of a Guardian or Administrator, if satisfied that³⁰:

- The adult concerned has impaired capacity; **and**

²³ <https://www.pt.qld.gov.au/about/about-us/>

²⁴ *Guardianship and Administration Act 2000 (Qld)* s 115.

²⁵ *Guardianship and Administration Act 2000 (Qld)* s 14(1)(a)(i).

²⁶ *ibid* s 14(1)(b)(i).

²⁷ *ibid* s 118(a).

²⁸ *ibid* s 12(1).

²⁹ *ibid*.

³⁰ *ibid*.

- There is a need for a decision in relation to the matter outlined in the application; or the adult is likely to do something that is likely to involve unreasonable risk to the adult's health, welfare or property; **and**
- Without the appointment, the adult's needs will not be adequately met, or the adult's interests will not be adequately protected.

The Tribunal may also dictate the terms for the appointment that it considers appropriate.³¹ The Tribunal will also consider the appropriateness of the person seeking to be appointed according to the regime's overarching guidelines (outlined below).³² The Tribunal will also consider the extent to which the Applicant's interests may conflict with the adult.³³ The fact that the applicant is related to the adult will not, in and of itself, give rise to a conflict.³⁴ Moreover, the fact that the Applicant may be a beneficiary to the adult's estate will not automatically give rise to a conflict of interest.³⁵ Therefore, close relatives of adults living with Autism will not necessarily be unsuccessful in an application, merely because they are an adult's 'next of kin' under the *Succession Act 1981 (Qld)*.³⁶

7.4.2 Urgent Appointments

If the need for formal decision-making is urgent, persons concerned with the decision-making matter may make an application for an interim appointment.³⁷ However, the mere presence of a general level of risk for all persons with impaired capacity is not sufficient to grant an interim order.³⁸ There must be a specific, or higher risk for the adult in question, than any other person.³⁹ Or, the risk of harm to the adult must be immediate.⁴⁰

Practically, an interim appointment means that the Applicant would be appointed without the need for a hearing that considers all of the matters outlined above.⁴¹ Instead, the Tribunal must be satisfied that⁴²:

- The adult to whom the decisions relate has, or may have, impaired decision-making capacity for a matter; and
- There is an immediate risk of harm to the health, welfare or property of the adult.

The 'immediate risk of harm' to the adult may include a risk of abuse, exploitation, neglect, or self-neglect by the adult. The Tribunal will specify the length of the interim appointment in its order.⁴³ An interim appointment cannot be for longer than three (3) months.⁴⁴

³¹ *ibid* s 12(2).

³² *ibid* s 15(1)(a)-(b).

³³ *ibid* s 15(1)(c).

³⁴ *ibid* s 15(2).

³⁵ *Guardianship and Administration Act 2000 (Qld)* s 15(2).

³⁶ *Succession Act 1981 (Qld)* Part 3.

³⁷ *ibid* s 129.

³⁸ *Re SJ* [2012] QCAT 577.

³⁹ *ibid* [7].

⁴⁰ *ibid* [6].

⁴¹ *Guardianship and Administration Act 2000 (Qld)* s 129(2).

⁴² *ibid* s 129(2).

⁴³ *ibid* s 129(1)(b).

⁴⁴ *ibid* s 129(5).

If there is an urgent need to appoint a formal decision-maker for a person, and the person is under 18 years of age, an application can still be made for an Advance Appointment.⁴⁵ Advance Appointments can be made for a person who is 17 years and six months old and will lapse once the individual turns 19, unless the Tribunal specifies a longer period for the appointment.⁴⁶ At most, an Advance Appointment can be for five (5) years.⁴⁷

QCAT may order an Advance Appointment if it is satisfied that⁴⁸:

- There is a reasonable likelihood that the individual will have impaired capacity when they turn 18; **and**
- There is a reasonable likelihood that, when the individual turns 18, there will be a need to make decisions relating to a matter; or the individual is likely to do something that involves unreasonable risk to the individual's health, welfare or property; **and**
- Without the appointment, the individual's needs would not be adequately met, or their interest would not be adequately protected once they turn 18.

7.4.3 Appointments for Restrictive Practices

There is a specific procedure for appointing a service provider or Guardian to use restrictive practices on an adult with impaired capacity.⁴⁹ 'Restrictive Practices' are practices used to respond to behaviour by an adult with impaired capacity that causes physical harm to the adult, or to others.⁵⁰ These practices may include:⁵¹

- Containing or secluding the adult;
- Using chemical restraint (such as medication) or physical restraint on the adult; or
- Restricting the access of the adult.

To be appointed as a Guardian for the use of restrictive practices, an Applicant must satisfy the Tribunal that⁵²:

- The adult has impaired capacity; and
- The adult's behaviour has previously resulted in harm to themselves or to others; and
- There is a need for a decision about the use for restrictive practices; and
- Without the appointment, the adult's behaviour is likely to harm themselves or others; and
- The adult's interests will not be adequately protected without the order.

⁴⁵ *ibid* s 13.

⁴⁶ *ibid* ss 13(1) & (4).

⁴⁷ *ibid* s 13(6)(b).

⁴⁸ *ibid* s 13(1).

⁴⁹ *ibid* s 80R.

⁵⁰ *ibid* s 80U; See also *Disability Services Act 2006 (Qld)* s 144.

⁵¹ *ibid*.

⁵² *ibid* s 80ZD.

An appointment for the use of restrictive practices cannot be made for more than two (2) years.⁵³

7.4.4 Appointments for Special Health Matters

Certain medical procedures require specific orders from QCAT to be consented to on behalf of an adult with impaired capacity. These medical procedures are classed under the umbrella term 'Special Health Care'.⁵⁴ These procedures include⁵⁵:

- Tissue donation;
- Sterilisation;
- Termination of a pregnancy;
- Participation in special medical research;
- Participation in experimental health care;
- Electroconvulsive therapy.

'Special Health Matters' are matters relating to these procedures.⁵⁶ Generally, decisions regarding Special Health Matters may only be made in accordance with an order from QCAT.⁵⁷ Special healthcare decisions can only be made by existing Guardians.⁵⁸ If the adult does not have a Guardian, and does not have an attorney under an Enduring Power of Attorney, then the Public Guardian will be appointed to make decisions regarding special health care for an adult with impaired capacity.⁵⁹

Generally, a Guardian's decisions regarding special health matters are ineffective if the health care provider of the procedure knows, or reasonably should know, that the adult objects to the health care.⁶⁰ However, a Guardian's consent to the procedure will override the adult's objection if⁶¹:

- The adult has minimal or no understanding of what the health care involves, or why the health care is needed; and
- The health care is likely to cause no distress to the adult, or temporary distress that is outweighed by the benefits of the proposed procedure.

The Tribunal may consent to special health care by order.⁶² When making the order, the Tribunal must take into account the views of the adult's Guardian to the greatest extent possible.⁶³ If the adult does not have a Guardian, then the Tribunal may allow the Public Guardian to consent to the procedures on behalf of the adult.⁶⁴

⁵³ *ibid* s 80ZD(4).

⁵⁴ *ibid* Sch 2.

⁵⁵ *ibid*.

⁵⁶ *ibid* Sch 2.

⁵⁷ *ibid* s 66.

⁵⁸ *ibid* s 66 (2).

⁵⁹ *ibid* s 66(2)-(5).

⁶⁰ *ibid* s 67(1).

⁶¹ *Ibid* s 67(2).

⁶² *ibid* s 68.

⁶³ *ibid* s 68A(a).

⁶⁴ *ibid* s 68A(c).

7.5 Guidelines

The Guardianship and Administration scheme in Queensland is governed by extensive guiding principles.⁶⁵ These principles must be applied by a person appointed as a formal decision-maker for an adult with impaired capacity when making decisions.⁶⁶

7.5.1 General Principles

The law presumes that adults have capacity, unless impaired capacity is demonstrated in an application to QCAT.⁶⁷ Regardless of capacity, the Guardianship and Administration scheme operates on the basis that all adults have the same inherent dignity and fundamental rights.⁶⁸ An adult's rights under the scheme must be taken into account when formal decision-makers act on their behalf.⁶⁹ This includes ensuring that the adult has individual autonomy and the freedom to make their own choices.⁷⁰ Decisions made on behalf of an adult must also respect the adult's privacy, liberty and security.⁷¹ Generally, appointed Guardians or Administrators must empower the adult that they make decisions on behalf of to exercise their human rights.⁷²

When exercising their powers under an appointment, formal decision-makers must make decisions in a way that promotes and safeguards the adult's rights and interests.⁷³ Decisions must be made in the least restrictive way possible.⁷⁴ This entails adopting a structured decision-making approach. The relevant approach is as follows⁷⁵:

1. Preserve, to the greatest extent possible, the adult's right to make their own decision and, if possible, support them in the decision-making process;
2. Take into account the views, wishes and preferences demonstrated by the adult; and
3. Make the decision on behalf of the adult.

Formal decision-makers must also maintain the adult's existing supportive relationships,⁷⁶ and maximise the adult's participation in decision-making.⁷⁷ This practically involves consulting with the adult to find out who comprises their existing support network.⁷⁸ Formal decision-makers are also obliged to consult with the existing members of the adult's support network, including those who make decisions for the adult on an informal basis.⁷⁹ Guardians

⁶⁵ *ibid* ss 11B & 11C.

⁶⁶ *ibid* ss 11B(1), 11C(1).

⁶⁷ *ibid* s 11B(3) item 1.

⁶⁸ *ibid* s 11B(3) item 2.

⁶⁹ *ibid* s 11B(3) item 2.

⁷⁰ *ibid*.

⁷¹ *ibid* s 11B(3) items 6 & 7.

⁷² *ibid* s 11B(3) item 3.

⁷³ *ibid* s 11B(3) item 9.

⁷⁴ *ibid*.

⁷⁵ *ibid* s 11B(3) item 10.

⁷⁶ *ibid* s 11B(3) item 4.

⁷⁷ *ibid* s 11B(3) item 8.

⁷⁸ *Guardianship and Administration Act 2000 (Qld)* s 11B(3) item 4(2).

⁷⁹ *ibid*.

and Administrators ought to provide the necessary support and access to information to the adult to allow them to participate in making decisions.⁸⁰

7.5.2 Health Care Principles

There are specific additional principles that must be applied by formal decision-makers when making healthcare decisions for an adult.⁸¹

When making healthcare decisions, formal decision-makers must also take account of⁸²:

- Information given by the adult's health provider; and
- The nature of the adult's medical condition and their prognosis; and
- Potential alternatives to the proposed healthcare; and
- The nature and degree of any risks associated with the proposed healthcare; and
- Whether the healthcare can be postponed to a time when a better alternative may become available; and
- The consequences for the adult if the proposed healthcare is not carried out; and
- The benefits compared with the potential burdens of the proposed healthcare; and
- The impact of the proposed healthcare on the adult's dignity and autonomy.

Regardless of capacity, all adults must be offered appropriate healthcare, including preventative care.⁸³ In applying the general principle that all adults have the same fundamental rights,⁸⁴ it is also necessary that any consent to, or refusal of, treatment by the adult is taken into account.⁸⁵

7.6 Removing guardians/ administrators

5.6.1 Making Review Applications

If an adult, or another interested party, wishes to have a Guardian or Administrator removed, they may do so by applying to QCAT for a Review of Appointment.⁸⁶ Regardless, the Tribunal must review an appointment with respect to a person with permanently impaired capacity at least every five (5) years, except where the appointed administrator is the Public Trustee.⁸⁷

Appointments for the use of restrictive practices may be reviewed on the application of the adult, an interested person, one of the adult's disability service providers, the chief executive

⁸⁰ *ibid* s 11B(3) item 8.

⁸¹ *ibid* ss 11C(1), 11C(3) item 1.

⁸² *ibid* s 11C(3) item 3.

⁸³ *ibid* s 11C(3) item 2.

⁸⁴ *ibid* s 11B(3) item 2.

⁸⁵ *ibid* s 11C(3) item 2.

⁸⁶ *Guardianship and Administration Act 2000* (Qld) s 29.

⁸⁷ *ibid* s 28(1)(b).

(disability services), or the Public Guardian.⁸⁸ Even if an interested party has not made an application for a Review of Appointment, the Tribunal must review an appointment of a Guardian for restrictive practices at least once before the appointment term ends.⁸⁹

5.6.2. The Review/Removal Process

The Tribunal may conduct a Review of Appointment in the manner that it considers most appropriate.⁹⁰ The Tribunal will revoke an appointment if satisfied that it would not make a new appointment for the adult if a new appointment was being requested.⁹¹

When undertaking the Review of Appointment, the Tribunal may require the current Guardian or Administrator to advise the Tribunal of additional information.⁹² This may be information that has not previously been disclosed to the Tribunal, but would be relevant to their competence and appropriateness for the role.⁹³ Practically, this information would be evidence that the appointee does not meet the eligibility requirements of their appointment (see part 5.4.1).⁹⁴

If the existing appointment is not an appointment of the Public Guardian, the Tribunal may remove the appointee if it considers that the appointee is no longer competent, or another person is more appropriate for the position.⁹⁵ In determining whether a current appointee is no longer competent, the Tribunal will consider:⁹⁶

- Whether one of the adult's interests has not been, or is not being adequately protected; or
- Whether the appointee has neglected their duties, or abused their powers; or
- Whether the appointee has contravened the *Guardianship and Administration Act 2000*⁹⁷ in any other way (e.g., contravening the General Principles, or Healthcare Principles).

If the existing appointment is to the Public Guardian, the Tribunal may remove the Public Guardian as appointee if there is another appropriate person available for the appointment.⁹⁸

If the Tribunal is not satisfied that the appointment should end, it may nonetheless alter the existing appointment by changing the term, or appointee from the original appointment order.⁹⁹

⁸⁸ *ibid* s 29(1)(c).

⁸⁹ *ibid* s 29(2).

⁹⁰ *ibid* s 31(1).

⁹¹ *ibid* s 31(2).

⁹² *ibid* s 30(1).

⁹³ *ibid* s 30(1)(b).

⁹⁴ *ibid* s 16.

⁹⁵ *ibid* s 31(4).

⁹⁶ *ibid* s 31(5).

⁹⁷ *Guardianship and Administration Act 2000 (Qld)*.

⁹⁸ *ibid* s 31(6).

⁹⁹ *ibid* s 31(3)(b).

5.6.3. Removal Due to a Mistaken Legal Decision

Guardianship and Administration orders can be appealed and removed if the Tribunal is satisfied that there has been a mistake of law by the trial judge.¹⁰⁰ For example, if the trial judge did not take into account material information at trial or places too much emphasis on certain material, then the order may be removed.¹⁰¹ Moreover, if the trial judge failed to consider the adequacy of the adult's existing support network when making the order, making the order may have been a mistake of law.¹⁰²

8. Resources

8.1 Caxton Resources – Queensland Law Handbook

The Caxton Legal Centre Inc's Queensland Law Handbook is a comprehensive but simple legal resource. It covers topics including The Australian Legal System, Family Law, Living and Working in Society, Your Rights and Responsibilities.

The most relevant chapters include Disability and the Law and Laws Relating to Individual Decision Making.

<https://queenslandlawhandbook.org.au/>

8.1.1 Disability and the Law

The Disability and the Law chapter explains many facets of life ranging from human rights to how disability interacts with medical care, contracts, the criminal justice system, among others.

<https://queenslandlawhandbook.org.au/the-queensland-law-handbook/health-and-wellbeing/disability-and-the-law/>

8.1.2 Laws Relating to Individual Decision Making

The Laws Relating to Individual Decision Making chapter explains what constitutes impaired decision-making capacity. It also outlines Powers of Attorney, Supreme Court and Tribunal powers, and Guardianship and Administration for People with Impaired Decision-making capacity.

<https://queenslandlawhandbook.org.au/the-queensland-law-handbook/health-and-wellbeing/laws-relating-to-individual-decision-making/>

¹⁰⁰ *PLC v Adult Guardian* [2013] QCATA 11.

¹⁰¹ *ibid* [22], [29].

¹⁰² *ibid* [20].

8.2 Youth Advocacy Centre Inc.

The Youth Advocacy Centre Inc provides legal services, youth support and family support assistance and services to young people (generally 10-18 years inclusive). The Centre has compiled information about the law and young people, including 'what are rights' and 'when can I'.

<https://www.yac.net.au/legal-info-2/>

8.2.1 What are rights

'What are rights' outlines what rights are and which rights children have under the United Nations Convention on the Rights of the Child. This information sheet also explains the Queensland Human Rights Act and the Queensland Human Rights Commission for complaints.

<https://www.yac.net.au/what-are-rights/>

8.2.2 When Can I

'When Can I' explains what an individual can do under the law from ages 10 to 18. It also outlines what an individual can do at any age.

<https://www.yac.net.au/when-can-i/>

8.3 Other resources.

There are some further resources available to assist parents and young people transitioning to adulthood.

See for example

[*Transitioning to Adulthood: A guide for adolescents and young adults*](#) (Qld Health)

[*Transitioning to adulthood: Child Safety Practice Manual*](#) (Qld Govt)

Although not Australian, this US resource provides an example of a resource for parents.

[*A Guide For Transition to Adulthood*](#) (Organisation for Autism Research)

9. Conclusion

Until the age of 18, minors have evolving competency and capacity to make decisions. During this transition into adulthood, children have the competency to make some, but not necessarily all, decisions concerning themselves. Therefore, even though a child may have autism, they may still have competency to make decisions. Once an adult, the law presumes that adults have capacity, unless impaired capacity is demonstrated in an application to QCAT under the Guardian and Administration Act. The law encourages adults living with

impaired capacity to have an active role in decision-making in their lives, where possible. However, to protect the interests of adults living with impaired capacity, the Guardianship and Administration Act provides a formal framework to make legally valid decisions on behalf of an adult where those decisions concern matters beyond their capacity.



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