

## 1. The Guardianship and Administration Tribunal

The Tribunal is composed of members with various backgrounds who hear applications involving the rights of adults with impaired decision-making capacity. The Tribunal's functions include:

- making decisions about the capacity of an adult;
- appointing guardians and administrators and reviewing their appointments;
- making declarations, orders, recommendations or giving directions and advice to guardians and administrators;
- approving decisions or proposed decisions by informal decision-makers;
- reviewing the actions and appointments of attorneys appointed under the *Powers of Attorney Act 1998*;
- consenting to special health care.

The Tribunal and its registry operate differently to courts and other Tribunals. The Tribunal is not adversarial and operates within a protective framework. The registry is not just a repository for information; the staff of the registry actively research the circumstances of the adult to make sure the Tribunal has all the relevant information it needs to make decisions.

A Tribunal hearing is less formal than a court hearing and unlike a court, the Tribunal is not bound by the rules of evidence. The Tribunal is more of a people-centred forum, focusing on the issues and needs of the adult rather than the strict legal process. During the hearing the Tribunal members examine documents (such as reports from health professionals) and listen to information from those attending the hearing, including the adult.

Throughout the hearing, the Tribunal makes every effort to help the adult to understand what is happening, to participate in the hearing and, where necessary, to provide a language interpreter or other communication assistance.

The Tribunal's website can be found at: <http://www.gaat.qld.gov.au/index.htm> and provides comprehensive information about the services the Tribunal. It guides users through the entire process from when an application is received to what occurs during and after a hearing is finalised. Documents such as Application Kits, Fact Sheets, Forms and Annual Reports can be found on the website.

## 2. Legislation and jurisdiction

The Tribunal operates under the *Guardianship and Administration Act 2000* ("the Act"). The Act is to be read in conjunction with the *Powers of Attorney Act 1998*, which also authorises substituted decision makers to make decisions for adults with impaired capacity. If there is an inconsistency between the Act and the *Powers of Attorney Act 1998*, the *Guardianship and Administration Act 2000* prevails.

Adults with impaired capacity are the primary focus of the Act, however, chapter 5A deals with children with an impairment. Any person or entity performing a function or exercising a power under the Act, in relation to persons with impaired decision

making capacity, must apply the General Principles set out in Schedule 1 of the Act. These principles are:

1. Presumption of capacity;
2. Same human rights;
3. Individual value;
4. Valued role as member of society;
5. Participation in community life;
6. Encouragement of self-reliance;
7. Maximum participation, minimal limitations and substituted judgment;
8. Maintenance of existing supportive relationships;
9. Maintenance of environment and values;
10. Appropriate to circumstances;
11. Confidentiality

Pursuant to s.109A of the *Powers of Attorney Act 1998*, the Tribunal has concurrent jurisdiction with the Supreme Court of Queensland in matters relating to Enduring Powers of Attorney.

The Tribunal is a specialist Tribunal to decide the question of an adult's capacity in a particular matter. Often this involves litigation in another court, examining either the adult's ability to give instructions to legal representatives or to conduct the litigation on his/her own behalf. The following case studies are examples of matters that have been referred to the Tribunal by the Supreme Court where these questions have arisen:

- *CAC, Re [2008] QGAAT 45* - Although the adult had previously been declared unfit to stand trial over criminal charges, the Supreme Court of Queensland referred to the Tribunal the question of whether the adult had capacity to instruct lawyers in a civil claim.
- *MAE, Re [2008] QGAAT 34* - The Supreme Court of Queensland referred to the Tribunal the question of whether the adult had capacity to instruct solicitors or conduct litigation in a personal injuries claim.

The Tribunal publishes its decisions, in a de-identified form, on the AustLII website. The full text of the above matters, along with all other Tribunal decisions where written reasons have been issued can be found at:

<http://www.austlii.edu.au/au/cases/qld/QGAAT/>

There are a range of options available to those who are dissatisfied with decisions made by the Tribunal. The Act provides an avenue of appeal to the Supreme Court of Queensland against a decision of the Tribunal. Decisions made by the Tribunal may also be reviewed, by the Tribunal at a new hearing, if there is new information or a change of circumstances since the original hearing.

### **3. What is “Capacity” ?**

In most matters before the Tribunal, the first issue for determination is whether an adult has impaired decision-making capacity for a particular matter. This determination is a threshold jurisdictional issue as only in those cases where impaired decision-making capacity is found can the Tribunal go on to appoint guardians and administrators. Consequently, one of the major functions of the Tribunal is making declarations that an adult either does or does not have capacity to make decisions about personal or financial matters.

Schedule 4 of the Act provides that “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.

#### **4. What are Enduring Powers of Attorney, Statutory Health Attorneys and Advanced Health Directives**

An Enduring Power of Attorney (“EPA”) provides the ability for an adult to give another person the legal authority to make personal/health and/or financial decisions for that adult. An EPA is made when an adult has decision-making capacity. The EPA does not lapse when the adult loses decision-making capacity but has effect until the death of the adult. Making an EPA is one way that an adult can select a person to make decisions when the decision-making capacity of that adult is impaired.

In circumstance where an adult has not appointed a health attorney under an EPA, or where there has been no guardian appointed under the Act, a Statutory Health Attorney is empowered under the *Powers of Attorney Act 1998*, to make decisions about health matters that the adult could lawfully make if the adult had capacity for the matter. A statutory Health attorney could be:

- (a) a spouse of the adult if the relationship between the adult and the spouse is close and continuing;
- (b) a person who is 18 years or more and who has the care of the adult and is not a paid carer for the adult;
- (c) a person who is 18 years or more and who is a close friend or relation of the adult and is not a paid carer for the adult; or
- (d) the Adult Guardian, if no-one listed above is readily available and culturally appropriate to exercise power for a matter or willing to act.

An Advance Health Directive (“AHD”) is a document that states your wishes or directions regarding your future health care for various medical conditions. It comes into effect only if you are unable to make your own decisions.

Special Health Care of an adult, as defined in Schedule 2 of the Act, is health care of the following types:

- (a) removal of tissue from the adult while alive for donation to someone else;
- (b) sterilisation of the adult;

- (c) termination of a pregnancy of the adult;
- (d) participation by the adult in special medical research or experimental health care;
- (e) electroconvulsive therapy or psychosurgery for the adult; or
- (f) prescribed special health care of the adult.

Neither a guardian nor an attorney under an EPA is authorised to make decisions in relation to special health care matters. An adult may give a direction about a special health care matter in an AHD, or alternatively, the Tribunal may give consent to particular special health care pursuant to Part 5 of the Act.

### **5. How do you execute an Enduring Power of Attorney & Advanced Health Directive?**

An Enduring Power of Attorney can be witnessed by a lawyer, justice of the peace, a commissioner for declarations or notary public. A witness to the execution of an EPA has a statutory duty to certify that the principal appeared to have the capacity necessary to make the document. The Queensland Law Society (“QLS”) has published a guide for EPA witnesses.

The Guide for EPA witnesses can be accessed by legal practitioners on the QLS website:

<http://www.qls.com.au/content/lwp/wcm/connect/QLS/Home/>

The completion of an Advanced Health Directive requires the involvement of at least three people, being, the principal, a doctor and a witness. The witness must be twenty-one years of age or over and must be a justice of the peace, a commissioner for declarations, a lawyer or a notary public. He/she must not be the principal’s attorney, a relation of the principal, a beneficiary under the principal’s will, the principal’s paid carer or current health-care provider (e.g. nurse or doctor).

Documents such as Enduring Powers of Attorney and Advanced Health Directives are available for download on the Department of Justice and Attorney General’s website:

<http://www.justice.qld.gov.au/2254.htm>

### **6. Rights and Obligations of Guardians, Administrators and Attorneys**

The functions and powers of guardians and administrators can be found in Chapter 4 of the Act. The functions and powers of attorneys appointed under enduring documents are found in Chapter 3 of the *Powers of Attorney Act 1998*.

Guardians are responsible for making some or all personal and lifestyle decisions, including health care decisions. Likewise, administrators are responsible for making some or all financial decisions and legal decisions that involve financial matters.

An attorney is able to do anything in relation to the adult’s financial or personal matters that the adult could lawfully do for themselves, if the adult had the

decision-making capacity. However, this power is limited to the powers given to the attorney under the EPA. The advantage of an EPA is the appointment of someone the person can trust. This need not be a family member. It could, for example, be a trustee company or a professional such as an accountant or lawyer.

The statutory obligations of substituted decision makers include a duty to:

- apply the general principles;
- act honestly and with reasonable diligence; and
- avoid conflict transactions.

The provisions and definitions relating to “conflict transactions” can be found in s.73 of the *Powers of Attorney Act 1998* and s.37 of the Act.

### **7. Representatives may be used with the Tribunal’s leave.**

Section 124 of the Act provides that an active party to a proceeding may, with the Tribunal’s leave, be represented by a lawyer or agent. Furthermore, any person given Notice to attend a hearing to give evidence or produce things may, with the Tribunal’s leave, be represented by a lawyer or agent.

### **8. An applicant’s right to commence a proceeding in the Tribunal**

An applicant must have a close and continuing interest in the adult to start an application in the tribunal. In the matter of *MAD, Re [2007] QGAAT 56*, the Tribunal dismissed the application as the lawyer acting for the medical defence fund did not have legal standing to bring the application as the lawyer was not an interested person in that he did not have an ongoing concern for the welfare of the adult. The lawyer’s concern was for the interest of the parties he represented.