



Brisbane Magistrates Court
3rd Floor 363 George St
Brisbane Q 4000
PO Box 13554 GEORGE STREET Brisbane Q 4003

Telephone (07) 3234 0870, 1300 653 187
Facsimile (07) 3239 6367

www.justice.qld.gov.au/guardian

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Questions and Answers with the Adult Guardian, Ms Dianne Pendergast

ROLE OF OFFICE OF THE ADULT GUARDIAN

1. What is the role of the Office of the Adult Guardian and how is your organisation structured?

The role of the Adult Guardian is set out under the *Guardian and Administration Act 2000* which states that the Adult Guardian is an independent statutory officer appointed to protect the rights and interests of adults who have impaired capacity for a matter:

- To protect adults who have impaired capacity for a matter from neglect, exploitation or abuse and
- To act as a substitute or supported formal decision-maker for an adult with impaired capacity if appointed by the Tribunal;
- To seek help for, or making representations for, an adult with impaired capacity for a matter (advocacy);
- To educate and advise persons about the operation of the *Guardian and Administration Act 2000* and the *Powers of Attorney Act 1998*;
- Adult Guardian (Guardian of last resort)

Informal Substitute Decision Making

The *Guardianship and Administration Act 2000* recognises that decisions may be made on an informal basis by an adult's existing support network if the person lacks capacity to make his or her own decisions.

Who are our clients?

- Adults who lack decision-making capacity for a matter or matters &
- Have been diagnosed with:
 - . Intellectual disability
 - . Dementia
 - . Psychiatric disability

- . Acquired brain injury
- . A form of dementia
- . Dual diagnosis
- . Temporary delirium or coma

Structure of the Office of the Adult Guardian

Office of the Adult Guardian is based solely in Brisbane, but covers all of Queensland.

- 1 Adult Guardian for Queensland – Ms Dianne Pendergast
- 2 Assistant Adult Guardians – Corporate, Client Services

- 18 Guardians
 - 2 Principal Guardians who are each involved in more complex case work; management matters; policy and procedures as well as the supervision of guardianship teams.

 - 10 Senior Guardians - each manage a region in addition to some Brisbane clients – higher priority clients

 - 3 Guardians - no specific region (whole of Queensland) - lower priority clients

 - 2 Liaison Officers monitoring and review of low priority clients

 - 1 Senior Client Liaison Officer - works as a liaison between the Guardianship and Administration Tribunal and the Office of the Adult Guardian (based at OAG and GAAT)

- 6 Investigators
 - 1 Principal Investigator – involved in more complex investigations and management matters as well as policy and procedures and supervision of investigators.

 - 5 Senior Investigators – each are assigned a case load to investigate allegations of abuse, exploitation, actions of attorneys. Also provide advice on enquiries.

- 1 Legal Officer – provides legal advice to Office of the Adult Guardian, represents OAG at Tribunals, Court.

- 1 Health Care Consent Officer – provides health care consents where Adult Guardian is Statutory Health Attorney of last resort.

- 2 Community Liaison Officers – responsible for providing community education and liaison to service providers, interest groups, professional bodies, stakeholders, schools and universities on the role of the Office of the Adult Guardian and respective legislative frameworks.

- Administrative Support Team
 - Executive Assistant to the Adult Guardian
 - Senior Resource Officer
 - Administrative Officer

2. In what situations could the Office of the Adult Guardian assist?

Guardianship and Administration Act 2000 recognises that decisions may be made on an informal basis by an adult's existing support network if the person lacks capacity to make his or her own decisions.

- Guardian of last resort (appointed by GAAT)
 - On an order of the Tribunal for personal & health care matters
- Investigate allegations of abuse, neglect, exploitation; or inappropriate decision making
- Act as Statutory Health Attorney of last resort
- Act as a personal attorney of last resort under an Enduring Power of Attorney (EPA) for personal and health care matters or Advance Health Directive (AHD).
- Act as a personal attorney while an Enduring Power of Attorney is suspended.
- Mediate between people formally appointed decision makers (i.e. in healthcare disputes)
- Educate community about the role and functions of AG – s174 of Act
- Act as an Allied person under *Mental Health Act 2000*

The Adult Guardian as last resort - may be appointed by GAAT to act as the guardian of an adult of last resort when:

- there is a need for a decision to be made that cannot be made by the informal supports
- Informal network either unable or unwilling
- Where the adult has been abused, neglected or exploited
- Where there is such serious conflict in the family about the decisions that need to be made for the adult that GAAT decides that it is best for someone external to the family or supportive network to act as the adult's guardian
- Adult Guardian acts as an impartial, independent third party

Guardianship Orders

- The Adult Guardian's authority is specified in a guardianship order made by the Guardian and Administration Tribunal for personal matters relating to:
 - Accommodation
 - Service provision
 - Health care
 - Contact
 - Legal matters
 - Employment and related activities
 - Day-to-day matters
 - Behaviour Management Plans involving restrictive practices

Investigations

- Provides advice to attorneys, guardians and administrators
- Make representations or seeking assistance on behalf of the adult
- Referring the adult or persons supporting the adult to other agencies to obtain services
- Referring the matter to other investigative bodies, such as the police or Disability Services Queensland

- Making applications to the Guardian and Administrative Tribunal for the appointment of a guardian and/or administrator
 - Suspending the authority of attorneys to act on behalf of the adult. Right to information - s183
 - Notice to produce records
 - Summons to give evidence
- Health care decisions include giving consent to withdrawing or withholding of life sustaining measures (should such a situation occur)

CAPACITY

3. What is the difference between the role of the Office of the Adult Guardian and GAAT (The Guardianship and Administration Tribunal)?

The Guardianship and Administrative Tribunal (GAAT) is a simple and inexpensive way of meeting the decision-making needs and protecting the rights of adults who are unable to make a decision and put it into effect themselves because of impaired capacity.

The Tribunal's main job is to determine whether or not a person with impaired decision-making has capacity, needs a guardian or administrator and, if necessary the Tribunal, will make an appointment order.

The Guardianship and Administration Tribunal is empowered to make guardianship and administration orders (that is, to appoint people as guardians and administrators and set the terms of their appointment) and to review these orders.

The Tribunal has the authority to appoint guardians and administrators for adults with impaired decision-making capacity. The Tribunal works from the following principles:

- most people with disabilities don't need a legally-appointed guardian or financial manager;
- GAAT is the last resort and should only be used when a person is incapable of making their own decisions and when all other suitable alternatives have been tried;
- GAAT's main concern is the welfare of the person with impaired decision-making capacity.
- Tribunal can consent to special health care for an adult with impaired decision-making capacity under specific guidelines and principles so as to safeguard his or her rights

4. What does impaired capacity mean and what constitutes it?

According to **schedule 4, *Guardian and Administration Act 2000*** capacity - for a person for a matter, means that person is capable of -

- (a) Understanding the nature and effect of decisions about the matter; and
- (b) Freely or voluntarily making decisions about the matter; and
- (c) Communicating the decision in some way.

Indicators of impaired capacity

- ❖ Forgetful of recent events
- ❖ Repeating themselves
- ❖ Less able to grasp new ideas
- ❖ Anxious about decision making
- ❖ Becoming irritable/upset if unable to manage a task
- ❖ Easily influenced by others when decision making
- ❖ Less concerned about other people's activities
- ❖ Less able to adapt to change
- ❖ Losing things
- ❖ Getting lost
- ❖ Changes in usual behaviour
- ❖ Personality change

Who may have impaired capacity?

People with:

- ❖ Intellectual disability
- ❖ Acquired Brain Injury
- ❖ Psychiatric Disability
- ❖ Dementia
- ❖ Temporary coma, delirium

(Capacity can be determined by a neuro psychologist, psychiatrist, geriatrician or psychologist)

5. How much proof do you need that an older person does not have capacity before an investigator will act and what sort of proof do you need, i.e. do you need a full medical report, mini mental test or a multi-disciplinary report?

Evidence from medical professionals (Neuro psychologist, psychiatrist, geriatrician or psychologist) and allied health practitioners is relied on as they use a number of criteria and standardised measurements to determine capacity.

In the application to the Guardian and Administration Tribunal – Medical Professional Report (accompanying the application) will refer to questions relating the adult's health status, health diagnosis, chronic illness, mental health issues as well as medication.

Aged Care Assessment Team – ACAT recommendation which can also accompany GAAT application may refer to MMSE scores – Mini Mental. However, the MMSE – Mini Mental as a lone cognitive tool or assessment is not appropriate – due to variability over time and responses.

According to Dr Annette Broom, Psychogeriatric Unit and Memory Clinic, Princess Alexandra Hospital “A person's capacity is often best represented by multiple data points – combining assessment instruments, collateral reports and behavioural experiments.”

There is a growing concern about the validity of capacity tests as there may be a limited focus on particular decisions and populations and a lack of awareness or consideration of cultural differences.

For example, there may be a limited opportunity to demonstrate competence due to language, environmental or contextual issues. Or there is limited assess to a range of cognitive functions.

Moreover, the criteria for deciding whether an individual has capacity are often subjective and arbitrary.

6. If we feel that a client is about to make a wrong decision, or are putting themselves at risk and we cannot determine if they have full capacity i.e. they may be borderline, should we call the AG anyway to see what you think?

If in doubt, always call the Office of the Adult Guardian. Officers are trained to handle all enquiries either in person, by phone or via email with empathy and impartiality. Senior investigators will look at the question of the adult's capacity or lack thereof and the situation of risk.

Each case is treated as a unique situation and investigated accordingly. You may be asked to submit a referral form, outlining the alleged situation.

If there is serious doubt about the adult's capacity and a situation of risk has been identified, the investigations team will proceed to investigate the matter.

7. What happens if someone has temporarily lost capacity i.e. due to medication, stroke or temporary head injury, where the likelihood is that they will regain capacity in the future?

Can these people also be referred if there is an immediate situation?

For example, where an inpatient with impaired capacity is at risk of serious abuse if they are discharged the following day, could the Office of the Adult Guardian do anything to prevent this person from being discharged even if the family insisted upon the patient being discharged?

Protective Powers of Adult Guardian (AG)

- apply to GAAT for the appointment of a guardian and or administrator
- AG can apply to GAAT for a warrant for entry to remove an adult where there is alleged risk of harm
- AG can suspend an attorney's powers under an EPA for up to 3 months if the attorney has not been competent

Health Care Disputes and the Adult Guardian

- If guardian/Attorney acting contrary to the Health Care Principle, e.g.
 - Fails to make a decision or makes decision contrary to the health care principle, then Adult Guardian can provide consent as Statutory Health Attorney of last resort.
- In the instance of disputes between eligible Statutory Health Attorneys/ guardians - this could be referred to Adult Guardian for informal mediation (least restrictive alternative).
- If that fails, Adult Guardian can make the health care decision

In other words can they act immediately? (Refers also to Guardianship)

Officers of the Adult Guardian can apply to the Guardianship and Administration Tribunal for an urgent interim order to enable them to act for the adult's immediate ongoing care and protection.

Order of priority for health care decision making

1. Advance Health Directive
2. Guardian appointed by GAAT for health care matters
3. Enduring Power of Attorney
4. Statutory Health Attorney
5. Adult Guardian

INVESTIGATIONS

8. If we know that a family member or friend is abusing their Power of Attorney responsibilities, can you investigate this?

Yes – we frequently receive complaints where it alleged that family or friends (either as formal attorneys or informal decision makers) are financially abusing or taking advantage of an elderly person or person with impaired capacity.

9. If as a service provider, we make a referral to the Office of the Adult Guardian, do we remain anonymous if it begins to be investigated or can we nominate to be anonymous? And what happens if the matter is referred onto GAAT, would a service provider who informed still remain anonymous?

Service providers can be anonymous but may be able to be identified simply through circumstances. Legislation does not allow us to confirm or deny the source of the referral. *Freedom of Information* legislation specifically excludes the Office of the Adult Guardian. In addition the GAAT report won't name the source (referrer), however it may still be likely, due to the nature of the information provided by the referrer that by process of elimination they may become known. There is the option of seeking a confidentiality clause under **S. 109(2)** of the *Guardian and Administration Act (2000)* which also provides whistleblower protection for people referring complaints for investigation.

10. Can you tell us the procedure that follows once a referral has been made to the office? What happens next?

We must obtain information about capacity of the adult so that we have jurisdiction to investigate and will refer to GP and hospital records, ACAT assessments re. Capacity.

Then if allegations are in regard to financial abuse – the Investigators would seek to access relevant Title searches, bank records, Centrelink records, Accountant's records.

If allegations relate to physical and verbal abuse, Investigators would visit the client in person as well as interviewing carers, family members and attorneys.

In respect of allegations relating to sexual abuse we would then liaise with the Police, and emergency accommodation and support services.

11. If there is no formal proof of capacity to give the Office of the Adult Guardian, then what would happen? Would you conduct your own investigation of capacity?

- If there is **no** evidence that an adult has impaired decision making capacity for the relevant issue, the Adult Guardian **cannot** investigate
- If it is alleged that the person lacks capacity, details outlining the person's capacity must be supplied or details of a health professional who can provide this information must be supplied

12. What is the average turn around period of when you make a report and when the AG starts to investigate?

Time period or turn around period is hard to define as each investigation is different and also depends on the complexity of the allegations made. For example the allegations can be simple and defined; "\$10,000 was withdrawn from adult's account in 2006 that the adult has no knowledge of". Or the allegation might indicate very vague concerns about the adult's wellbeing or their risk of exploitation by an unknown party.

Until we can gain enough information in respect of the capacity of the adult – the investigation may be stalled.

13. Throughout the investigation process, can the referrer call with updates on how the investigation is progressing or is the Office of the Adult Guardian too busy for that?

Whilst we have limited resources, we can discuss matters as they are ongoing and are very happy to update the referrer on the progress of the investigation.

Currently each Investigator has about 35 active investigations throughout the state.

14. Where there is an outcome to an investigation, such as the case was referred to GAAT, as the referrer do we have a right to the final report?

The person(s) referring the complaint will get a copy of the final report regardless of the outcome of the investigation.

GUARDIANSHIP

- 15. Can the Adult Guardian be appointed as a temporary guardian if the situation cannot be resolved straight way or if a hearing to determine who would be best as guardian is going to take a while?**

The Guardianship and Administration Tribunal may make an Interim Order ranging from 3 weeks to 6 months, appointing the Adult Guardian as the guardian for an adult who is at risk of neglect, exploitation or abuse. This enables a delegate of the Adult Guardian to make any decisions during this period while ongoing investigations continue into the adult's situation.

Prior to the end of the interim order, the appointed guardian and investigations officer of the Office of the Adult Guardian will make a report to the Guardianship and Administration Tribunal with recommendations about the continuance/discontinuance of the order, the need for a guardian, what decisions may be emerging and the most appropriate party/parties to fulfil the function of guardian.

A delegate of the Adult Guardian may also act for the adult with impaired decision-making capacity when an Enduring Power of Attorney is suspended pending further investigations and a subsequent tribunal hearing.

- 16. Do you have independent guardians that can be appointed if there is no one else appropriate and what decisions can they make?**

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In providing approval for decisions Guardians "must"

- Seek the adult's views and wishes and take them into account;
- Consider views of support network
- Consider recommendations from healthcare/service provider
- Consult with administrators (where appointed)
- Comply with the ***General and Health Care Principles, Power of Attorney Act 1998***
 - 1) The ***health care principle*** means that power for a health matter for an adult should be exercised by an attorney—
 - (a) in the way least restrictive of the adult's rights; Make decisions that are least restrictive of adult's rights *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.
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

- Make decisions that are consistent with adult's care and protection
- **Right to Information, Section 44 *Guardian and Administration Act 2000***— Right to Information means that the guardian can access information from service providers and official records that the adult would have had access to and could rely on to make a decision, if they had capacity in the first place (substituted decision making).

Snapshot of our clients (2005-06) and the guardianship matters Adult Guardian was appointed for

- Adult Guardian acted as Guardian or Attorney for 641 Adults with impaired capacity
- All personal matters – 111
- Accommodation – 398
- Service provision – 275
- Contact – 142
- Health care – 220
- Legal – 57
- Behaviour Management – 14
- Education/training/employment – 14
- Day-to-day issues – 4
- Licence/permit – 3
- Other personal matters - 7

POWERS OF ATTORNEY AND ENDURING DOCUMENTS

17. What is an Enduring Power of Attorney and what is best way of obtaining one?

An Enduring Power of Attorney (EPA) is a document prepared by an adult (principal) that gives another person (attorney) the power to make personal and/or financial decisions on the adult's behalf.

The Adult/Principal needs capacity to complete document.

Under *The Powers of Attorney Act 1998* s41 - Principal may:

- Only make an EPA if he/she understands the nature and effect of EPA
- Specific requirements of understanding are set out in s41(2), *The Powers of Attorney Act 1998*
- For financial matters, the attorney can start to act when the principal wants. The Principal can state that the attorney's power starts immediately or at a future, stated time
- The principal can limit the power that his/her attorney has

Greater capacity required of Adult/Principal to make an EPA than to complete a will.

- Principal may not always be able to make decisions when they need to

- Principal may become too ill to make choice about their medical treatment
- Principal may suffer a disability e.g. stroke that prevents them from telling others what decisions they want made

Once the power for a matter begins...

- Attorney has power to make and to exercise full control over the matter, subject to terms or information included in EPA
- Attorney's given power continues even if principal becomes a person with impaired capacity
- Attorney's decisions have the same legal force as if the principal had made them
- Attorney's power only ends:
 - With the principal's death; or the attorney becomes a person with impaired Capacity; or the EPA is revoked by GAAT or a court.
 - *Adult requires capacity to complete, amend or revoke document**
- Power begins when adult states for financial matters
- **Power for personal matters begins only when the adult loses capacity**
- Power of the attorney may also be limited
- No formal register of EPA documents
- May have > 1 person as attorney
- If attorney is required to buy/sell land, the EPA must be registered with Lands Title Office

Advance Health Directives (AHDs) and Enduring Power of Attorney (EPA) forms can be purchased from newsagencies, Australia Post or GoPrint Bookshops

- AHDs and EPAs forms and fact sheets can also be downloaded from the Department's website:
See www.justice.qld.gov.au/guardian

18. Can you nominate the Adult Guardian to be your power of attorney and in what sorts of situations would you nominate?

As a last resort, you can ask the Adult Guardian to agree to be your personal attorney if there is no one else appropriate in your life, or if you have no supportive informal networks available eg. Family breakdown/dysfunction or a lack of family and friends and support networks.

19. What is the responsibility of the doctor or treating Director of Nursing of an aged care facility to inform an acute hospital of a patient's wishes in an Advanced Health Directive?

A copy of the Advanced Health Directive (AHD) should be kept with the patient's records and made available to hospital and medical staff. If medical staff knows about the existence of a patient's AHD and if they have it, they have a duty of care to provide the care requested under this directive.

- An AHD is a formal way of giving instructions for your future health care

- particular treatment you do not want
 - Special medical condition that your doctor should know about such as diabetes or allergies
 - Religious, spiritual or cultural beliefs that could affect your treatment such as blood transfusion
 - Palliative care measures
- It comes into effect ONLY if you are UNABLE to make your own decisions
 - The best time to make an AHD is now before any urgent matters arise; however, it is also important to make one if:
 - Your medical condition is likely to affect your decision making abilities
 - You have a chronic medical condition that could result in serious complications such as a heart or renal condition
 - Medical staff will refer to the AHD if the patient becomes so ill that he/she can no longer make decisions for him/herself.
 - The Advance Health Directive does not authorise euthanasia or assisted suicide
 - Keep the original in a safe but accessible place and give a copy to your doctor, your attorney (if you have appointed one) and a trusted family member or friend
 - It's a good idea to carry a card in your wallet or purse stating that you have an Advance Health Directive, where it can be found and the contact details of your personal attorney, family or friend.