

Mental Health Act 2016

Guide to Advance Health Directives, Enduring Powers of Attorney, Guardians and Administrators

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General

The purpose of this Guide is to summarise the provisions of the [Powers of Attorney Act 1998 \(POAA\)](#) and the [Guardianship and Administration Act 2000 \(GAA\)](#) of most relevance to clinicians treating patients with a mental illness.

Clinicians should work collaboratively with and in partnership with patients to ensure their unique age-related, cultural and spiritual, gender-related, religious and communication needs are recognised, respected and followed to the greatest extent practicable. Clinicians should consider the timely involvement of appropriate local supports and provide treatment and care with a recovery-oriented focus.

Overview

The POAA and GAA provide a legal framework for decisions to be made in relation to an adult person (18 years or over):

- by the person, when the person has capacity to make a decision, to apply at a future time when the person does not have capacity, or
- by another person, when the person does not have capacity to make a decision.

Under the POAA and GAA, a person has capacity to make a decision about a matter if the person is capable of:

- (a) understanding the nature and effect of decisions about the matter
- (b) freely and voluntarily making decisions about the matter, and
- (c) communicating the decisions in some way (See section 3.4 'Capacity').

The POAA and GAA apply to decisions made about:

- 'personal matters', which includes health matters, and
- financial matters.

Under these Acts, 'health care' means the care or treatment of, or a service or a procedure for, an adult:

- (a) to diagnose, maintain, or treat the adult's physical or mental condition, and
- (b) carried out by, or under the direction or supervision of, a health provider.

The Acts also specify 'special personal matters' and 'special health matters', where different decision-making frameworks apply. Electroconvulsive therapy is an example of a special health matter.

Attachment 1 (from Schedule 2 of the POAA and GAA) defines personal matters, special personal matters, health care, and special health care.

There are several ways that decisions may be made in relation to a person, either by the person when the person has capacity, or by another person when the person does not have capacity, namely:

- for health matters and special health matters - under an [Advance Health Directive \(AHD\)](#),
- for health matters - with the consent of an attorney appointed by a person under an AHD,
- for personal matters (including health matters), and financial matters - with the consent of an attorney appointed by a person under an [Enduring Power of Attorney \(EPOA\)](#),
- for health matters – with the consent of a statutory health attorney,
- for personal matters (including health matters) – by a guardian appointed by the [Queensland Civil and Administrative Tribunal \(QCAT\)](#), and
- for financial matters – an administrator appointed by the QCAT.

In addition, healthcare can be provided without consent if it is permitted under another Act (e.g. the [Mental Health Act 2016](#)) or by a court.

Refer to section 1.5 'Order of Priority'.

1 Consent to health care

1.1 Advance health directives

A person may make an AHD at any time they are well and have capacity to make decisions.¹

An AHD acts as a record of a person's consent to receive (or not receive) particular health care, which applies at any time when the person does not have capacity to make these decisions. An AHD may also include the person's views, wishes and preferences about their future health care (see section 222(2) of the [Mental Health Act 2016](#)). Directions under an AHD may relate to special health matters, such as consent to receive electroconvulsive therapy.

An AHD may appoint one or more persons to be an attorney for the person in addition to, or instead of, giving directions under an AHD. Attorneys may be appointed to make decisions in different ways, for example – decisions **must** be made jointly, a second attorney is only to make decisions if the first attorney is not available, or either attorney can make a decision. The AHD may specify or place limits or conditions on the decisions an attorney can make.

An attorney may make decisions relating to the person's health care at a time when the person does not have capacity. However, the attorney's decisions cannot be inconsistent with the person's directions in an AHD. Also, an attorney does not have power to make decisions for special health matters, including electroconvulsive therapy.

¹ The Chief Psychiatrist has approved an advance health directive form for the use of persons with a mental illness. ([See Advance Health Directive for Mental Health – Guide and Form](#)).

1.2 Attorney appointed under an Enduring Power of Attorney

An adult may appoint an attorney under an EPOA.

An EPOA must be made in the approved form under the POAA.

A person may, under an EPOA, appoint one or more persons to be an attorney for the person for personal matters, includes health matters². As with attorneys appointed under AHDs, attorneys may be appointed to make decisions in different ways. The appointment may specify or place limits or conditions on the decisions an attorney can make.

An attorney may make decisions relating to the person's health care at a time when the person does not have capacity. An attorney does not have power to make decisions for special health matters, including electroconvulsive therapy.

1.3 Statutory health attorneys

A 'statutory health attorney' may make decisions relating to a person's treatment and care at a time when the person does not have capacity. A statutory health attorney is the first, in listed order, of the following people who is readily available and culturally appropriate to make decisions for the person:

- a spouse of the adult if the relationship between the adult and the spouse is close and continuing,³
- 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, and
- 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.

If none of the above are readily available and culturally appropriate to make decisions for a person, the Public Guardian is the person's statutory health attorney.

No appointment is required for the person to perform the function of a statutory health attorney.

A statutory health attorney cannot consent to health care if an AHD giving a direction about the matter is in place for the relevant matter, or an attorney or guardian has been appointed for the matter (see section 2.5 'Order of Priority' below).

² An attorney may also be appointed for financial matters under an EPOA.

³ A spouse includes a de facto partner and a civil partner under the *Civil Partnerships Act 2011*.

1.4 Guardians

The [Queensland Civil and Administrative Tribunal](#) (QCAT) may appoint one or more guardians for a personal matter, including health matters, for a person who does not have capacity for the matter.

In making this appointment, the QCAT sets the terms and conditions of the appointment.

Subject to the terms of the appointment, a guardian may consent to the person's treatment and care at a time when the person does not have capacity. A guardian does not have the power to consent for special health matters, such as electroconvulsive therapy.

1.5 Order of priority

It is possible that one or more of the above decision-making arrangements are in place for a person at any one time. To clarify how these arrangements work together, the POAA and GAA establish an order of priority in dealing with these decision-making arrangements, by reference to 'health care' and 'special health care'⁴.

In summary, consent for health care (not special health care) is dealt with as follows:

- 1) if the person has made an Advance Health Directive giving a direction about a particular matter, the matter may only be dealt with under the direction
- 2) if (1) does not apply and the QCAT has appointed one or more guardians for the matter or made an order about the matter, the matter may only be dealt with by the guardian(s) or under the order
- 3) if (1) or (2) do not apply, an attorney appointed under an Advance Health Directive or an EPOA may consent to the matter, and
- 4) if (1) to (3) does not apply, a statutory health attorney may consent to the matter.

⁴ Attachment 2 details this order of priority.

2 Matters Related to Consent to Health Care

2.1 Use of physical restraint and requiring a person to remain an inpatient

There are various scenarios where physical restraint may be used in relation to a patient.

Section 75 of the GAA provides that:

A health provider and a person acting under the health provider's direction or supervision may use the minimum force necessary and reasonable to carry out health care authorised under this Act. For example, an agitated patient may be held so that an injection can be administered safely and effectively.

A doctor may treat a patient without capacity in an inpatient unit from which the patient cannot leave only if it is necessary for the patient's health and wellbeing, and an AHD, attorney or guardian for health care expressly consents to this treatment (noting that this power may also be exercised under a Treatment Authority made under the *Mental Health Act 2016*).⁵

It should be noted that the POAA and GAA only apply where the reason for the use of force or restraint is the provision of health care. The Acts do not apply in circumstances where physical restraint is used only to protect the patient and others from harm.

2.2 Objections to health care

Section 67 of the GAA provides that: Generally, the exercise of power for a health matter or special health matter is ineffective to give consent to health care of an adult if the health provider knows, or ought reasonably to know, the adult objects to the health care.

However, this does not apply if:

- (a) the adult has minimal or no understanding of what the health care involves or why the health care is required, and
- (b) the health care is likely to cause the adult no distress, or temporary distress that is outweighed by the benefit to the adult of the proposed health care.

⁵ The [Advance Health Directive form](#) approved by the Chief Psychiatrist expressly provides for a person to consent, or not to consent to this treatment, including a maximum time period for the treatment.

As such, health practitioners need to be cognisant of any objections made while the person had capacity, including for example, in an AHD.

However, there are circumstances when a patient's objection will not be sufficient to prevent the provision of healthcare. If the patient lacks capacity to make decisions about their healthcare, and the criteria in section 67 of the GAA are met, the healthcare can be provided despite the objection.

2.3 Urgent health care

The fact that a person has an AHD, or has an attorney or guardian appointed, does not affect the legal authority to treat a person in urgent circumstances without consent under section 63 of the GAA (Urgent health care).

This provision allows health care (but not special health care) to be carried out for an adult without consent if the health provider reasonably considers the person does not have capacity for the health matter and one of the two scenarios applies.

Firstly, where the health care should be carried out urgently to meet imminent risk to the adult's life or health. However, in these circumstances, health care may not be carried out if the health provider knows the adult objects to the health care in an AHD.

Alternatively, where the healthcare should be carried out urgently to prevent significant pain or distress to the adult and it is not practicable to obtain consent. This health care may not be carried out if the health provider knows the person objects to the health care unless the person has minimal or no understanding of:

- what the health care involves or why the health care is required, and
- the health care is likely to cause the adult no distress, or temporary distress that is outweighed by the benefit to the adult of the health care.

The health provider **must** certify in the person's clinical records as to the matters enabling the health care to be carried out under this section.

2.4 Capacity

Under the [Mental Health Act 2016](#), a person has capacity to consent to be treated if the person is capable of understanding, in general terms:

- that the person has an illness, or symptoms of an illness, that affects the person's mental health and wellbeing
- the nature and purpose of the treatment for the illness
- the benefits and risks of the treatment, and alternatives to the treatment, and
- the consequences of not receiving the treatment.

This definition of ‘capacity’ is more specific and detailed compared to its definitions in the POAA and GAA. Because of this, it is likely that a person who is found to lack capacity under the *Mental Health Act 2016* will also lack capacity under the POAA and GAA. The definition of capacity in the *Mental Health Act 2016* should be followed for patients receiving care under that Act.

The person **must** also be capable of making a decision about the treatment and communicating the decision in some way.

Health practitioners need to decide whether or not a person has capacity for the purposes of deciding whether:

- a Treatment Authority can be made for the person (under the *Mental Health Act 2016*), and
- whether a person can be treated under an AHD or with the consent of an attorney or guardian (under the POAA and GAA).

2.5 Responsibilities of Guardians and Attorneys

The POAA and GAA place strict obligations on attorneys and guardians, namely:

- in making a health care decision, an attorney or guardian **must** apply the general principles and the health care principle (see attachment 3)
- an attorney or guardian **must**:
 - make decisions honestly and with reasonable diligence to protect the person’s interests
 - act in accordance with any terms or conditions of their appointment, and
- a guardian **must** comply with any order made by the QCAT.

2.6 Right to information

The POAA and GAA provide that an attorney or guardian has a right to all information that the relevant person would have been entitled to if the person had capacity at the time. The information **must** be necessary for the attorney or guardian to make a decision for the person that they are authorised to make.

These Acts provide that this requirement overrides any duty of confidentiality under legislation or the common law.

2.7 Protections for health practitioners

Health practitioners are provided with substantial protections under the POAA and GAA (see attachment 4).

Summary

- a person is entitled to rely on the certificate of the witness to the document as evidence of the patient's capacity at the time of making an AHD or EPOA,
- a person who acts under an AHD or a decision by an attorney under an AHD or EPOA does not incur any liability if the health practitioner did not know the directive or the power to make the decision were invalid,
- where a health practitioner gives health care to a patient with the consent of a person (attorney or guardian) who represented that they had the right to consent for the person, the health practitioner is taken to have the patient's consent (unless the health practitioner knew or should have known the person did not have the power to consent), and
- a person who acts under an AHD or a decision by an attorney is not liable to any act or omission to any greater extent than if the act or omission happened with the person's consent when the person had capacity.

3 Administrators for financial matters

The QCAT may appoint an administrator for a financial matter for a person who does not have capacity for the matter.

In making this appointment, the QCAT sets the terms and conditions of the appointment.

Subject to the terms of the appointment, an administrator can deal with any financial matter that the person could have done if they had capacity.

Issued under section 305 of the *Mental Health Act 2016*.

Dr John Reilly

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Attachment 1 - Types of matters (POAA, Schedule 2 (extract) and GAA Schedule 2 (extract))

Personal matter

A personal matter, for a principal, is a matter, other than a special personal matter or special health matter, relating to the principal's care, including the principal's health care, or welfare, including, for example, a matter relating to 1 or more of the following—

- (a) where the principal lives;
- (b) with whom the principal lives;
- (b)a) services provided to the principal;
- (c) whether the principal works and, if so, the kind and place of work and the employer;
- (d) what education or training the principal undertakes;
- (e) whether the principal applies for a license or permit;
- (f) day-to-day issues, including, for example, diet and dress;
- (g) whether to consent to a forensic examination of the principal⁶;
- (h) health care of the principal;
- (i) a legal matter not relating to the principal's financial or property matters;

Special personal matter

A special personal matter, for a principal, is a matter relating to 1 or more of the following—

- (a) making or revoking the principal's will;
- (b) making or revoking a power of attorney, EPOA or AHD of the principal;
- (c) exercising the principal's right to vote in a Commonwealth, State or local government election or referendum;
- (d) consenting to adoption of a child of the principal under 18 years;
- (e) consenting to marriage of the principal;
- (f) consenting to the principal entering into a civil partnership;
- (g) consenting to the principal terminating a civil partnership;
- (h) entering into, or agreeing to enter into, a surrogacy arrangement under the *Surrogacy Act 2010*;
- (i) consenting to the making or discharge of a parentage order under the *Surrogacy Act 2010*.

⁶ See also section 104 (Protection for person carrying out forensic examination with consent).

Health care

- (1) Health care, of a principal, is care or treatment of, or a service or a procedure for, the principal—
 - (a) to diagnose, maintain, or treat the principal's physical or mental condition; and
 - (b) carried out by, or under the direction or supervision of, a health provider.
- (2) Health care, of a principal, includes withholding or withdrawal of a life-sustaining measure for the principal if the commencement or continuation of the measure for the principal would be inconsistent with good medical practice.
- (3) Health care, of a principal, does not include—
 - a) first aid treatment; or
 - b) a non-intrusive examination made for diagnostic purposes⁷; or
 - c) the administration of a pharmaceutical drug if—
 - i. a prescription is not needed to obtain the drug; and
 - ii. the drug is normally self-administered; and
 - iii. the administration is for a recommended purpose and at a recommended dosage level; or
 - d) psychosurgery for the principal.

Special health care

Special health care, of a principal, is health care of the following types—

- a) removal of tissue from the principal while alive for donation to someone else⁸;
- b) sterilisation of the principal;
- c) termination of a pregnancy of the principal;
- d) participation by the principal in special medical research or experimental health care;
- e) electroconvulsive therapy or a non-ablative neurosurgical procedure for the principal;
- f) prescribed special health care of the principal.

⁷ *Example of paragraph (b)*—a visual examination of a principal's mouth, throat, nasal cavity, eyes or ears

⁸ *Note:* For the situation after the principal has died, see the [Transplantation and Anatomy Act 1979](#), particularly section 22.

Attachment 2 - Order of priority in dealing with health matters and special health matters (GAA, sections 65 and 66).

Adult with impaired capacity—order of priority in dealing with health matter

1. If an adult has impaired capacity for a health matter, the matter may only be dealt with under the first of the following subsections to apply.
2. If the adult has made an AHD giving a direction about the matter, the matter may only be dealt with under the direction.
3. If subsection (2) does not apply and the QCAT has appointed 1 or more guardians for the matter or made an order about the matter, the matter may only be dealt with by the guardian or guardians or under the order⁹.
4. If subsections (2) and (3) do not apply and the adult has made 1 or more enduring documents appointing 1 or more attorneys for the matter, the matter may only be dealt with by the attorney or attorneys for the matter appointed by the most recent enduring document.
5. If subsections (2) to (4) do not apply, the matter may only be dealt with by the statutory health attorney.
6. This section does not apply to a health matter relating to health care that may be carried out without consent under division 1.

Adult with impaired capacity—order of priority in dealing with special health matter

1. If an adult has impaired capacity for a special health matter, the matter may only be dealt with under the first of the following subsections to apply.
2. If the adult has made an AHD giving a direction about the matter, the matter may only be dealt with under the direction.
3. If subsection (2) does not apply and an entity other than the QCAT is authorised to deal with the matter, the matter may only be dealt with by the entity.
4. If subsections (2) and (3) do not apply and the QCAT has made an order about the matter, the matter may only be dealt with under the order¹⁰.

⁹ Note: If, when appointing the guardian or guardians, the [QCAT] was unaware of the existence of an enduring document giving power for the matter to an attorney, see section 23 (Appointment without knowledge of enduring document), particularly subsection (2).

¹⁰ Note: However, the [QCAT] may not consent to electroconvulsive therapy or psychosurgery—see section 68(1).

Attachment 3 - General Principles and Health Care Principle (POAA and GAA)

General Principles (POAA, Schedule 1, Part 1 and GAA, Schedule 1, Part 1)

Presumption of capacity

An adult is presumed to have capacity for a matter.

Same human rights

1. The right of all adults to the same basic human rights regardless of a particular adult's capacity **must** be recognised and taken into account.
2. The importance of empowering an adult to exercise the adult's basic human rights **must** also be recognised and taken into account.

Individual value

An adult's right to respect for his or her human worth and dignity as an individual **must** be recognised and taken into account.

Valued role as member of society

1. An adult's right to be a valued member of society **must** be recognised and taken into account.
2. Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society **must** be taken into account.

Participation in community life

The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.

Encouragement of self-reliance

The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, **must** be taken into account.

Maximum participation, minimal limitations and substituted judgment

1. An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, **must** be recognised and taken into account.
2. Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions **must** be taken into account.

3. So, for example—

- a) the adult **must** be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and
- b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
- c) a person or other entity in performing a function or exercising a power under this Act **must** do so in the way least restrictive of the adult's rights.

4. Also, the principle of substituted judgment **must** be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act **must** take into account what the person or other entity considers would be the adult's views and wishes.

5. However, a person or other entity in performing a function or exercising a power under this Act **must** do so in a way consistent with the adult's proper care and protection.

6. Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

Maintenance of existing supportive relationships

The importance of maintaining an adult's existing supportive relationships **must** be taken into account.

Maintenance of environment and values

1. The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), **must** be taken into account.

2. For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition¹¹ or Island custom¹²), **must** be taken into account.

Appropriate to circumstances

Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs.

Confidentiality

An adult's right to confidentiality of information about the adult **must** be recognised and taken into account.

¹¹ **Aboriginal tradition** has the meaning given by the *Acts Interpretation Act 1954*, schedule 1.

¹² **Island custom** has the meaning given by the *Acts Interpretation Act 1954*, schedule 1.

Health Care Principle (POAA, Schedule 1, Part 2 and GAA, Schedule 1, Part 2)

1. The health care principle means that power for a health matter for an adult should be exercised by an attorney [or guardian]—
 - (a) in the way least restrictive of the adult's rights; and
 - (b) only if the exercise of power—
 - (i) is necessary and appropriate to maintain or promote the adult's health or wellbeing; or
 - (ii) is, in all the circumstances, in the adult's best interests.

*Example of exercising power in the way least restrictive of the adult's rights—
If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.*
2. In deciding whether the exercise of a power is appropriate, the attorney [or guardian] must, to the greatest extent practicable—
 - (a) seek the adult's views and wishes and take them into account; and
 - (b) take the information given by the adult's health provider into account.

*Note—
See section 81 (Right of attorney to information).*
3. The adult's views and wishes may be expressed orally, in writing (for example, in an AHD) or in another way, including, for example, by conduct.
4. The health care principle does not affect any right an adult has to refuse health care.

Attachment 4 - Protections for health practitioners

Powers of Attorney Act 1998

Protection for persons dealing with attorney and next person if unaware of invalidity (extract)

1. A person who—
 - (a) deals with an attorney under a general power of attorney made under this Act, or an enduring document, (the **document**), and
 - (b) does not know, or have reason to believe, the principal did not have capacity to make the documentis entitled to rely on the certificate of the witness to the document as evidence of the principal's capacity to make the document.

Additional protection if unaware of invalidity in health context

A person, other than an attorney, who, without knowing an AHD or a power for a health matter under an enduring document [an AHD or an EPOA] is invalid, acts in reliance on the directive or purported exercise of the power, does not incur any liability, either to the adult or anyone else, because of the invalidity.

No less protection than if adult gave health consent

A person, other than an attorney, acting in accordance with a direction in an AHD, or a decision of an attorney for a health matter, is not liable for an act or omission to any greater extent than if the act or omission happened with the principal's consent and the principal had capacity to consent.

Protection of health provider unaware of Advance Health Directive

A health provider is not affected by an adult's AHD to the extent the health provider does not know the adult has an AHD.

Protection of health provider for non-compliance with Advance Health Directive

1. This section applies if a health provider has reasonable grounds to believe that a direction in an AHD is uncertain or inconsistent with good medical practice or that circumstances, including advances in medical science, have changed to the extent that the terms of the direction are inappropriate.
2. The health provider does not incur any liability, either to the adult or anyone else, if the health provider does not act in accordance with the direction.
3. However, if an attorney is appointed under the AHD, the health provider has reasonable grounds to believe that a direction in the AHD is uncertain only if, among other things, the health provider has consulted the attorney about the direction.

Under the POAA, 'good medical practice' for the medical profession in Australia consists of the nationally recognised ethical standards, as well as medical standards, practices and procedures.

Guardianship and Administration Act 2000

Protection of health provider

1. To the extent a health provider giving health care to an adult complies with a purported exercise of power for a health matter or special health matter by a person who represented to the health provider that the person had the right to exercise the power, the health provider is taken to have the adult's consent to the exercise of power.

2. Subsection (1) does not apply if the health provider knew, or could reasonably be expected to have known, the person did not have the right to exercise the power.

Offence to exercise power for adult if no right to do so

It is an offence for a person who knows he or she has no right to exercise power for a health matter or special health matter for an adult, or who is recklessly indifferent about whether he or she has a right to exercise power for a health matter or special health matter for the adult, to—

- (a) purport to exercise power for a health matter or special health matter for the adult; or
- (b) represent to a health provider for the adult that the person has a right to exercise power for a health matter or special health matter for the adult.

Maximum penalty—

- (a) for special health matter—300 penalty units; or
- (b) for health matter—200 penalty units.

No less protection than if adult gave health consent

A person carrying out health care of an adult that is authorised by this or another Act is not liable for an act or omission to any greater extent than if the act or omission happened with the adult's consent and the adult had capacity to consent.