Advance Health Directives and ‘Less Restrictive Way’ of Treatment

1. Purpose

This Policy outlines the relevant provisions of the Mental Health Act 2016, and the Chief Psychiatrist Policy, in relation to advance health directives and treating persons in a ‘less restrictive way’ (as defined in the Act).

Promoting the use of advance health directives and other alternatives to treatment without consent under the Mental Health Act 2016 gives individuals greater control over their future healthcare and supports consumer empowerment and patient recovery.

2. Scope

This Policy is mandatory for all authorised mental health services (AMHSs). An authorised doctor, authorised mental health practitioner, AMHS administrator, or other person performing a function or exercising a power under the Act must comply with this Policy.

This Policy only applies in circumstances where a health practitioner assesses that a person does not have capacity to make decisions about his or her own health care.

This Policy does not apply to persons on a forensic order or treatment support order.

This Policy must be implemented in a way that is consistent with the Objects and Principles of the Act.

3. Authorising legislation

Section 305(1)(a) of the Mental Health Act 2016.

4. Background

Treating a person voluntarily with their own consent is the least restrictive form of health care.

Where persons lack capacity to make decisions about their own health care, alternative mechanisms are needed to obtain consent to health care.

The Powers of Attorney Act 1998 and the Guardianship and Administration Act 2000 outline consent arrangements if a person does not have capacity to consent to health care at the relevant time.

Under an advance health directive, a person may consent to future health care and/or appoint a person (an ‘attorney’) to consent to the person’s health care if the person does not have capacity at a future time. A person may also express their views, wishes and preferences in the way health care is to be provided in an advance health directive.

Alternatively, a person may appoint an attorney under an Enduring Power of Attorney to consent to personal matters, such as future health care, if the person does not have capacity at a future time.
The Queensland Civil and Administrative Tribunal (QCAT) may appoint a person (a ‘guardian’) to consent to the person’s future health care if the person does not have capacity to make health care decisions. (Under the Mental Health Act 2016, a guardian is referred to as a ‘personal guardian’ to distinguish them from parental guardians).

If none of the above apply, a statutory health attorney (for example, a spouse) can consent to a person’s health care if the person does not have capacity. The authority of a statutory health attorney is automatic and does not require an appointment.

Further information on these arrangements is provided in Attachment 2: Guide to Advance Health Directives, Enduring Powers of Attorney, Guardians and Administrators.

To support these arrangements, the Mental Health Act 2016 requires the Chief Psychiatrist to establish and maintain a records system for advance health directives and Enduring Powers of Attorney related to a person’s future treatment and care for a mental illness. This system is established on the Consumer Integrated Mental Health Application (CIMHA).

The Chief Psychiatrist has also developed a template Advance Health Directive for Mental Health for consumers to complete.

A person may request an administrator to keep a copy of an advance health directive or an Enduring Power of Attorney related to the future treatment and care for a mental illness on the record system. This applies whether or not the advance health directive or Enduring Power of Attorney deals with other health care. The administrator must comply with the request.

The record system may also record the appointment of a guardian for a person who has the authority to consent to healthcare.

Clinicians need to be aware that the definition of ‘capacity’ under the Powers of Attorney Act 1998 and the Guardianship and Administration Act 2000 differs from the definition under the Mental Health Act 2016 (see Attachment 1). Given the more specific and detailed definition under the Mental Health Act 2016, using the definition under the Mental Health Act 2016 will achieve the same outcome for all relevant decisions about capacity.

Under the Mental Health Act 2016, a treatment authority cannot be made for a person if there is a ‘less restrictive way’ for the person to receive treatment and care for the person’s mental illness, namely:

- if the person is a minor - with the consent of the minor’s parent
- if the person has made an advance health directive - under the advance health directive
- if a personal guardian has been appointed for the person to consent to healthcare - with the consent of the personal guardian
- if an attorney has been appointed by the person - with the consent of the attorney, or
- with the consent of the person’s statutory health attorney, other than the Public Guardian.

If more than one of the above apply, the person is to be treated in the first of the listed order.

The requirement to treat a person in a less restrictive way is subject to this Policy, which outlines circumstances where the requirement does not apply.

5. Policy

5.1 Obligations of health practitioners

Treating a patient under an advance health directive, or with the consent of an attorney or guardian, does not affect a health practitioner’s clinical, ethical and legal obligations to the patient in any way.

A health practitioner must always make treatment decisions in the best interests of the patient.
A health practitioner must always minimise any adverse impacts on the patient’s rights and liberties.

A health practitioner must not be unduly influenced by an attorney or guardian to treat a person in a way that is contrary to good clinical practice.

A treating practitioner should always exercise caution where an attorney or guardian is proposing a more restrictive form of treatment, such as requiring a person to remain an inpatient or sedating a patient.

A health practitioner must, to the greatest extent possible, follow an advance health directive if it is consistent with appropriate and safe clinical practice. If some elements of an advance health directive cannot be followed, this does not remove the obligation of a practitioner to consider other elements of the directive.

A health practitioner must, to the greatest extent practicable, consider the patient’s views, wishes and preferences for their health care as expressed in an advance health directive.

If there is a disagreement between a treating practitioner and a support person or the patient (when the patient has recovered) over a practitioner not using of an advance health directive, a Clinical Director should be asked to assist in relation to any clinical matters. An Independent Patient Rights Adviser should be informed to provide advice to the patient in relation to their rights.

5.2 Requirement to consider a less restrictive way of treatment

5.2.1 General

A person is presumed to have capacity to make decisions about his or her own health care. The principles of supported decision-making also apply to assessing capacity, namely, that a person is taken to have capacity to make decisions if the person has capacity with the assistance of someone else.

A person with capacity to make decisions about his or her own health care has the right to consent to treatment and care, or not to consent to treatment and care. The decision a person makes is of no relevance in deciding whether a person has, or does not have, capacity.

This Policy applies to:

• a doctor or authorised mental health practitioner who is examining a person to decide whether to make a recommendation for assessment, and
• an authorised doctor assessing a person who is subject to a recommendation for assessment to decide whether to make a treatment authority for the person.

5.2.2 If the person is a minor and does not have capacity due to a mental illness

If the person is a minor (under 18 years of age), the doctor or authorised mental health practitioner must seek the consent of the minor’s parent for treatment if the parent is reasonably available. This would apply, for example, if a minor was brought into hospital by concerned parents.
For the purposes of the Act, a parent includes:

- a guardian of the minor (under the *Child Protection Act 1999*)
- a person who exercises parental responsibility for the minor, other than on a temporary basis (e.g. child minding)
- for an Aboriginal minor - a person who, under Aboriginal tradition, is regarded as a parent of the minor, and
- for a Torres Strait Islander minor - a person who, under Island custom, is regarded as a parent of the minor.

5.2.3 **If the person has made an advance health directive, appointed an attorney or has a personal guardian**

A doctor or authorised mental health practitioner must take reasonable steps to find out if the person has made an advance health directive, appointed an attorney or has a guardian for healthcare appointed.

The doctor or authorised mental health practitioner must search the patient’s health records on CIMHA. The doctor or authorised mental health practitioner must also ask any support persons who are with the person whether the person has made an advance health directive, appointed an attorney or has a guardian for healthcare appointed. The Act authorises QCAT to disclose the name and contact details of a personal guardian (section 796).

If an advance health directive has been made giving consent to health care, the doctor or authorised mental health practitioner must decide if the person’s treatment and care needs can be reasonably met by the consent stated in the directive.

If an attorney has been appointed under an advance health directive, the attorney’s consent to treatment must be sought if the directions are inadequate or if the advance health directive only appoints an attorney and does provide any directions. This does apply in an urgent situation and the attorney is not available.

If an attorney is appointed under an Enduring Power of Attorney, the attorney’s consent to treatment must be sought unless, in an urgent situation the attorney, is not available.

If a guardian for healthcare has been appointed for the person, the guardian’s consent to treatment must be sought unless, in an urgent situation, the guardian is not available.

5.2.4 **Statutory health attorney**

If a person is accompanied by a support person when first admitted, the doctor or authorised mental health practitioner must ask the person if their relationship with the person enables him or her to act as a statutory health attorney for the person (see *Guide to Advance Health Directives, Enduring Powers of Attorney, Guardians and Administrators*). If this is the case, the doctor or authorised mental health practitioner may seek the consent of the person for the treatment and care (See - *Inpatient with consent of statutory health attorney* in Section 5.5). It should be noted that a statutory health attorney can only make decisions for a person without capacity if the person does not have an advance health directive, or a personal guardian or attorney for the relevant matters.

5.2.5 **Recording of consent**

An authorised doctor must record in the patient’s health records the fact that a patient is being treated under an advance health directive or with the consent of an attorney or guardian.

5.2.6 **If a less restrictive way becomes available at a future time**

The requirements under the Act, and in this Policy, to treat a person in a less restrictive way have ongoing application. For example, if a treatment authority was initially made for a person, but an attorney becomes available at the health service at a later time, an authorised doctor must ask the attorney if he or she will consent to the patient’s treatment and care.
5.3 Use of physical restraint in providing treatment and care

The use of physical restraint to provide treatment to a patient must only occur if less restrictive options are not possible. Where physical restraint is used in providing health care, it must be the minimum necessary in the circumstances.

Seclusion is specifically regulated under the Act and cannot be authorised under an advance health directive or with the consent of a guardian, attorney or, if the person is a minor, the consent of the minor’s parents.

5.4 Treatment as an inpatient

A person may be treated as an inpatient if:

• the patient is an inpatient on a treatment authority under the Mental Health Act 2016
• an advance health directive expressly consents to being treated as an inpatient
• an attorney appointed by the person or a guardian for healthcare expressly consents to the person being treated as an inpatient, or
• a person requests they remain as an inpatient when they are admitted to hospital if the person is concerned that their condition may deteriorate and that being treated this way would be beneficial for their own safety and well-being.

The Act requires that a person under a treatment authority must be placed on a community category unless the patient’s treatment and care needs cannot be met that way. This principle is also to apply to a person being treated under an advance health directive, or with the consent of an attorney or guardian. An authorised doctor should only treat a person as an inpatient if satisfied it is necessary for the patient’s health, well-being and safety, and only for as long as is necessary.

Health care planning for a patient being treated as an inpatient should plan for the patient’s return to the community as soon as practicable.

5.5 When requirement to treat in a less restrictive way does not apply

5.5.1 Inpatient with consent of a statutory health attorney

As a statutory health attorney is not appointed by the person, treating a person as an inpatient with the consent of a statutory health attorney is not considered treatment in a less restrictive way. This means that, if an authorised doctor believes a person needs to be treated as an inpatient, the doctor may make a choice as to whether to treat the person with the consent of a statutory health attorney or, if the treatment criteria apply, under a treatment authority, having regard to the best interests of the patient.

5.5.2 Inpatient under an advance health directive or with the consent of an attorney or guardian

Treating a person as an inpatient under an advance health directive or with the consent of an attorney or guardian is most beneficial for short-term admissions. If a person is an inpatient under an advance health directive or with the consent of an attorney or guardian for 14 days or more, the treatment and care of the person must be reviewed by a Clinical Director at or around 14 days after admission. The Clinical Director may determine if the person should remain as an inpatient or treatment in the community would be more appropriate.

If the patient is to remain an inpatient, the authorised doctor also needs to decide the mechanisms for the patient’s ongoing treatment. If the criteria for treating the patient under an advance health directive or with the consent of an attorney or guardian and the criteria for treating the patient under a treatment authority both apply, then the authorised doctor may make a choice as to which of these mechanisms to use, having regard to the best interests of the patient.
If the person continues to be treated as an inpatient under an advance health directive or with the consent of an attorney or guardian, the authorised doctor should set a further review time to reconsider the mechanisms to use, having regard to the person’s circumstances.

5.6 Ongoing lack of capacity

Situations may arise where a person lacks capacity in an ongoing way. This may apply if the person is being treated under a treatment authority, advance health directive or with the consent of an attorney.

Where this applies, an authorised doctor must contact the Office of the Public Guardian to consider whether guardianship arrangements are appropriate for the person.

5.7 Making of an advanced health directive for future health care

Where a patient with a mental illness is being discharged from hospital, health service staff are to inform the patient of the options to make an advance health directive or an Enduring Power of Attorney for their future health care. This is also one of the functions of Independent Patient Rights Advisers under the Act.

5.8 Urgent health care

The ‘less restrictive way’ provisions do not affect the legal authority to treat a person in urgent circumstances without consent under section 63 of the Guardianship and Administration Act 2000 (Urgent health care).

6. Supporting documents

- Attachment 1; Comparison of Definitions of ‘Capacity’
- Attachment 2: Guide to Advance Health Directives, Enduring Powers of Attorney, Guardians and Administrators

Issued under section 305 of the Mental Health Act 2016

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Comparison of Definitions of ‘Capacity’

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<td>‘Capacity’, for a person for a matter, means the person is capable of:</td>
<td>‘Capacity’, to consent to be treated, means the person:</td>
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<td>• understanding the nature and effect of decisions about the matter</td>
<td>• is capable of understanding, in general terms:</td>
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<td>– that the person has an illness, or symptoms of an illness, that affects the person’s mental health and wellbeing</td>
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<td>– the nature and purpose of the treatment for the illness</td>
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<td>– the benefits and risks of the treatment, and alternatives to the treatment, and</td>
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<td>– the consequences of not receiving the treatment.</td>
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<td>• freely and voluntarily making decisions about the matter</td>
<td>• is capable of making a decision about the treatment and communicating the decision in some way.</td>
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See:

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

1. Purpose
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.

2. Overview
The POAA and the 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 the 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.\(^1\)

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

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\(^1\) See section 3.4 ‘Capacity’
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**
- for health matters - with the consent of an **attorney appointed by a person under an advance health directive**
- 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**
- 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 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.

See attached diagram – *Consent to Health Care for Persons who Lack Capacity*.

### 3. Consent to Health Care

#### 3.1 Advance health directives

An adult may make an advance health directive under the POAA when the person has capacity to do so.

Under an advance health directive, a person can consent to the person’s own treatment and care, to apply at a time when the person does not have capacity to make these decisions. An advance health directive may also include the person’s views, wishes and preferences about their future treatment and care (see section 222(2) of the *Mental Health Act 2016*). Consent under an advance health directive may relate to special health matters, such as electroconvulsive therapy.

An advance health directive may appoint one or more persons to be an attorney for the person in addition to, or instead of, giving consent under an advance health directive. 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 of the first attorney is not available, or either attorney can make a decision. The advance health directive may specify or place limits or conditions on the decisions an attorney can make.

An attorney may give consent to the person’s treatment and care at a time when the person does not have capacity. An attorney does not have power to give consent for special health matters, including electroconvulsive therapy.

Where an advance health directive gives consent to the person’s own treatment and care, and also appoints an attorney, the attorney’s decisions cannot be inconsistent with the person’s consent in a directive.

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2 See section 2.5 ‘Order of Priority’

3 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*).
3.2 Attorney appointed under an Enduring Power of Attorney

An adult may appoint an attorney under an Enduring Power of Attorney (EPOA) under the POAA.

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 matters. As with attorneys appointed under advance health directives, 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 give consent to the person’s treatment and care at a time when the person does not have capacity. An attorney does not have power to give consent for special health matters, including electroconvulsive therapy.

3.3 Statutory health attorneys

A ‘statutory health attorney’ may consent 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 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
- 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.

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

If none of the above is 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 advance health directive 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).

3.4 Guardians

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, 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.

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4 An attorney may also be appointed for financial matters under an EPOA.
3.5 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’.

Attachment B details this order of priority.

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 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. Matters Related to Consent to Health Care

4.1 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.

In circumstances where there may be doubt as to the use of ‘minimum force’, it would be prudent for a health practitioner to consider whether consent to the use of physical restraint has been given in an advance health directive, or seek the consent of an attorney or guardian. This may apply, for example, if more than one person was required to physically restrain a patient to provide health care.

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 advance health directive, attorney or guardian for health care expressly consents to this treatment.6 (noting that this power may also be exercised under a treatment authority made under the Mental Health Act 2016).

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.

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6 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.
4.2 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.

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

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.

4.3 Urgent health care

The fact that a person has an advance health directive, 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 advance health directive.

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.

4.4 Capacity

The definition of ‘capacity’ in the POAA/GAA (see section 1) differs slightly from the definition of ‘capacity’ in the MHA 2016. Under MHA 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.

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 MHA 2016), and
- whether a person can be treated under an advance health directive or with the consent of an attorney or guardian (under POAA/GAA).

Given the more specific and detailed definition under the Mental Health Act 2016, using the definition under the Mental Health Act 2016 is likely to result in the same outcome for all relevant decisions about capacity.

4.5 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 (see Attachment C) and the health care principle (see Attachment D)
- 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 QCAT.

4.6 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.

The Acts provide that this requirement over-rides any duty of confidentiality under an Act or the common law.

4.7 Protections for health practitioners

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

In 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 advance health directive or EPOA
- a person who acts under an advance health directive or a decision by an attorney under an advance health directive or EPOA does not incur any liability if the doctor 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 advance health directive 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.

5. **Administrators for Financial Matters**

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

In making this appointment, 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.
Types of Matters (POAA, Schedule 2 (extract) and GAA Schedule 2 (extract))

A. 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;
(c) services provided to the principal;
(d) whether the principal works and, if so, the kind and place of work and the employer;
(e) what education or training the principal undertakes;
(f) whether the principal applies for a licence or permit;
(g) day-to-day issues, including, for example, diet and dress;
(h) whether to consent to a forensic examination of the principal;

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

(i) health care of the principal;
(j) a legal matter not relating to the principal’s financial or property matters.

B. 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, enduring power of attorney or advance health directive 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

C. 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 purposes; 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.

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

D. 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 else;
   *Note:* For the situation after the principal has died, see the *Transplantation and Anatomy Act 1979*, particularly section 22.
(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 psychosurgery for the principal;
(f) prescribed special health care of the principal.
**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 advance health directive 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 tribunal 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 order.

   **Note:** If, when appointing the guardian or guardians, the tribunal 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).

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 advance health directive 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 tribunal 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 tribunal has made an order about the matter, the matter may only be dealt with under the order.

   **Note:** However, the tribunal may not consent to electroconvulsive therapy or psychosurgery—see section 68(1).
Part 1 General Principles  (POAA, Schedule 1 and GAA, Schedule 1)

1. **Presumption of capacity**
   
   An adult is presumed to have capacity for a matter.

2. **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.

3. **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.

4. **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.

5. **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.

6. **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.

7. **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.

8. **Maintenance of existing supportive relationships**

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

9. **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 tradition or Island custom), must be taken into account.

*Notes—*
1. *Aboriginal tradition* has the meaning given by the *Acts Interpretation Act 1954*, schedule 1.
2. *Island custom* has the meaning given by the *Acts Interpretation Act 1954*, schedule 1.

10. **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.

11. **Confidentiality**

An adult’s right to confidentiality of information about the adult must be recognised and taken into account.
Part 2 Health Care Principle (POAA, Schedule 1 and GAA, Schedule 1 (extract))

(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 advance health directive) 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.
Protections for Health Practitioners

A. Powers of Attorney Act 1998

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

(1) A person who—
(a) deals with an attorney under ... an enduring document, (the document); and
(b) does not know, or have reason to believe, the principal did not have capacity to make the document;

is entitled to rely on the certificate of the witness to the document as evidence of the principal’s capacity to make the document.

100 Additional protection if unaware of invalidity in health context

A person, other than an attorney, who, without knowing an advance health directive or a power for a health matter under an enduring document [an advance health directive or an enduring power of attorney] 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.

101 No less protection than if adult gave health consent

A person, other than an attorney, acting in accordance with a direction in an advance health directive, 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.

B. Guardianship and Administration Act 2000

77. 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.

78 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.
80  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.
Consent to Health Care for Persons who Lack Capacity

By person in advance
- Advance health directive – made when person has capacity
  - Consent to health care (may include ECT)

By appointed substitute decision-maker
- Attorney appointed under AHD
  - Consent to health care – subject to:
    - AHD
    - EPOA, or
    - QCAT appointment or order
- Attorney (for personal matters) appointed under EPOA
- Enduring Power of Attorney
- QCAT
  - Guardian appointed or QCAT order

By statutory health attorney
- Consent to health care
  - Authorised under an Act – eg. MHA 2016
  - Urgent health care – s.66 GAA
  - Minor and uncontroversial health care – s.64 GAA
  - Court order

Consent Not Required