

# Guardianship Reforms: key reforms to Queensland's guardianship legislation, forms and guides

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Kim Chandler

Director, Strategic Policy and Legal Services

Department of Justice and Attorney-General

# Overview

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Background to reforms

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Changes to the law

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Changes to forms

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Capacity Guidelines

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Further resources

# 1. Background to Reforms

- Reforms implemented by the *Guardianship and Administration and Other Acts Amendment Act 2019* (Amendment Act) that commenced on 30 November 2020.
- The Amendment Act amended the:
  - *Guardianship and Administration Act 2000*
  - *Powers of Attorney Act 1998*
  - *Public Guardian Act 2014*

# 1. Background to Reforms

- The Amendment Act implemented some recommendations from the Queensland Law Reform Commission's Report – *A Review of Guardianship Laws* (2010).
- The QLRC made 317 recommendations across a broad range of areas relevant to Queensland's guardianship system.
- The QLRC also recommended:
  - changes to the forms for Enduring Powers of Attorney and Advance Health Directives and the development of explanatory guides
  - the development of Guidelines for the Assessment of Capacity

## 2. Changes to the law – QLRC recs

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Changes to the general principles and health care principles

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Applying the presumption of capacity

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Clarifying the test of capacity for making an enduring document

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Eligibility requirements for attorneys

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Limit to the number of joint attorneys

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Conflict transactions

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Broader remedies – when an attorney, administrator or guardian has failed to comply with their duties and obligations

## 2. Changes to the law – other

- Recognising the role support plays in determining capacity
- Taking into account the views, wishes and preferences of an adult
- Power for QCAT to order an attorney (or former attorney), administrator (or former administrator), guardian (or former guardian) to compensate a principal or a principal's estate
- Providing a legislative exception to ademption in certain circumstances
- Missing Persons – enabling appointment of an administrator

# 2. Changes to the law: general principles/ health care principles

- The general principles and the health care principles have been updated to be more consistent with human rights, particularly the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).
- They also put a greater focus on adults with impaired capacity participating in decision-making.
- There is a new factsheet available on the Qld Government publications portal

## General principles and health care principles under Queensland's guardianship framework

The general principles and the health care principles set out the principles underpinning Queensland's guardianship framework and provide guidance to any person or entity performing a function or exercising a power under Queensland's guardianship legislation (the [Guardianship and Administration Act 2000](#) and the [Powers of Attorney Act 1998](#)).

When making decisions on behalf of an adult with impaired decision-making capacity, **attorneys, guardians, administrators and statutory health attorneys** must apply the general principles, and the health care principles (in relation to health matters). A **person making a decision for an adult on an informal basis** must also apply the general principles.

The **Supreme Court** and the **Queensland Civil and Administrative Tribunal** are also required to apply the general principles and health care principles, for example, when determining whether an adult has capacity for a matter or considering whether to appoint a guardian or administrator for a matter.

The **community** is encouraged to apply and promote the general principles.

### The General Principles

#### 1. Presume the adult has capacity

This principle recognises the presumption of capacity. Capacity refers to the ability to make and communicate decisions about a matter.

It must be presumed that every adult has capacity to make a decision about a matter until proven otherwise. Capacity is specific to the type of decision to be made and the time the decision is made.

For more information about capacity, see the [Queensland Capacity Assessment Guidelines 2020](#).

#### 2. Same human rights and fundamental freedoms

This principle recognises that all adults (regardless of whether or not the adult has decision-making capacity) has the **same human rights and fundamental freedoms** as others in the community.

In recognising and taking into account these rights and freedoms the following principles should be taken into account:

- **respect** for the adult's **inherent dignity and worth, autonomy** (including the freedom to make one's own choices) and **independence**;

# 2. Changes to the law: general principles/ health care principles

- Key changes include:
  - More contemporary language is used such as
    - 'safeguards' rather than 'protection'
    - an adult's 'rights, interests and opportunities' are promoted rather than their 'best interests'
- The new general principle 10 provides a more structured approach to decision-making – it emphasises recognising and supporting an adult's right to make their own decision, and recognising and taking into account any views, wishes and preferences expressed or demonstrated by the adult – before resorting to substitute decision-making.

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## 2. Changes to the law – the importance of support

- Section 5 *Guardianship and Administration Act 2000* - provides that the capacity of any adult (not just an adult with impaired capacity) to make decisions may differ according to:
  - the type of decision to be made, including, for example the complexity of the decision to be made; and
  - the support available from members of the adult's existing support network.
- Principle 10: sets out the steps to be followed by a person or entity performing a function or power – they must first recognise and preserve, to the greatest extent practicable, the adult's right to make their own decisions and support the adult to make a decision, if possible.
- Principle 8: recognises that an adult is not to be treated as unable to make a decision about a matter until all practicable steps have been taken to provide the adult with the necessary support and information to make and communicate a decision

## 2. Changes to the law – presumption of capacity

The presumption that all adults have decision-making capacity is fundamental to Queensland's guardianship system.

The reforms do not change that presumption, but clarify how to apply it in certain circumstances, specifying that:

- every time QCAT or the Supreme Court must make a decision about an adult's capacity, they must presume that the adult does have capacity for the matter until the contrary is proven
- if QCAT or the Supreme Court have appointed a guardian or administrator for an adult for a matter, that guardian or administrator does not need to presume the adult has capacity for

*Bucknall v Guardianship and Administration Tribunal (No 1) [2009] 2 Qd R 402*

## 2. Changes to the law: capacity to make an enduring document

- The reforms clarify the capacity required for an adult to make an enduring document (i.e. an advance health directive or an enduring power of attorney)
- To make an enduring document the adult must both:
  - understand the nature and effect of the document
  - be capable of making it freely and voluntarily
- See section 6 – Capacity Guidelines

## Queensland Capacity Assessment Guidelines 2020

Are you concerned about another adult's  
capacity to make decisions?  
Are you thinking about seeking a capacity assessment?  
Are you having your own capacity assessed?

A guide to understanding capacity,  
capacity assessment and the legal tests of capacity  
under Queensland's guardianship legislation.

## 2. Changes to the law – eligibility for attorneys

### **Attorney under an Enduring power of attorney**

In addition to the existing criteria an attorney:

- Must have capacity for a matter
- Must not have been a paid carer for the principal in the previous 3 years before their appointment

*A paid carer* is someone paid a fee or wage to provide care, not someone receiving a carer's pension or benefit.

### **Attorney under an Advance Health Directive**

- In addition to the existing criteria an attorney:
  - Must have capacity for health matters
  - Must not be a service provider for a residential service where the principal resides

*A residential service* is rooming accommodation regulated under the Residential Services (Accreditation) Act 2002. A residential service is sometimes called a boarding house

## 2. Changes to the law – limit on number of joint attorneys

### 1. jointly

- ✓ all of your attorneys must agree on every decision before a decision is made and exercise powers unanimously (e.g. signing documents putting a decision into action). You can only appoint a maximum of four joint attorneys for a matter

OR

### 2. severally

- ✓ any one of your attorneys can make the decision without having to agree with any other attorney

OR

### 3. by a majority

- ✓ if you have more than two attorneys, more than half of your attorneys must agree before a decision is made

OR

### 4. other

- ✓ you must specify how your attorneys must make decisions (e.g. jointly and severally or appointing a successive or alternative attorney).

There are four options for choosing how more than one attorney must make decisions.

The reforms restrict the number of joint attorneys that can be appointed to a maximum of 4

## 2. Changes to the law – conflict transactions

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- A **conflict transaction** happens when there is a conflict between an administrator's or attorney's duty to the principal and the administrator's or attorney's own interests.
- An administrator cannot enter into a conflict transaction unless a court or tribunal has authorised it. An attorney cannot enter into a conflict transaction unless the principal has authorised them to do so in the enduring power of attorney document, or if a court or tribunal has authorised it.
- The reforms emphasise that attorneys and administrators should seek **authorisation in advance** before entering a conflict transaction.
- While making it clear these transactions may continue to be authorised after the fact (i.e. retrospectively), the reforms clarify that until that happens, an administrator or attorney has acted against their duty not to enter into a conflict transaction.

## 2. Changes to the law – remedies – when an attorney, administrator or guardian has failed to comply with their duties

- The reforms clarify the current powers QCAT can exercise and provide additional powers to improve access to redress for victims of financial abuse including that:
  - QCAT can order both a current or a former attorney, administrator or guardian to pay compensation for a loss to the adult or the adult's estate caused by their failure to comply with their duties.
  - QCAT can order a current or a former attorney or administrator to file records and audited accounts of their dealings and transactions conducted on behalf of the adult.
- Additional power for the Supreme Court and QCAT to order that an attorney, guardian or administrator (or former appointee) account for any profits accrued as a result of their failure to comply with their duties.

## 2. Changes to the law – legislative exception to ademption

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- Ademption occurs where the gifting of a specific item of property in a will fails because, before the death of the *testator* (i.e. the maker of the will), the item is sold or changes in form to the point that it can't be regarded as the item described in the will—and it is no longer considered to form part of the deceased's estate. (e.g. *a person gifts a house under their will, but the house is sold to fund their entry into aged care before they die*)
- The legislative exception means that ademption will not occur and the beneficiary will be entitled to the same interest in any surplus money or other property (the proceeds) arising from a sale, mortgage, charge or disposition or other dealing with the property by the administrator or attorney, as the beneficiary would have had in the property, had it not been sold or otherwise dealt with. (e.g. the beneficiary will be entitled to the proceeds of the sale, or surplus money)
- The amendments also allow the beneficiary (or a personal representative) to apply to the court for an order that adjusts the beneficiary's entitlement to better reflect the intention of the testator (e.g. if the proceeds of the sale of the house have been depleted).



## 2. Changes to the law – missing persons

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- QCAT is empowered to appoint an administrator for a missing person where QCAT is satisfied that both:
  - the person is missing
  - their financial interests would be adversely affected if an administrator is not appointed.
- Appointing an administrator for a missing person will allow pressing issues relating to the person's estate (e.g. where action is required to preserve the missing person's assets) to be dealt with immediately.

## Form 9

Powers of Attorney Act 1998 (section 145)  
Version 5, approved for use from 30 November 2020.

### Enduring power of attorney explanatory guide (Queensland)

Your guide to completing an  
enduring power of attorney (Queensland)

Read this guide before you begin filling in your  
[Form 2 – Enduring power of attorney – short form](#)  
or [Form 3 – Enduring power of attorney – long form](#).

It provides detailed explanatory notes about the  
information required to complete these forms. It also has a  
step-by-step guide to each section of your enduring power  
of attorney form.

Forms and explanatory guides are available at [www.qld.gov.au/queensland-planshead](http://www.qld.gov.au/queensland-planshead)

FORM 9 – ENDURING POWER OF ATTORNEY EXPLANATORY GUIDE | Version 5, approved for use from 30 November 2020.  
To be used with Form 2 – Enduring power of attorney – short form (Section 145) and Form 3 – Enduring power of  
attorney – long form (Section 145), which are approved for use from 30 November 2020.



## Form 2

Powers of Attorney Act 1998 (section 147B)  
Version 5, approved for use from 30 November 2020.

### Enduring power of attorney – short form (Queensland)

This form allows you to appoint someone you trust (an 'attorney') to make  
decisions for you during your lifetime. Use this form to appoint:

- ▶ attorney(s) for financial (including health) matters only
- ▶ attorney(s) for financial matters only
- ▶ the same attorney(s) for both personal (including health) matters and financial  
matters.

Before you complete this form, read [Form 9 – Enduring power of attorney  
explanatory guide](#), consider who you want to appoint and talk to them.

This is a **legal document** that can significantly affect your legal rights. It is  
recommended that you seek independent legal advice before completing this form.

Forms and explanatory guides are available at [www.qld.gov.au/queensland-planshead](http://www.qld.gov.au/queensland-planshead)

ENDURING POWER OF ATTORNEY – SHORT FORM | Version 5, approved for use from 30 November 2020.



## Form 3

Powers of Attorney Act 1998 (section 147C)  
Version 4, approved for use from 30 November 2020.

### Enduring power of attorney – long form (Queensland)

This form allows you to appoint someone you trust (an 'attorney') to make  
decisions for you during your lifetime.

Use this form to appoint different attorneys for personal (including health) matters  
and for financial matters.

Before you complete this form, read [Form 9 – Enduring power of attorney  
explanatory guide](#), consider who you want to appoint and talk to them.

This is a **legal document** that can significantly affect your legal rights. It is  
recommended that you seek independent legal advice before completing this form.

Forms and explanatory guides are available at [www.qld.gov.au/queensland-planshead](http://www.qld.gov.au/queensland-planshead)

ENDURING POWER OF ATTORNEY – LONG FORM | Version 4, approved for use from 30 November 2020.



# 3. Changes to the forms – Enduring Powers of Attorney

### 3. Changes to the forms – Enduring Powers of Attorney – what’s new?

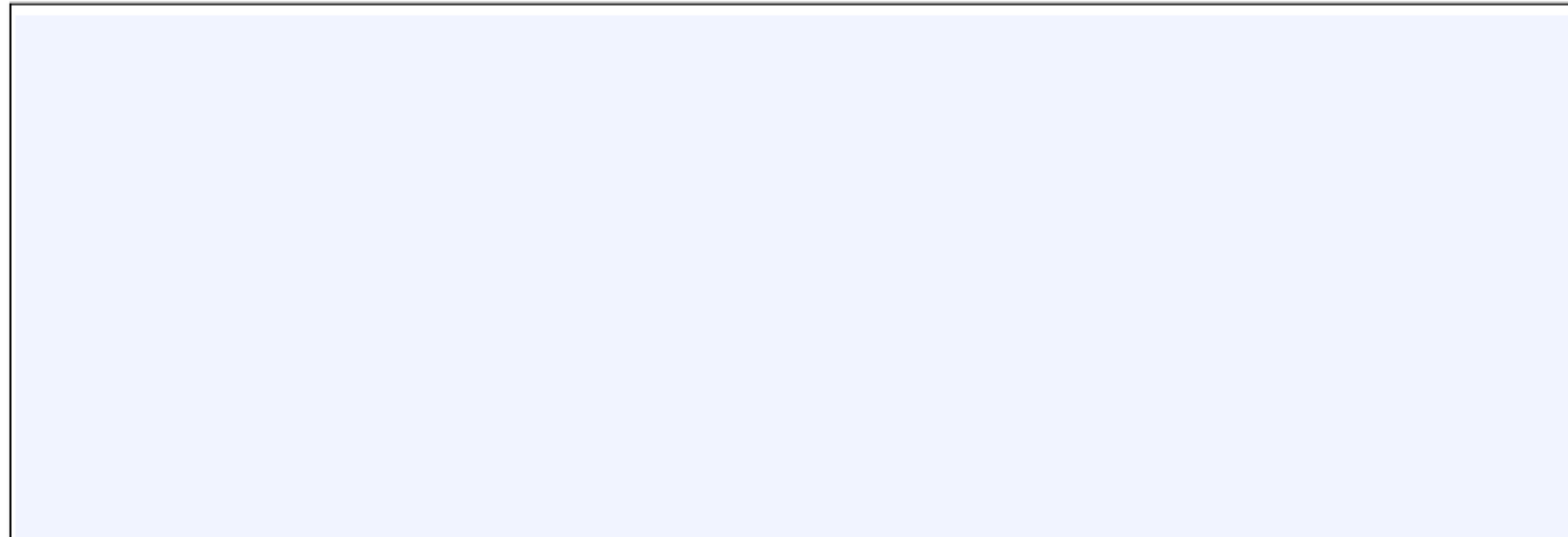
## SECTION 2: YOUR VIEWS, WISHES AND PREFERENCES

**Your attorney(s) must consider your views, wishes and preferences when making decisions for you but these are not instructions to your attorney(s).**

Section 2 allows you to provide information about yourself, including what is most important to you in life now and into the future.

**This is what I want my attorney(s) to know about me when making decisions for me:**

(e.g. your views about where you would prefer to live, your health care preferences and any other views, wishes and preferences you would like your attorney(s) to know)



# 3. Changes to the forms – Enduring Powers of Attorney – what’s new

## Terms and instructions (notifications for personal (including health) matters)

### Who to notify

My attorney(s) for personal (including health) matters must notify the following person(s) when exercising power for personal (including health) matters in writing:

- me (the principal)
- my other current attorney(s)
- the nominated person below

Full name			
Address			
	Suburb	State	Postcode
Phone number			
Email			

- I need more space to include additional nominated person(s).

Attach any additional pages to this form and tick the box to indicate that extra pages are attached.

### What to notify

My attorney(s) for personal (including health) matters must provide the following to the person(s) nominated above:

- written notice that my attorney(s) intend to begin exercising power for a personal matter (including a health matter) under this enduring power of attorney before exercising the power for the first time
- other information: (Provide details about the information that must be provided including how often your attorney(s) must provide the information)

## (notifications for financial matters)

### Who to notify

My attorney(s) for financial matters must notify the following person(s) when exercising power for financial matters in writing:

- me (the principal)
- my other current attorney(s)
- the nominated person below

Full name			
Address			
	Suburb	State	Postcode
Phone number			
Email			

- I need more space to include additional nominated person(s).

Attach any additional pages to this form and tick the box to indicate that extra pages are attached.

### What to notify

My attorney(s) for financial matters must provide the following to the person(s) nominated above:

- written notice that my attorney(s) intend to begin exercising power for financial matters under this enduring power of attorney before exercising the power for the first time.
- all financial records and accounts
- records relating to transactions above a nominated amount: \$ \_\_\_\_\_  
(You must specify an amount here if you select this option)
- records and accounts for all assets including property, investments and vehicles
- summaries of income, expenditure and assets
- copies of financial management plans and financial advice obtained
- other: (Provide details)

## Form 10

Powers of Attorney Act 1998 (section 165)  
Version 5, approved for use from 30 November 2020.

# Advance health directive explanatory guide (Queensland)

Your guide to completing an  
Advance health directive (Queensland)

Read this guide before you begin filling in [Form 4 – Advance health directive](#). It provides detailed explanatory notes about the information required to complete the form. It also has a step-by-step guide to each section of your advance health directive form.

Forms and explanatory guides are available at [www.qld.gov.au/guardianship-plans/head](http://www.qld.gov.au/guardianship-plans/head)

ADVANCE HEALTH DIRECTIVE EXPLANATORY GUIDE | Version 5, approved for use from 30 November 2020.  
To be used with Form 4 – Advance health directive (version 10), which is approved for use from 30 November 2020.



## Form 4

Powers of Attorney Act 1998 (Qld) section 44(2)  
Version 5, approved for use from 30 November 2020.

For patient record purposes, health services can affix identification label here

# Advance health directive (Queensland)

Use this form to give directions about your future health care and special health care. You can also use this form to appoint an attorney(s) for health matters.

To help you complete this form, please read [Form 10 – Advance health directive explanatory guide](#) first.

You should then talk to people who are important to you and can help inform your healthcare choices including your doctor, family and friends.

Forms and explanatory guides are available at [www.qld.gov.au/guardianship-plans/head](http://www.qld.gov.au/guardianship-plans/head)

ADVANCE HEALTH DIRECTIVE | Version 5, approved for use from 30 November 2020.



# 3. Changes to the forms – Advance Health Directives

### 3. Changes to the forms – Advance Health Directives— what’s new?

An expanded values section has been added to the form

#### SECTION 3: YOUR VIEWS, WISHES AND PREFERENCES

**(a) These things are important to me:** *(Describe what living well means to you now and into the future e.g. spending time with your family and friends, living in your own home)*

**(c) These are the cultural, religious or spiritual values, rituals or beliefs I would like considered in my health care:**

**(d) When I am nearing death, the following would be important to me and would comfort me:** *(e.g. you may prefer to die at home or you may like a certain type of music played)*

**(e) I would prefer these people to be involved in discussions about my health care:**

**(b) These things worry me about my future:** *(e.g. being unable to live at home, being unable to communicate)*

**(f) I would prefer these people not be involved in discussions about my health care:**

### 3. Changes to the forms – Advance Health Directives – what’s new?

**I give the following directions about life-sustaining treatment:**

(Please choose **only one** of the following four options)

**Option 1**

I consent to all treatments aimed at sustaining or prolonging my life.

OR

**Option 2**

I refuse any treatments aimed at sustaining or prolonging my life.

OR

**Option 3**

I cannot decide at this point. I want my attorney(s) to make the decisions about life sustaining treatment on my behalf at the time the decision needs to be made using the information in this advance health directive and in consultation with my health providers and the people I have listed in section 3.

OR

**Option 4**

I give the following specific directions about life-sustaining treatments:

(Tick one box per row in the table below)

**new options for giving direction**

Life-sustaining treatment	(a) I consent to this treatment in all circumstances	(b) I refuse this treatment in all circumstances	(c) I consent to this treatment in the following circumstances (You must specify the particular circumstances for each treatment)
<b>CPR</b> (cardiopulmonary resuscitation) <i>(For option (c), specify circumstances here)</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Assisted ventilation</b> (e.g. a machine which assists your breathing through a face mask or a breathing tube) <i>(For option (c), specify circumstances here)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<b>Artificial nutrition</b> (e.g. a feeding tube through the nose or stomach) <i>(For option (c), specify circumstances here)</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Artificial hydration</b> (e.g. intravenous (IV) fluids) <i>(For option (c), specify circumstances here)</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Antibiotics</b> <i>(For option (c), specify circumstances here)</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Other life-sustaining treatment</b> <i>(insert the treatment name)</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

# Queensland Capacity Assessment Guidelines 2020

Are you concerned about another adult's  
capacity to make decisions?  
Are you thinking about seeking a capacity assessment?  
Are you having your own capacity assessed?

A guide to understanding capacity,  
capacity assessment and the legal tests of capacity  
under Queensland's guardianship legislation.

# Guidelines for the Assessment of Capacity

- Made under s250 *Guardianship and Administration Act 2000*
- Relevant for Queensland's guardianship legislation:
  - *Guardianship and Administration Act 2000*
  - *Powers of Attorney Act 1998*
- Implements recommendations (7-11 to 7-17) of the Queensland Law Reform Commission (QLRC) Report that:
  - Guidelines for assessing capacity under guardianship legislation should be developed



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**SECTION 1: Introduction** Page 4

A snapshot of capacity, what you will find in these guidelines and who they will be most useful to.

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**SECTION 2: Capacity** Page 5

More information about capacity and who may need to carry out a capacity assessment.

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**SECTION 3: Capacity assessment principles** Page 9

The **capacity assessment principles** to be applied in making an assessment of an adult's capacity.

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**SECTION 4: The general test of capacity** Page 15

The **general test of capacity** to make personal, health or financial decisions under Queensland's guardianship legislation.

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**SECTION 5: The capacity assessment checklist** Page 21

The **capacity assessment checklist**, which provides a step-by-step guide to conducting a capacity assessment to make personal, health or financial decisions, along with helpful information and case studies.

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**SECTION 6: Assessing capacity to make an enduring document** Page 40

A guide for witnesses to **enduring documents** (enduring powers of attorney and advance health directives).

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**APPENDIX A: If you need further assistance** Page 51

How to contact different agencies providing further assistance.

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**APPENDIX B: Next steps if capacity is in doubt** Page 53

What to do if capacity is in doubt.

# To find out more

- **Changes to guardianship laws and forms:** [Changes to guardianship laws and forms | Your rights, crime and the law | Queensland Government \(www.qld.gov.au\)](#)

[\(www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/guardianship-changes\)](#)

- **Capacity guidelines:** [Guidelines for assessing decision-making capacity | Your rights, crime and the law | Queensland Government \(www.qld.gov.au\)](#)
- **Forms:** [Power of attorney and advance health directive forms - Datasets | Publications | Queensland Government](#)