Advocacy and the Queensland Guardianship and Administration Tribunal

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Introduction

The *Guardianship and Administration Act 2000* established the Guardianship and Administration Tribunal (GAAT) which commenced on 30 June 2000. The Tribunal provides a simple and inexpensive way of meeting the decision–making needs and protecting the rights of adults with impaired capacity for decision making. Essentially applications to the Tribunal usually relate to adults with, dementia, a mental illness or an intellectual disability.

This legislation brings under one Act provisions that have been scattered among the *Public Trustee Act 1978*, the *Mental Health Act 1974*, and the *Intellectually Disabled Citizens Act 1985*. The Tribunal commenced scheduled hearings in the second week of August 2000 and as at March 2001 has heard approximately 800 matters throughout Queensland. These hearings have ranged from simple cases such as where an administrator is required to manage the affairs of a pensioner to complex cases involving suspensions of attorneys, applications for consents to special health care and warrants to enter and remove an adult on the grounds of immediate risk of harm due to neglect.

As with any Tribunal the nature of the advocacy required depends on the nature of the application being sought. Many practitioners are still not aware of the extent of the Tribunal's jurisdiction. Practitioners also need to remember that GAAT is an inquisitorial Tribunal which is comprised of members who have particular professional or personal experience of people with impaired decision making ability. In addition there are some particular procedural matters which practitioners will need to be aware of.

It is also essential to have a thorough understanding of the Principles set out in Schedule 1 of the Act, to have a thorough understanding of the needs of the adult for whom the applications are being brought and an understanding of the nature of the appointments which can be made by the Tribunal. It is also necessary to understand the limits of the appointments and the need for specific Tribunal approval for some matters.

Jurisdiction of the Tribunal

The functions of the Tribunal are set out in **section 82** of the Act, which provides as follows:

_ make declarations about the capacity of an adult, guardian, administrator or attorney for a matter.

_ consider applications for the appointment of guardians and administrators.

_ appoint guardians and administrators if necessary and reviewing the appointments.

_ make declarations, orders or recommendations or give directions or advice in relation to guardians
and administrators, enduring documents, attorneys and related matters.
_ ratify a decision or proposed decision by an informal decision maker.
_ consent to special health care (other than electroconvulsive therapy or psychosurgery).
_ register an order made under an Act of the Commonwealth or another State of Australia or a law
of a foreign jurisdiction.
_ review a matter in which a decision has been made by the Registrar of the Tribunal.
_ perform other functions given to the Tribunal by the Act.

It is important to remember that **section 240** of the Act provides that the Supreme Court's inherent
jurisdiction is not affected including its parens patriae jurisdiction. **Section 239** also provides that the Act
does not affect the rules of court of the Supreme, District or Magistrates Court in relation to the appointment
of a litigation guardian for a person under a legal incapacity.
Section 245 also provides that if in a civil proceeding the Supreme or District Court sanctions a settlement
involving an adult with impaired capacity for a matter the Court may exercise all the powers of the Tribunal
under chapter 3 of the Act and appoint a guardian or an administrator for a matter. The recent decision of
Justice Mullins in *Welland-v- Payne* (no 1022 of 1995, Judgement delivered on 28 November 2000) is a
good analysis of the current position.
If the Court makes an order under this section the registrar of the Court must give a copy of the order to the
Tribunal.

Composition of the Tribunal

The Tribunal has a President, 2 Deputy Presidents and 14 Tribunal Members. (**section 81**) The President
must be a lawyer of a least five years standing and with experience in mediation or ADR and with
experience and an understanding of the issues about impaired capacity.
The Deputy Presidents and Tribunal Members must be either lawyers with experience in mediation or ADR
and particular knowledge or experience with respect to persons with impaired decision making capacity or a
person with extensive professional knowledge or a person with experience of persons with impaired decision
making capacity for matters.
There are currently 8 lawyers, 6 professional members and whilst there are 3 members with specific personal
experience many of the lawyers and professional members also have personal experience of people with
impaired decision making ability.

The nature of the Tribunal

Section 107(1) of the Act requires that the proceeding before the Tribunal be conducted as simply and
quickly as the requirements of the Act and an appropriate consideration of the matters allow.

Section 107(2) provides that the Tribunal is not bound by the rules of evidence and may inform itself in a
way it considers appropriate. In practice however the Tribunal would only attach weight to evidence which
is strictly relevant and has been substantiated or tested in some way as the Tribunal is very conscious that the
major criticism of Guardianship Tribunals has been that "decisions are frequently made on scanty evidence
with little or no cross-examination." (Carney and Tait p75 Federation Press 1997).
In *Mahon-v-Air New Zealand* (1984) AC 808 Lord Diplock at p820 referred to two rules of natural justice
that were germane to that appeal. The rule that the person making a finding in the exercise of an
investigative jurisdiction must base his decision upon evidence that has some probative value, and secondly
that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place
before him or would have so wished if he had been aware of the risk of the finding being made.
The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts

consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is
not logically self contradictory.
The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of the opportunity to adduce additional material of probative value which, had it been placed before the decision maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.
GAAT is an inquisitorial or investigative Tribunal with **section 130** providing that before it can hear and
decide a matter the Tribunal must ensure that it has all the relevant material and s**ection 134** providing that
the Tribunal may receive in evidence in a proceeding a written report by the Tribunal staff. The section
ensures however that if the Tribunal does receive such a report into evidence then the adult and each other
active party must be advised of the contents of the report and be given a copy of the report.
The nature and role of an inquisitorial Tribunal was addressed by the *Queensland Law Reform Commission*
Report 49 on Assisted and Substituted Decisions, Volume 1 at page 218.
…when a matter is heard by a court the judge generally assumes the role of neutral umpire presiding over an adversarial dispute. Each side decides what information is to be presented to
the judge. This is done by calling witnesses who are asked questions and then tested by crossexamination
according to the rules of the law of evidence. The complexity of these rules usually requires the participation of lawyers.
With a tribunal on the other hand, procedures can be simplified and the rules about giving

evidence and presenting arguments relaxed. The use of lawyers can be minimised and public accessibility can be increased by the removal of some of the procedural and financial barriers
imposed by a formal legalistic system. The tribunal can ensure that the information necessary to achieve the most appropriate solution is available.
Creation of a tribunal would also allow for the appointment to the tribunal of people who have
experience or special expertise in particular areas of decision-making disability and their associated problems.

Particular procedural issues

1. Legal representation

Under **section 124** of the Act lawyers must seek leave to appear. To date no application for leave has been
refused however there may well be occasions where leave will be refused. If for example an active party to
the proceedings objects then the legal representative may need to persuade the Tribunal that it is appropriate
for a lawyer to appear in the circumstances. Factors that will be taken into account include:

_ The complexity of the legal and factual issues involved.
_ The lawyers ability to help the Tribunal and the party.
_ The ability of the party to represent itself, (normally if a lawyer was seeking to act for an adult
with impaired capacity then leave would be granted.)

Many lawyers have appeared before the Tribunal and not only have they adapted easily to the non
adversarial nature of the Tribunal but they have generally been of great assistance to the Tribunal in
clarifying the essential issues and assisting the parties to confine themselves to these relevant issues.

2. Tribunal proceedings

Section 109 provides that generally a hearing of the Tribunal must be in public however there are instances
where a proceeding may take place in private and there may be specific directions prohibiting or restricting
publication.

Section 99 provides for the making of Tribunal Rules about the practices and procedures in the Tribunal or
Tribunal Registry but to date no rules have been made although some rules are currently being drawn in
relation to applications for warrants to enter and remove.

Section 100 provides for Presidential Directions of which there were 2 directions made in 2000 which
related to procedures in relation to the recognition of interstate orders and unauthorised real estate
transactions. (Copies of these Directions are attached to this paper). Directions are also currently being
drawn up relating to requirements that an outline of argument in advance is required if legal submissions are
to be made at the hearing. This is aimed at ensuring that parties have some warning that legal arguments are
to be raised so that they can consider whether to obtain legal advice.

Section 104 provides that if the procedure is not provided for by the Act, Tribunal Rules or Presidential
Directions then the procedure in a hearing is within the presiding member's discretion.
A hearing is a meeting of 'active parties' before the Tribunal. Hearings usually consist of a panel of 3
Tribunal members. This can vary if the President considers it appropriate. Hearings are held regularly
throughout the state in principle locations. The Tribunal also utilises communication methods such as
teleconferencing, videoconferencing and facsimiles to communicate with parties and to hold hearings.
Under **section 118** of the Act the Tribunal, at least 14 days before the hearing must give notice to the adult,
the applicant, members of the adult's family, all current guardians, administrators and attorneys for the adult
as well as The Adult Guardian, The Public Trustee and others the Tribunal considers should be notified.
However under **section 118 (4)** the Tribunal may by a direction under **section 110** reduce the time and
dispense with the requirements to give notice (except in relation to the adult) **section 118 (5)**.
The adult and the applicant are automatically considered to be active parties **(section 119)**. Anyone else
notified by the Tribunal of a hearing can give notice to the Tribunal that they wish to be an active party. The
notice must be given at least 3 business days prior to the hearing **(section 120)**.
At a hearing, an active party may appear in person **(section 123)**, seek leave of the Tribunal to be
represented **(section 124)**, inspect a document to which the Tribunal proposes to have regard in reaching a
decision **(section 108)** and receive decisions and written reasons where issued **(section 158)**.
The length of a hearing is dependent upon the complexity of the application and if additional information is
needed or the Tribunal needs more time to consider the matter, they may adjourn the hearing to a later date.
Generally most matters are listed for an hour.

3. Procedural fairness

The leading case in relation to procedures before Tribunals is *The Mental Health Review Tribunal ex parte*
Brian Gillespie (Supreme Court 1985) which referred to the remarks of *Russell LJ in Herring-v- Templeman*
(1973) 3 All ER 569 at 587.
Its members are not judges in a law court, nor are they legal arbitors. They are entitled to such flexibility in their procedure as they think the particular case under consideration requires.

Just as the *Gillespie* decision also outlined that it would be inconsistent with the scheme of the Act to hold
that the prosecutor must fail because he had used the wrong form then GAAT would similarly adopt a
flexible approach in relation to applications and the use of the appropriate forms. In particular there are
provisions such as **section 12** which provide that the Tribunal may make an order appointing a guardian or

administrator on its own initiative and **section 29** which provides that the Tribunal may review an
appointment of a guardian or administrator at any time on its own initiative or application of an interested
person.
Williams J in the *Gillespie Case* outlined the requirements of natural justice in relation to Tribunals as
follows:
The principle provides in essence that the citizen affected must be given a fair hearing. But what constitutes a fair hearing varies from Tribunal to Tribunal, is dependant on the type of order which may be made, and is frequently affected by the nature of the evidence or material on which the Tribunal's decision will be based.
In *Heatley –v-Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 516, also referred to by
Ryan J in *Gillespie*, Aickin J stated;
that while it was for the Commission itself to devise its own procedures in the light of the obligation to act fairly it should not act on information the general nature of which was not revealed to the person affected.
Section 108 provides that the Tribunal must observe the rules of procedural fairness and **section 108(2)**
expressly provides that each active party must be given a reasonable opportunity to present an active parties
case and in particular to inspect a document to which the Tribunal proposes to have regard in reaching a
decision and to make submissions about the document.
This right to inspect may however be displaced by a confidentiality order. You will also note that there is no
right to be given a copy of the documents on the Tribunal file but only a right to inspect, the only exception
to this is where the Tribunal is to rely on a report from a Tribunal staff member. In that regard a right to a
copy exists.
This approach is based on the fact that the adults right to confidentiality of information is expressly provided
for in the Act in **section 112** and **section 11 of schedule 1.**
Confidentiality issues often arise in relation to medical information and financial information. In particular
medical practitioners often seek that the medical information be kept confidential particularly in relation to
mental illness and even dementia where they are trying to maintain an ongoing relationship.
There are also occasions where a particular family member wishes to be appointed as an administrator for a
family member who has received a large damages award of several million dollars and there is a tension
between procedural fairness to the applicant and confidentiality owed to the adult. This is particularly so
where the Act requires that a potential administrator must put in a financial management plan. To do this
they would need to have access to information in relation to the adult's finances.
If there have been no Rules or Presidential Directions in relation to the issue generally then it is up to the
Presiding Member to decide what information is to be made available and in what form. In many instances
the way in which it is handled is for relevant sections to be extracted that relate to the issue of capacity and

only the relevant financial information.
Section 131 however provides that if the Tribunal considers that urgent or special circumstances justify it,
they may proceed to decide the matter on the information before it without receiving further information.

Section 135 provides that the Tribunal may receive evidence on oath, by affirmation statutory declaration or
any other way. Similarly the Tribunal will allow cross-examination if there are good reasons to do so,
particularly if there are issues as to credit. In a number of hearings the Tribunal has made it clear that crossexamination
is allowable.
There are strict confidentiality provisions and **section 112(3**) provides that a person must not publish
information about a proceeding or disclose the identity of a person involved in a proceeding.
Generally there are no orders as to costs (**section 127)** except in exceptional circumstances such as where the
application was frivolous or vexatious.

Capacity

Section 12 provides that the Tribunal may make an order appointing a guardian or administrator for a matter
if the Tribunal is satisfied that the adult has impaired capacity for the matter. Accordingly hearings at the
Tribunal must commence with a thorough discussion of the question of capacity which is defined in
Schedule 4.
An adult is deemed to have impaired capacity if they are unable to go through the normal process of
reaching a decision and putting it into effect. There are 3 parts to the process:
_ understanding the nature and effect of the decision;
_ deciding freely and voluntarily;
_ communicating the decision in some way whether orally, in writing or by means of signs.
If a person is unable to carry out any of these, he/she is said to have impaired decision-making capacity,
whether the impairment is the result of congenital intellectual disability, acquired brain injury, dementia,
mental illness or some other cause.
Decisions, however, can vary in complexity so that a person's capacity for decision-making also depends on
the complexity of a particular decision.
The capacity in question must relate to a particular matter. The Tribunal decision of *Re M* (QGAAT
2000/26*)* discussed the issue of capacity for a health matter and decided that in that particular case the adult
did indeed have capacity to refuse treatment as the Tribunal was satisfied he fully understood the nature and
consequences of the decision which was to refuse ventilation.
It is important to remember that the Act specifically provides in **section 7** and **schedule 1** that an adult is
presumed to have capacity. Many of the applications for a declaration that an adult did not have capacity to
make an enduring document on a certain date have failed because there was not sufficient evidence produced

to rebut the presumption.

Applications

Section 114 provides that there is no filing fee payable to the Tribunal for making an application or filing
any document.

Section 115 provides that applications may be made to the Tribunal for a declaration, order, direction,
recommendation or advice in relation to an adult about something in or related to the GAAT Act or the
Powers of Attorney Act 1998.

Applications must be in writing (**section 116),** be signed by the applicant, contain the information set out in
section 116(2) and any other information relevant to the application that is prescribed under a regulation.

The *Guardianship and Administration Regulation 2000* does set out further information, which is required
for specific applications. The application must also include the proposed appointee's agreement in writing
to the appointment. (**section 117)**.

Several standard application forms as well as health professional reports and financial management plans
have already been approved and are available from the Tribunal and will soon be available electronically.

The proposed appointee must also advise about their appropriateness and competence **(section 16)** and a
statutory declaration to this effect is contained on the last page of the application.

All applications must be accompanied by a health professional's report, which addresses the issue of the
adult's capacity for making decisions in relation to personal and financial matters.

In addition, the Regulations provide that certain applications must contain specific information.

Applications for the appointment of a guardian or an administrator must contain the information set out in
regulation 3 including a copy of any existing enduring documents, a proposed financial management plan as
well as evidence addressing the need for the appointment. Applications for a declaration about capacity
must contain the information set out in **regulation 4. Regulation 5** sets out the information needed for an
application to register a registrable order and **regulation 6** sets out the information, which must accompany
an application for consent to special health care.

1. Application for the appointment of a guardian

A guardian is a person who is appointed under the *Guardianship and Administration Act 2000* to make
personal decisions for an adult with impaired decision-making capacity. In accordance with **section 14** a
guardian must be at least 18 years of age, not a paid carer and not a health provider.

Generally a guardian is able to make decisions about **personal matters** as defined in **schedule 2** of the act
such as:

_ where the adult lives and with whom the adult lives;
_ whether the adult works and if so, the kind and place of work and the employer;

_ what education or training the adult undertakes;
_ whether the adult applies for a licence or permit;
_ day to day issues, including for example , diet and dress;
_ the health care of the adult;
_ a legal matter not relating to the adult's financial or property matters;
However a guardian **cannot** make decisions about:
_ financial or property matters, unless the Tribunal has also appointed them as an administrator also;
_ special health care such as removal of tissue for donation, sterilisation, termination of pregnancy,
participation in special medical research or experimental health care.
_ special personal matters, such as, making or revoking a will or enduring power of attorney, giving
consent to marry and relinquishing a child for adoption.
A family member or friend can be a guardian. If there is no one wanting to be appointed as guardian, or
there is a dispute about whom should be guardian or concern about the appropriateness of a proposed
guardian, the Tribunal can appoint the Adult Guardian.

The **duties of a guardian** are to:
_ respect the rights, capacity, dignity and worth of the adult;
_ act diligently to protect the adult's interests;
_ recognise the adult's right to be a valued member of the community;
_ encourage and support the adult to live in the community and participate as much as possible in
community life;
_ encourage and support the adult to be as self-reliant as possible and to seek and take into account,
as far as possible the wishes of the adult;
_ restrict as little as possible the adult's freedom of decision making and freedom of action;
_ recognise the importance of existing support relationships, as well as cultural and religious beliefs.
_ make decisions only in the matters specified in the order.
_ take into account the adult's previous decision making.
The tribunal may appoint one or more of the following in accordance with **section 14 (3)**:
_ a single appointee for a matter or all matters;
_ different appointees for different matters;
_ a person to act as appointee for a matter or all matters in a stated circumstance;
_ alternative appointees for a matter or all matters so power is given to a particular appointee only in
a stated circumstance;
_ successive appointees for a matter or all matters so power is given to a particular appointee only
when power given to a previous appointee ends;
_ joint or several, or joint and several, appointees for a matter or all matters;
_ 2 or more appointees for a matter or all matters, being a number less than the total number of
appointees for the matter or all matters;
The Tribunal may appoint a guardian for whatever period of time it considers appropriate up to 5 years. The
appointment will be reviewed just before the end of the period, or earlier if the Tribunal considers it
necessary, or if someone has applied for a review.

In deciding who should be the guardian, the Tribunal must give consideration to the appropriateness considerations outlined in **section 15** of the Act. These include that the potential for conflict of interests between the adult and the person is minimised and that there is compatibility between the adult with impaired capacity and the person, including, for example, communication and cultural compatibility. The proposed guardian must also be available and accessible to the adult. The Tribunal must also ensure, if appointing more than one guardian, that there is also compatibility between guardians.

2. Application for the appointment of an administrator

An administrator is a person who is appointed to make financial decisions on behalf of an adult with impaired capacity. An administrator must be at least 18 years of age , not a paid carer and not a health provider.

The extent of administrator's decision-making authority is outlined in the order made by the Tribunal.

Generally an administrator is able to make decisions about financial or legal matters that the adult would make if they had capacity. Financial matters are defined in the act in **schedule 2** and include:

_ paying maintenance and accommodation expenses;

_ paying the adult's debts;
_ receiving and recovering money;
_ carrying on a trade or business;
_ performing contracts entered into by the adult;
_ discharging a mortgage;
_ paying rates, taxes, insurance etc;
_ insuring the adult's property;
_ preserving or improving the adult's property;
_ investing for the adult;
_ continuing investments of the adult;
_ undertaking an authorised real estate transaction;
_ undertaking an authorised security transaction;
_ with approval, undertaking an unauthorised security transaction;
_ a legal matter relating to financial or property matters.

An administrator however cannot make decisions about personal and lifestyle matters, unless also appointed as a guardian, conduct financial matters that require the approval of the Tribunal. eg, sell or purchase real estate other than to provide a home for the adult or a dependent of the adult or make certain investments.

A family member of friend, an appropriate professional, the Public Trustee of Queensland and a private trustee company can all be appointed as an administrator.

Once appointed administrators must carry out certain duties. They must:

_ apply the general principles **(section 34);**
_ make decisions only in the matters specified in the order of the Tribunal (**section 36**);
_ keep accurate records of financial actions and transactions (**section 49**);
_ provide records for examination and auditing when requested by the Tribunal;
_ keep the finances and property of the adult separate from their own (unless property is owned

jointly **section 50**);
_ avoid any actions, which would involve a conflict of interest (**section 37**);
_ inform the Tribunal of anything that would affect their suitability to be an administrator;
_ act honestly and with reasonable diligence (**section 35**).
The Tribunal may appoint an administrator for whatever period of time it considers appropriate for a period
of up to 5 years. The appointment will be reviewed when the period expires, or earlier if the Tribunal
considers it necessary, or if someone has applied for a review.
Notwithstanding decision making incapacity, application to be an Administrator should only be made if it
can be demonstrated there is a specific need for such an appointment. The Tribunal requires the proposed
administrator to give written evidence of their willingness to be appointed, provide advice about the
appropriateness considerations, and provide a management plan outlining how the adult's financial matters
will be administered.

Application for consent to special health care

The Tribunal may consent to special health care other than electroconvulsive therapy and psychosurgery for
an adult (**section 68**). A special health matter is a matter relating to special health care of the following
types: donation of tissue (**section 69**), sterilisation (**section 70**), termination of pregnancy (**section 71**),
special medical research or experimental health care (**section 72**) and withdrawal or withholding of lifesustaining
treatment.
The Guardianship and Administration Tribunal may consent to special health care. It is the only authority,
apart from the Supreme Court, able to consent to special health care for an adult with impaired capacity
where the adult does not have an advance health directive for the matter. A guardian appointed by the
Tribunal for personal matters such as decisions about an adult's lifestyle and/or health care does not have the
authority to consent to special health care. In addition, a relative or friend who acts as the statutory health
attorney does not have the authority to consent to special health care.
The Act empowers the Tribunal to consent to the removal of tissue (**section 69**) from an adult with impaired
capacity for donation to another person, only if the Tribunal is satisfied of the following matters:
_ the risk to the adult is small;
_ the risk of the failure of the donated tissue is low;
_ the life of the proposed recipient is in danger without the donation;
_ there is no other compatible donor easily available;
_ there is a close personal relationship between the adult and the person.
Furthermore, the Tribunal cannot consent if the adult objects to the health care. Where the Tribunal does
consent to the removal of tissue for donation, the Order must specify the proposed recipient.
A prerequisite for consent for sterilisation (**section 70**) is that one of the following scenarios applies.

_ the sterilisation is medically necessary.
_ the adult is, or is likely to be sexually active and there is no method of contraception that could
reasonably be expected to be successfully applied.
_ the adult is female and she has problems with menstruation and cessation of menstruation, and
sterilisation is the only practicable way of overcoming the problems.
The Tribunal is required to take into account alternative forms of health care. This includes other
sterilisation procedures available or likely to become available in the foreseeable future. The Tribunal is
also required to consider the nature and extent of short term, or long-term significant risks associated with
the proposed procedure and available alternative forms of health care including other sterilisation
procedures.
The Tribunal may consent for an adult with impaired capacity for the special health matter, to the
termination of the adult's pregnancy (**section 71**) if the Tribunal is satisfied that the termination is necessary
to preserve the adult from serious danger to her life or physical or mental health.
The Tribunal may consent (**section 72**) to participation by an adult with impaired capacity in special medical
research or experimental health care as defined in **section 12 of schedule 2.** This must relate to a condition
that the adult has or to which the adult has a significant risk of being exposed, *or* to gain knowledge that can
be used in the diagnosis and treatment of the condition of the adult. The Tribunal must also be satisfied
about the following matters:
_ the special medical research or experimental health care is approved by an ethics committee;
_ the risk and inconvenience to the adult and the adult's quality of life is small;

_ the special medical research or experimental health care may result in significant benefit to the
adult or other persons with the condition;
_ the special medical research or special health care can not reasonably be carried out without a
person who has or has had the condition taking part;
_ the special medical research or experimental health care will not unduly interfere with the adult's
privacy;
The Tribunal however may not consent to an adult's participation in the special medical research or
experimental health care if the adult objects or indicated unwillingness in an enduring document.
Clinical Research trials (**section 13 of schedule 2**) may also be approved by the Tribunal if the requirements
set out in schedule 2 are satisfied. Once approved the clinical research becomes "approved clinical research"
and approved clinical research is no longer special health care but health care which a statutory health
attorney may give consent to under the *Power of Attorney Act 1998* **section 63(1)**.

The Tribunal may also consent to withholding or withdrawal of special life sustaining measures. Special life-sustaining measures are defined in section **16(1) schedule 2** as health care intended to sustain or prolong life and which supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation, including cardiopulmonary resuscitation, assisted ventilation and artificial nutrition and hydration. Special life-sustaining measures do not include a blood transfusion.

In making decisions about special health care the Tribunal will take into account the general principles and health care principle set out in **schedule 1**. The Tribunal will also consider the wishes of the adult and the adult's right to refuse the health care. The views and wishes of any guardians appointed by the Tribunal are noted, as are the views of any person appointed as an attorney by the adult. The views of any statutory health attorney for the adult – if there is no guardian or attorney are also observed. The nature of the condition and the nature and degree of any risks are recognised. Any alternative procedures that may be available in the short or long term are also considered, as are the reasons why a particular procedure is being proposed.

Principles underpinning the legislation

Section 11 provides that a person or other entity who performs a function or exercises a power under this Act for a matter in relation to an adult with impaired capacity for a matter must apply the principles stated in **schedule 1** which are **The General Principles** and **The Health Care Principle**.

Any one who makes an application to the Tribunal for an appointment should in fact address these issues in their submission and an advocate should place particular emphasis on this aspect of the application particularly if there is a choice between prospective appointments.

Section 1 of schedule 1 provides that a person is presumed to have capacity to make his or her own decisions unless incapacity is proven for a particular decision. Regardless of decision-making capacity, all persons have the same basic rights, including the protection of individual liberty and the right to access services. The importance of empowering a person to exercise their human rights is also recognised.

Section 2 of schedule 1 states that all people are valued as individuals and respected for their human worth and dignity. An adult's right to be a valued member of society is recognised as is the importance of encouraging and supporting the person to perform valued social roles, such as home owner; banker; investor; shopper; worker; volunteer (**section 4).** The importance of encouraging and supporting an adult to live a life

in the community and to take part in activities enjoyed by the general community is recognised in **section 5**.

Section 6 establishes the importance of encouraging and supporting an adult to achieve their maximum physical, social, emotional and intellectual potential and to become as autonomous and self-reliant as practicable.

A person or body performing a function or exercising a power under the legislation must also do so in a way, which is the least restrictive of the adult's rights. (**section 7(3))**.

The right of adults to participate, to the greatest extent practicable in decision-making is stated in the Act in **section 7(1) of schedule 1** as is the importance of preserving their right to make their own decisions.

Application of this principle necessitates giving the adult any necessary support and access to information.

The principle of substituted judgement is also recognised in the Act **(section 7(4) schedule 1)** necessitates seeking and taking into account the person's views and wishes ascertained through the adults previous actions, or expressed orally, in writing, or any other way.

The importance of maintaining a person's existing supportive relationships is set out in **section 8** and the importance of maintaining the person's cultural and linguistic environment, including any religious beliefs and lifestyle choices is recognised in **section 9**. Assistance given to a person to make a decision should be appropriate to the person's characteristics and current needs **(section 10)**. **Section 11 of schedule 1** also recognises an adult's right to confidentiality of information.

The Health Care Principle states that when making a decision about a health care matter, a guardian, the Adult Guardian or the Tribunal in special health care matters must exercise their decision-making authority in a way which is the least restrictive of the adult's rights. Also, the decision must be appropriate to promote and maintain the person's well being.

In deciding what is appropriate, the decision-maker must, to the greatest extent practicable, seek and take into account the person's views and wishes, and take into account the information given by the person's health provider. The health care principle does not affect any right an adult has to refuse health care.

The Tribunal or other entity must also, to the greatest extent practicable, seek the views of the following and take them into account: a guardian appointed by the Tribunal for the adult; if there is no guardian, an attorney for a health matter appointed by the adult; and if there is no guardian or attorney, the statutory health attorney for the adult.

Is there a need for an appointment?

Even though an application may be made for the appointment of a guardian or an administrator, an

appointment may not in fact made by the Tribunal unless they are satisfied that in accordance with **section 12(1)(b)** there is a need for a decision to be made and that without the appointment, the needs and interests of the adult will not be adequately met and protected. **(section 12(1)(c)**.

In many instances an application is made for the appointment of a guardian and an administrator and whilst there is often a need for an administrator to be appointed there is frequently no need established to support the appointment of a guardian. If accommodation issues have been decided and the only decisions that need to be made are health care decisions then a statutory health attorney can make these decisions in accordance with the provisions of section 63 of the *Powers of Attorney Act 1998* without the need for a formal appointment. In most hearings a significant amount of time is spent advising close family and friends of their rights as a Statutory Health Attorney and reassuring them of their right to be consulted in relation to health decisions.

Transitional provisions

Chapter 12 of the *Guardianship and Administration Act 2000* deals with the transitional provisions.

Decisions of the Intellectually Disabled Citizens Council under the *Intellectually Disabled Citizens Act 1985*.

If the Public Trustee managed a person's estate under **section 32** of the *Intellectually Disabled Citizens Act 1985*, then, on commencement of the *Guardianship and Administration Act 2000,* the Public Trustee is taken to be appointed by the Tribunal as the person's administrator for all financial matters. The Tribunal must review such appointment within 5 years of the date of commencement of the Act, then on a periodic review basis.

If a person wants consideration by the Tribunal to have the appointment of the Public Trustee reviewed or someone other than the Public Trustee appointed as administrator, they must make an application for review.

If an urgent referral was made by the Legal Friend to the Public Trustee immediately prior to the commencement of the *Guardianship and Administration Act 2000* the Tribunal must review the appointment of the Public Trustee as administrator as soon as practicable.

Where a decision of the IDCCQ included provision for the Legal Friend to provide assistance to an adult for matters other than consent for health care, the role of the Legal Friend will be taken up by the Adult Guardian. The Adult Guardian's authority ends if the Adult Guardian receives a written request from the adult's administrator requesting that the Adult Guardian no longer act under the authority.

Amendments to the *Public Trustee Act 1978*

Section 65(1) of the *Public Trustee Act* was amended by the *Guardianship and Administration Act* by the substitution of the words "person who is under 18 years" for the word "person" where it first appeared in **section 65(1).** A protection order made pursuant to Division 2 of Part 6 of the *Public Trustee Act* is now no longer available to a person 18 years or older. (*Welland –v- Payne)*

If the Public Trustee had been appointed under a Protection Order under **section 67** of the *Public Trustee Act 1978,* on commencement of the *Guardianship and Administration Act 2000,* **section 146** of the *Public Trustee Act 1978* provides that the Public Trustee is taken to be appointed under the *Guardianship and Administration Act* as the person's administrator for all financial matters. The appointment must be reviewed by the Tribunal in its first 5 years of operation and then on a periodic basis. If a person wants priority consideration by the Tribunal to have the appointment of the Public Trustee reviewed, or someone other than the Public Trustee appointed as an administrator, they must make an application for review.

When appointed under Certificate of Disability, **section 147** provides that a person is taken to have made an enduring power of attorney appointing the Public Trustee as attorney for all financial matters.

Amendments to the *Mental Health Act 1974*

When the Public Trustee has been appointed under the *Mental Health Act 1974,* on commencement of the *Guardianship and Administration Act 2000,* the Public Trustee is taken to be appointed under the Act as the adult's administrator for all financial matters. Such appointments must be reviewed by the Tribunal in its first 5 years of operation and then on a periodic basis. If a person wants priority consideration by the Tribunal to have the appointment of the Public Trustee reviewed, or someone other than the Public Trustee appointed as an administrator, they must make an application for review.

Committee arrangements involve the appointment of a Committee of the person or estate of the person under the *Mental Health Act 1974* other than the Public Trustee continue for 1 year after commencement of the *Guardianship and Administration Act 2000.* During or after this period, an application can be made to the Tribunal for appointment of a guardian and/or administrator.

Decisions of the Tribunal

Section 156 provides that the Tribunal must give its decision on a matter within a reasonable time after the matter is heard. To date most decisions have been given on the date of the hearing or within a few days unless a matter has been adjourned to obtain more evidence. Even in the applications for special health consents a decision of the Tribunal has been available on the day of the hearing or within 24 hours.

Section 157(3) provides that when an active party is given notice of a decision they must also be given
notice that to obtain the Tribunal's written reasons for the decision, the person must make a written request
to the Tribunal within 28 days of the notice.
Section 157(2) also states that the Tribunal must give written reasons for a decision if a person aggrieved by
the decision gives the Tribunal a written request within the 28 day period. The Tribunal then has 28 days to
provide the reasons.

Appeal provisions

Section 164 provides that an eligible person may appeal against a Tribunal decision to the Supreme Court.
An eligible person is a person whose capacity for a matter was under consideration, the applicant, a person
proposed for an appointment, a person whose power as a guardian, administrator, or attorney was changed or
removed by a Tribunal decision, the Adult Guardian, the Public Trustee or the Attorney General.
The Court's leave is required for an appeal except for an appeal on a question of law only.
The uniform Civil Procedure Rules govern the appeal and it is important to note that the appeal must be
lodged within 28 days of the decision **not** 28 days after receiving the reasons for decision. An appeal will
therefore need to be lodged before reasons are obtained.

Conclusion

Advocates in the Guardianship and Administration Tribunal need to be aware of the particular Principles
underpinning the legislation as well as the individual needs of the adult for whom the orders are sought.
Because the Tribunal is an inquisitorial Tribunal advocates will also need to adapt to the non adversarial
nature of the proceedings.