



The Queensland Law Handbook is a comprehensive plain-English legal resource designed to help you deal with your legal problems.

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## Disability and the Law

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## Introduction

It is important to understand that some laws, policies and practices disproportionately impact people with disability and can act to exclude people with disability. Recognising the rights of people with disability has involved a shift away from a paternalistic approach, where decisions that are deemed to be in the person's 'best interest' are made for them, to a human rights perspective that embraces the notion of people with disability as rights bearers.

## Human Rights of People with Disability

People with disability have the same rights as everyone else including the right to enforce their rights through legal and other remedies. Some of these rights are protected under international human rights law while others are also protected in state and Commonwealth legislation.

### Protection of human rights in Queensland

Not all the rights mentioned in international human rights law are enforceable. However, the right to be free from discrimination, because of a person's disability, is protected by both state and Commonwealth legislation.

The relevant legislation in Queensland are the *Anti-Discrimination Act 1991* (Qld) (Anti-Discrimination Act) and the *Human Rights Act 2019* (Qld) (Human Rights Act). The relevant Commonwealth legislation is the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act).

The Disability Discrimination Act prohibits discrimination because of a person's disability in employment and in a variety of other circumstances, including education. For the purposes of the Disability Discrimination Act, s 4(1) defines 'disability' to include the '... total or partial loss of the person's bodily or mental functions'. This may include intellectual disability. Disability discrimination occurs where a person or entity (the discriminator) treats, or proposes to treat, a person with disability less favourably than a person without disability, because of the person's disability. Similar protections are contained within the Anti-Discrimination Act. Protections from disability discrimination are discussed further below.

The Human Rights Act protects 23 human rights, including the right to recognition and equality before the law. The Human Rights Act protects the rights of all people in Queensland, including people with disability. The Human Rights Act requires all Queensland public entities, such as Queensland government departments, as well as registered National Disability Insurance Scheme service providers, to act and make decisions in a way that is compatible with those 23 protected human rights. The Act also requires public entities to give proper consideration to relevant protected rights when making decisions.

### International human rights law

Australia is a party to seven core human rights treaties. People with disability are entitled to all the rights set out in each of these treaties. However, the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) provides a statement of rights that are specific to people with disability, reflecting the social model of disability. The social model of disability recognises that

disability does not reside in the individual as the result of some impairment, but is the result of societal and environmental barriers.

Generally, before international conventions can apply in Australia, they need to be incorporated into our legislation. While Australia ratified the CRPD on 17 July 2008, it is not legally enforceable in Australia. However, it can be referred to as a way to try to ensure that people with disability have access to the same rights and opportunities as everybody else.

The CRPD contains eight guiding principles. These are:

- respect for inherent dignity and individual autonomy including the freedom to make one's own choices
- non-discrimination (this principle requires that all people be treated equally and not be discriminated against based on characteristics such as disability, race, gender, religion)
- full and effective participation and inclusion in society
- respect for difference and acceptance of persons with disability as part of human diversity and humanity
- equality of opportunity
- accessibility
- equality between men and women
- respect for evolving capacities of children with disability, and respect for the right of children with disability to preserve their identities.

## **International human rights complaints mechanism and the Optional Protocol to the CRPD**

Australians can make complaints to the United Nations Committee on the Rights of Persons with Disabilities (the Committee) about potential violations of their rights under the CRPD. In order for a complaint to be admissible to the Committee, the complainant, or their representative, must show that they have exhausted all legal options in Australia and that they have been personally impacted by the violation.

## **Direct and Indirect Discrimination Against People with Disability**

Discrimination can be either direct or indirect. Direct discrimination occurs when a person with disability is treated less favourably than a person without disability would be treated in the same, or similar, circumstances. Indirect discrimination occurs, according to s 11 of the Anti-Discrimination Act and s 6 of the Disability Discrimination Act, when a person is required to comply with a term, requirement or a condition that they cannot comply with because of their disability and a higher portion of people without disability can comply with the term, requirement or condition. These anti-discrimination laws contain some exemptions that make what would otherwise be a discriminatory practice, acceptable in certain circumstances. For example, it may be lawful to discriminate if a

person with disability requires special services or facilities (e.g. a person's transport from one point to another), and it would cause an organisation unjustifiable hardship to provide these. In considering unjustifiable hardship, all the relevant circumstances of the case are taken into account including:

- the nature of the special services or facilities
- the cost of supplying the special services or facilities
- the number of people who would benefit or be disadvantaged
- the financial circumstances of the person (or organisation) who is being requested to provide the special services or facilities
- the nature of any benefit or detriment to all people concerned.

## **Making a complaint**

People who believe they have been discriminated against can make a complaint to the Queensland Human Rights Commission (QHRC) or the Australian Human Rights Commission (AHRC). Complaints for breaches of the Human Rights Act can also be made to the QHRC.

### **Process of making a complaint**

The Disability Discrimination Act confers on the AHRC the function to review complaints through a process of conciliation.

The QHRC administers the Anti-Discrimination Act and the Human Rights Act.

Complaints must be in writing. If the relevant legislation applies, the complaint will be investigated and attempts will be made to conciliate the complaint.

### *Complaints made pursuant to the Queensland Human Rights Commission*

If the parties reach agreement, this is put into writing and filed with the Queensland Civil and Administrative Tribunal (QCAT). If agreement is not reached through conciliation, the person has the option of pursuing the matter in QCAT. Human Rights Act complaints alone cannot be referred to QCAT if they are unresolved through the QHRC.

### *Complaints made pursuant to the Disability Discrimination Act to the AHRC*

If the parties do not secure an agreement, the complainant may proceed to the Federal Court of Australia or the Federal Circuit and Family Court of Australia.

For a full discussion on both the law and procedure for making discrimination and human rights complaints, see the chapters on Discrimination and Human Rights and Human Rights Law in Queensland.

## **Protecting Human Rights of People with Disability using Non-legal and Quasi-legal Mechanisms**

In seeking to protect the legal rights of a person with disability, it is important to consider the range of options available and decide which is most likely to give the desired result. Non- or quasi-legal remedies can be just as effective as legal remedies.

## Advocacy

In seeking to have rights recognised and protected, it can be important for a person with disability to have an advocate to act on their behalf. An advocate is someone whose role it is to speak, act or write on behalf of the particular person in order to promote, protect and defend the rights of that person. The advocate needs to have a clear loyalty and accountability to the person with disability.

Advocacy can be either formal or informal. A number of different types of advocacy exist within Queensland:

- individual advocacy—an individual is championing the rights of someone who is being treated unfairly
- self-advocacy—people who have a disability advocate for themselves as individuals or in groups
- family/parent advocacy—families or parents may adopt an advocacy stance on behalf of their family members or collectively for other people with disability
- legal advocacy—specialist advocacy, where solicitors and barristers advocate on behalf of people with disability
- systems advocacy—advocacy groups focus on systemic change and broad political, legal and societal changes. Systems advocacy is often a component of family and legal advocacy
- Public Advocate—an independent statutory officer is charged with protecting and promoting the rights of Queensland adults with impaired decision-making capacity through systems advocacy.

## Mediation

Some rights issues or complaints may be able to be resolved through mediation if both parties are willing to discuss the matter and work toward a solution. However, sometimes the power imbalance between parties may mean that mediation is unsuitable. This power imbalance can be offset if the person with disability has an advocate and/or support person present.

## Negotiation

Negotiation may help to prevent the need for formal, costly and often lengthy court or tribunal proceedings. However, people with disability may feel powerless and intimidated when trying to negotiate. A person with disability should ask family, friends, advocates and, if possible, a lawyer to assist and support them. While not a legal right, it is good practice and in line with procedural fairness principles to allow a person with disability to bring a support person along to meetings. If this is refused, written reasons for the refusal should be requested.

## Complaints to ministers

Complaints about government bodies or other more general problems (e.g. lack of accessible transport) can be made to the local member of parliament. A complaint can also be made to the state and Commonwealth government ministers responsible for the area in which the problem has arisen.

## Ombudsman

The Queensland Ombudsman can investigate the administrative decisions and actions of state government departments, prescribed and statutory authorities, public universities and local councils. Before making a complaint to the Ombudsman, the person with a complaint must first try to resolve the matter with the entity concerned, exhausting their internal complaints mechanism.

The Commonwealth Ombudsman can investigate complaints about administrative actions and decisions of Australian Government agencies to evaluate if they are wrong, unjust, unlawful, discriminatory or unfair. The Ombudsman also seeks solutions for those affected by administrative deficiency, and acts to improve public administration generally. While the Ombudsman can make recommendations, they cannot make binding decisions. For more information, see the chapter on Complaints to the Ombudsman.

## Legal Advice

Often, legal advice will be useful prior to making a complaint to either the AHRC or the QHRC. Legal representation is also useful during the conciliation process and when participating in proceedings before QCAT, the Federal Court or the Federal Circuit and Family Court of Australia. For further information, see the chapter on Discrimination and Human Rights.

## Restriction of People with Intellectual or Cognitive Impairment to Prevent Harm

Some adults with intellectual or cognitive impairment may have behaviours that place themselves or others at risk of harm. To manage these risks in a way that ensures people are safe, restrictions are sometimes necessary. These are known as restrictive practices.

Queensland's restrictive practices scheme is established under pt 6 of the *Disability Services Act 2006* (Qld) (Disability Services Act) and ch 5B of the *Guardianship and Administration Act 2000* (Qld) (Guardianship and Administration Act). This regime seeks to ensure that restrictive practices used by service providers take account of the adult's human rights and are the least restrictive ways of safeguarding them and others. The legislation applies only to adults 18 years or over, who have an intellectual or cognitive disability and are at risk of harming themselves or others and who receive services from government-provided and/or government-funded disability service providers.

It does not apply to families, or private or non-funded organisations.

The introduction of the National Disability Insurance Scheme (NDIS) saw the Commonwealth Government play a major role in providing funding for people with disability. The National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) is the instrument for the implementation and oversight of restrictive practices used with adults who are participants on the scheme.

The Rules are intended to support participants to be informed purchasers and consumers of NDIS supports and services. The main function of the NDIS Quality and Safeguards Commission (NDIS Commission) is to work with participants and providers to improve the quality and safety of NDIS services and to assist people with disability to live free from abuse, neglect, violence and exploitation.

The Rules provide compatible requirements with state legislation and require the lodgement of behaviour support plans with the NDIS Commission.

## What is a restrictive practice?

### Containment

Containment means to physically prevent an adult with an intellectual or cognitive disability from freely leaving the place where they receive disability services, other than by seclusion, in response to the adult's behaviours that may cause harm to themselves or others. However, the adult is not contained if the adult has a skills deficit and cannot safely leave without supervision, and their leaving is prevented by the locking of gates, doors or windows.

### Seclusion

Seclusion means to physically confine an adult with intellectual or cognitive disability alone, at any time of the day or night, in a room or area, from where they are prevented from freely leaving in response to the adult's behaviours that may cause harm to themselves or others.

### Chemical restraint

Chemical restraint means using medication for the primary purpose of controlling the behaviour of an adult with an intellectual or cognitive disability. Using medication to treat a diagnosed mental illness or medical condition is not chemical restraint.

### Physical restraint

Physical restraint means using any part of another person's body to restrict the movement of an adult with an intellectual or cognitive disability for the primary purpose of controlling their behaviour that may cause harm to themselves or others.

### Mechanical restraint

Mechanical restraint means using a device to restrict movement of an adult with an intellectual or cognitive disability or preventing or reducing the adult injuring themselves, for the primary purpose of controlling the adult's behaviour.

### Restricting access to objects

Restricting access to objects means restricting the access by an adult with an intellectual or cognitive disability to an object to prevent the adult using the object to cause themselves or others harm.

## Approvals

Before gaining general approval to use restrictive practices, disability service providers must complete an assessment of the adult with an intellectual or cognitive disability and develop a 'positive behaviour support plan', which is designed to encourage positive behaviour. Family members, guardians, advocates and healthcare professionals should be consulted as part of this process.

Section 150 of the Disability Services Act provides that positive behaviour support plans must specify for each restrictive practice:

- the circumstances when the restrictive practice is to be used

- how it is the least restrictive arrangement
- the procedure for using the restrictive practice, such as any observation and monitoring required during the restrictive practice's use
- the measures to ensure the adult is receiving proper care and treatment and is protected
- the positive and negative effects of using the restrictive practice
- how often the use of restrictive practice will be reviewed.

For each particular restrictive practice, there may be further requirements that the positive behaviour support plan must include.

### General approvals

Generally, the use of restrictive practices must be approved by QCAT, which can authorise the use of:

- containment
- seclusion
- chemical, physical and mechanical restraint
- restricting access to objects.

The decision maker must be satisfied that the restrictive practice is necessary and that it is the least restrictive way to keep the adult with an intellectual or cognitive disability or others safe. The tribunal's authorisation to the use of restrictive practices can be made up to a maximum of 12 months, after which time the decision is reviewed to determine whether they are still necessary. However, QCAT can review the arrangements at any time. The tribunal's approval will automatically end if the adult with an intellectual or cognitive disability stops receiving disability support services from the particular service provider.

The tribunal may also appoint a guardian to make restrictive-practice decisions for an adult only if it is satisfied:

- the adult has impaired capacity and
- the adult's behaviour has previously caused harm to themselves or others and
- there is a need for restrictive-practice decisions
- without the appointment of a guardian for restrictive practices, the adult's behaviour is likely to cause themselves or others harm and the adult's interests will not be adequately protected.

An order for the appointment of a restrictive-practice guardian cannot be made for more than two years. If there is no restrictive-practice guardian, an informal decision maker can only approve restricting access to objects. For a full discussion on the law on guardianship, see the chapter *Laws Relating to Individual Decision Making*.

### Short-term approvals

Where there is immediate and serious risk of the person harming themselves or others, short-term approvals for the use of restrictive practices can be made for periods of up to six months.



The Public Guardian approves the short-term use of containment and seclusion. Approvals for short-term use of chemical, mechanical or physical restraints and restrictions to access are made by the person's restrictive-practice guardian or, in their absence, the Chief Executive of the Disability Services.

The legislation grants immunity to relevant disability service providers and individuals acting on their behalf in relation to restrictive practices, provided they have complied with the statutory requirements set out in pt 6 of the Disability Services Act.

## Disability and Medical Treatment

If a doctor treats a person without their consent, the doctor commits an assault for which the person is entitled to bring legal action. Treatment carried out without consent in an emergency is not, however, assault (see the case of *Rogers v Whitaker* (1992) 175 CLR 479).

In some institutions, residents routinely receive medication, particularly sedative drugs. If such drugs are given against the will of the resident, especially if force is used to administer them, the administration of the drugs may amount to an assault.

Signed blanket consent to medical treatment does not automatically provide a doctor with the authority to give all forms of medical treatment.

A person with disability can consent to medical treatment if they are:

- capable of understanding the nature and effect of the treatment (as well as the consequences of refusing treatment) and
- able to freely and voluntarily decide whether to have the treatment
- able to communicate their decision about whether to have the treatment.

If a person with disability is not capable of making healthcare decisions, a statutory health attorney, attorney for personal matters or guardian for healthcare may be able to make these decisions for them. A person may also express their healthcare preferences in an advance health directive (see the chapter on Laws Relating to Individual Decision Making).

## Complaints about health services

The Office of the Health Ombudsman (OHO) has the authority to consider and conciliate complaints about any unreasonable aspect of health services provided at any place by any health service provider, including both registered and unregistered health practitioners, in Queensland.

### Health practitioners

Registered health practitioners are registered under the *Health Practitioner Regulation National Law Act 2009* (Qld) (for a list of the boards see [www.ahpra.gov.au/national-boards.aspx](http://www.ahpra.gov.au/national-boards.aspx)). Complaints about registered health practitioners can also be made to the Australian Health Practitioner Regulation Agency (AHPRA).

Unregistered health practitioners are any other individuals providing a health service, which can include:

- nutritionists

- masseuses
- naturopaths
- homeopaths
- dieticians
- acupuncturists
- social workers
- speech pathologists.

### Health service organisations

The OHO can also deal with complaints about any public or private organisation or entity providing a health service. This includes health services aligned with both registered and unregistered practitioners (e.g. a hospital and massage parlour are both health services).

Other examples of health services include:

- public or private hospitals or health services
- ambulance service
- medical, dental, pharmaceutical or physiotherapy practice.

For details about the operation of the OHO and the process of making a complaint, see the chapter on Complaints Against Professionals.

## Disability, Marriage, Family and Adoption

### Marriage

Any person is free to marry provided they are old enough, and they understand the nature and effect of the marriage ceremony at the time of the ceremony. Usually, there is no legal reason why a person with disability may not marry, unless the nature of their disability is such that they cannot understand the nature and effect of the marriage ceremony.

### Parenting

People with disability have the right to become parents. There is no presumption in the law that a person with any disability is an unfit parent.

### Contraception

A person with disability has the right to choose to use contraception and decide which type to use.

### Sterilisation

In the case of a person with disability under the age of 18, a sterilisation that is to be performed for non-therapeutic reasons can only be performed with the consent of the court or QCAT under the *Guardianship and Administration Act 2000* (Qld) (Guardianship and Administration Act). When considering an application for consent for sterilisation, the decision maker must only authorise the

sterilisation if satisfied that it is in the child's best interest. In making this determination, the decision maker must consider, amongst other things, whether the:

- sterilisation is medically necessary
- child's disability impacts their ability to communicate and understand social interaction and learning
- sterilisation cannot be reasonably postponed.

In the case of an adult, sterilisation can only be performed with that person's consent. Any medical treatment performed without consent, except in an emergency, can constitute an assault for which the doctor can be held legally responsible.

If a person with disability is over 18 years of age and is not able to give consent, then sterilisation falls under 'special healthcare matters' for the purposes of the Guardianship and Administration Act. On application, QCAT can give consent for these procedures—an attorney or guardian cannot. The tribunal must decide whether the procedure is necessary for the adult's health and wellbeing.

For further information where a person is not capable of giving consent, see the chapter on Laws Relating to Individual Decision Making.

## Abortion

Since December 2018, abortion is legal in Queensland under the *Termination of Pregnancy Act 2018* (Qld) (Termination of Pregnancy Act).

A health practitioner may refuse to provide the abortion if they disclose a conscientious objection. They must refer the person to another practitioner or health service believed to provide the procedure.

For pregnancies that are more than 22 weeks, extra circumstances are required in order to provide a legal termination.

Part 4 of the Termination of Pregnancy Act provides protection to the pregnant person and all workers. Criminal offences have been created to provide safe access to abortion that is free from harassment, intimidation, and the recording and distribution of images by objectors.

On application, QCAT can provide consent for a termination of a pregnancy to be carried out if the mother does not have capacity to provide consent.

## Adoption

In general, a child cannot be adopted without the consent of the parents.

### People with disability as adoptive parents

People with disability can encounter difficulties when applying to adopt a child in Queensland.

Part 6 of the *Adoption Act 2009* (Qld) (Adoption Act) provides for the assessment of prospective adoptive parents, and pt 6 div 5 (Adoption Act) outlines the basis for deciding suitability generally. Under s 122 of the Act, if the person has a disability or impairment then there are additional criteria that the Chief Executive of the Department of Child Safety, Seniors and Disability Services must consider in deciding if the person is suitable. These additional criteria exclude many people with

disability from being deemed suitable to be a prospective adoptive parent. These additional criteria include:

- the effect of a person's condition on the level of care the person will be able to provide to an adopted child, without help from someone else, and the time for which the person is likely to be able to provide the care
- whether the person needs a carer or is likely to need a carer in the future
- whether the condition is likely to have an adverse impact on an adopted child's wellbeing or best interests.

### Needs of a child with a disability

Section 156 of the Adoption Act provides that the particular needs of a child with a disability must be taken into consideration when selecting prospective adoptive parents.

## Disability, Contracts and Consumer Protection

### Capacity

If a person does not have the required legal capacity to enter a contract, then any contract entered by that person will not be valid.

In deciding whether a person has legal capacity in relation to a particular transaction, particular attention is paid to the level of understanding of the person, the complexity of the transaction and the value of the goods and services involved. The more complex the transaction and the higher the value of the goods and services, the greater the understanding required.

Capacity does not impact contracts for purchase of necessary items, providing a reasonable price has been paid. Necessaries are things a person needs to maintain a reasonable lifestyle such as food, clothing, medical treatment and housing.

If a person who lacks legal capacity makes a gift, the gift may be able to be retrieved if it has not been given, sold or disposed of to someone else who is unaware of the donor's incapacity. It is not necessary that the recipient of the gift ought to have realised that the disabled person did not have legal capacity.

### Improper conduct

Sometimes, a person with disability will enter a contract because (or partly because) of a misleading statement. This is called misrepresentation.

Sometimes a misrepresentation is fraudulent (intentionally false or made without caring whether it is false). In this case, the person with disability can normally avoid the contract and sue for damages to recover any loss suffered.

A court can also overturn transactions entered into following undue influence or unconscionable bargaining. Where a presumption of undue influence arises, it is up to the other party to prove that the person with disability made an informed and independent decision to enter the transaction. This will

be easier to prove if the person with disability received independent advice before completing the transaction.

## Consumer protection legislation

As well as the common law of contract outlined earlier, the *Competition and Consumer Act 2010* (Cth) contains a schedule that is known as the ‘Australian Consumer Law’, which deals with disputes about contracts (see the chapter on Consumers and Contracts).

## Seeking redress

The legal rights outlined earlier are rights that a person has under the common law or legislation. There are different ways of enforcing these rights:

- Advocacy is the simplest way to resolve a complaint (e.g. go directly to the other party). It may be helpful to have someone else present to act as an advocate.
- Complaints of breaches of consumer protection legislation can be made to the Australian Competition and Consumer Commission, the Office of Fair Trading in Queensland or the relevant industry ombudsman (e.g. in banking, telecommunications or insurance). The Office of Fair Trading can also inform consumers about their rights, negotiate on a consumer’s behalf and investigate a consumer’s claims.
- Complaints can be made to QCAT. The maximum amount in dispute cannot be more than \$25 000. For larger amounts of money, applications can be made to the relevant court.

## Disability and the Criminal Justice System

A person with disability may become involved with the criminal justice system as a victim of crime, as a person accused of a crime or as a witness. In all of these cases, the capacity of the person to give evidence may arise as an issue.

## People with disability as witnesses

A person is only able to give evidence in court if they are considered competent to do so.

Every person is presumed to be competent to act as a witness unless it is demonstrated to the judge that they are not.

In general, to be a competent witness, a person must be able to understand the nature of the oath and have sufficient memory and capacity to express their memory. In considering whether or not a person is competent as a witness, a court will consider whether the witness’s disability will affect the reliability of evidence on the facts of the particular case.

Considerations may be a witness’s capacity for observation, their ability to recollect what happened or whether it is possible to know if what they say is in any way related to real experience.

In Queensland, a person who is not considered by the judge to be competent to take an oath may give unsworn evidence. The judge must be satisfied the person understands that the truth must be told and they may be punished if the truth is not told.

## Special witness provisions

Appearing before a court as a witness can be an intimidating experience. For some people with disability, this prospect may be sufficient to discourage them from following a complaint through to court. However, special arrangements can be made to make a person who has a disability feel more comfortable in court.

Under pt 2 div 4 of the *Evidence Act 1977 (Qld)*, a court can make exceptions to the normal mode of giving evidence for a special witness. A special witness is a person who, if required to give evidence in accordance with the usual rules and practice of the court, would:

- as a result of intellectual impairment or cultural differences be likely to be disadvantaged as a witness
- be likely to suffer severe emotional trauma
- be likely to be so intimidated as to be disadvantaged as a witness.

The orders that the court may make are:

- in criminal proceedings, to exclude the person charged from the court room or obscure them from the view of the special witness, while the special witness is giving evidence or is in court for any other purpose
- to exclude all persons other than those nominated by the court from the court room
- to order that the special witness give evidence in a room other than the court room, and from which all persons other than those nominated are excluded;
- to approve a particular person to be present while the special witness is giving evidence or is required to appear in court for any purpose, in order to provide emotional support to the special witness
- to order that a video tape of the evidence of the special witness be made, and that the videotaped evidence be viewed and heard in the proceedings instead of direct testimony.

## People with disability as victims

According to the law, a person with disability who is a victim of crime has the same rights to the protection and assistance of the law as any other person. Often it does not work this way.

Many factors can cause the less favourable treatment of a person with disability. A victim with an intellectual or psychiatric disability may be less likely to complain about an infringement of legal rights. Even when a person with disability does manage to contact police, or someone does on their behalf, police may decide not to prosecute because they feel the person with disability will not be a good or reliable witness.

## People with disability as offenders

Some criminal acts (e.g. murder) require that the person committing the offence had the intention to commit it (or to commit the act that led to the offence). Some people with disability may be incapable of forming an intention to commit a crime due to their disability. Other criminal acts (e.g. assault) do

not require that the person committing the offence had any such intention. However, even in these cases, a person with disability may not be criminally responsible for an act where they could not understand what they were doing.

### Support person

In Queensland, when police interview a person with impaired capacity, they are required to have a support person (independent person) present. The support person may be a parent or friend of the person with disability. People with disability are also entitled, before they are questioned, to speak with a support person without being overheard. If it becomes apparent to police that a person they have charged has a disability, police must stop questioning the person until they have allowed the person to speak with a support person (s 422 *Police Powers and Responsibilities Act 2000* (Qld) (PPR Act)). The PPR Act also requires a support person be present if a person with impaired capacity is to be searched or if DNA samples are to be taken.

### Interpreters

A person with a hearing impairment is entitled to have both an interpreter and an independent person present during the interview. Under both the *Crimes Act 1914* (Cth) and the PPR Act, federal and Queensland police officers investigating a case must arrange for an interpreter to be present, if they believe that the person under arrest is unable to communicate verbally in English, due to a physical disability or inadequate knowledge of the English language.

### Consequences of unfair treatment

Police are legally bound to follow the requirements outlined above. A failure to comply with them may mean that a confession may be inadmissible as evidence. The officers may also be personally penalised.

When doubt exists about the fairness of an interrogation of a person with disability or the voluntariness of a confession, an application should be made to the court to exclude that evidence.

### Defences

The two defences most commonly pleaded by people with a severe or profound intellectual or psychiatric disability are insanity and diminished responsibility.

Insanity is a complete defence, leading to a finding of not guilty. Someone who is found not guilty in this way may still be detained in an institution (ss 27, 647 *Criminal Code Act 1899* (Qld) (Criminal Code)). However, the practical consequence is that the person may be detained indefinitely in a forensic institution, rather than receiving and serving a definitive sentence under the *Penalties and Sentences Act 1992* (Qld).

Diminished responsibility is only available as a defence in Queensland for murder charges to reduce the charge to manslaughter (s 304A Criminal Code).

These and similar matters are also dealt with under the *Mental Health Act 2016* (Qld) (Mental Health Act), which is designed to protect the rights of people with mental illness (for further information, see the chapter on Mental Health Laws). The Mental Health Act also correlates with the provisions of the

Guardianship and Administration Act, which are addressed in the chapter on Laws Relating to Individual Decision Making.

### Mental Health Court

The Mental Health Court decides the state of mind of people charged with criminal offences.

The court decides whether an alleged offender was of unsound mind when they were said to have committed an offence and whether they are fit for trial.

### Fitness to plead and to stand trial

Every accused person is asked to plead guilty or not guilty. Silence is assumed to be a plea of not guilty. A person who is judged to be unfit to plead may still be detained in custody (in jail or a mental health facility) until they are fit to plead.

An accused person must be able to understand the significance of telling the truth to the court, comprehend the nature of the charge and assist with their defence (e.g. able to instruct their solicitor). Someone considered unfit for trial can be kept in custody until they are fit for trial.

### Alternatives to imprisonment

Imprisonment may be an inappropriate sentence for many people with disability. In the prison environment, a person with disability may be vulnerable. It is also likely that imprisonment, for many people with disability, is unlikely to fulfil any of the purposes of punishment such as retribution, rehabilitation, deterrence and community protection.

Even when a person with disability has been convicted of a serious offence, alternatives to imprisonment exist.

A solicitor who is aware of their client's disability should attempt to establish whether the client has the ability and willingness to comply with any conditions that might be imposed as part of an alternative punishment. For example, if a person with disability is placed on a good behaviour bond, they must understand and agree to the ramifications of this before it can be imposed.

Legal representatives should also be aware of the resources and support services available in the community for clients with disabilities (see the Mental Health Laws chapter).

## Disability, Enduring Documents, Wills and Estates

A person with disability, like anyone else in the community, can make an enduring document or will as long as they have the capacity to do so.

### Enduring powers of attorney and advance health directives

Enduring documents appoint decision-making authority to others during the period of time when a person has been deemed to lack capacity or, at other times, for financial matters, dependent on the content of the document. Decision makers are to 'stand in the shoes' of the person and make decisions the person would have made for themselves if they had capacity.

Enduring documents cease to have any standing at the death of the person.



Enduring documents provide direction or appoint decision makers to deal with a person's personal matters and their property. They assist to ensure decision makers abide by the person's views and wishes. These documents can assist in avoiding the need to engage with QCAT and are less restrictive on the person with disability's decision-making autonomy than the formal appointment of a guardian or administrator.

### Capacity to make an enduring document

To make an enduring document, a person must be 18 years of age and must have the requisite capacity at the time of completing the document to understand the nature and effect of the document and the power it provides to the attorney(s). The person must make the document freely and voluntarily. A disability or diagnosis, including cognitive impairment, does not automatically preclude a person from having capacity to complete enduring documents.

If a person does not have the requisite capacity to complete an enduring document, but there is a need for a formal decision maker, any interested party can commence an application to QCAT. A QCAT member may appoint as the person's guardian or administrator any willing adult(s) or statutory decision maker(s) they believe appropriate and necessary.

### Choosing attorneys

A person should appoint attorneys whom they can trust to carry out their wishes regarding their personal and financial matters. Attorneys under an enduring document have fiduciary obligations and must always put the person's interests ahead of their own.

It is common to appoint more than one attorney, and people should consider structuring the document to provide them a safety net. For example, a person may choose to appoint their adult children as attorneys, who will also be beneficiaries under the person's will. This may lead to a conflict of interest in decision making and should be considered. The person may then consider appointing a willing combination of family, friends and professionals such as accountants and solicitors. Importantly it should be a small group that can cooperate.

## Hierarchy of enduring documents

There are three enduring documents in Queensland:

- Advance Health Directive (AHD)—only relates to healthcare (not including accommodation, finances or other personal decisions). Provides consent and refusal for healthcare and may also appoint attorneys for healthcare decisions
- Advance Health Directive – Mental Health (AHD MH)—only relates to healthcare and specifically addresses mental healthcare and treatment options. Provides consent and refusal for treatments and may also appoint attorneys for healthcare decisions
- Enduring Power of Attorney (EPA)—may relate to all personal and financial matters. The person can specify relevant areas and place restrictions on decisions and decision makers.

Given the complexity, specific content and thought required, legislation deems the AHD as the highest ranked document for healthcare decisions, regardless of dates of completion. Where the person has a mental health history and has completed an AHD MH, this document is seen as the

highest rank for their mental healthcare and can provide consent for treatment in accordance with the Mental Health Act.

## Validity of enduring documents

When witnessing an enduring document, it is recommended to follow the Guidelines for Witnessing Enduring Documents provided by the Office of the Public Guardian. These involve:

- asking open questions
- interviewing the person alone
- taking detailed notes
- considering a health professional's view of capacity
- querying the timeliness of the document.

If there is concern about the person's capacity to have completed the document, or the actions of any attorneys, an application can be brought to QCAT, by any interested party, to seek determination. If QCAT finds the person did not have capacity and requires decision makers, they may appoint an administrator or guardian for any relevant matters.

For more information, see Guardianship and Administration Act and *Powers of Attorney Act 1998* (Qld).

## Capacity to make a will

To make a will, a person must be of sound mind, memory and understanding. The person must have the capacity to understand the impacts about disposing of their estate (testamentary capacity). This means that they must understand:

- that a will is a document saying what is going to happen to their property when they die
- the amount and type of property they have
- who has a reasonable claim on their property.

If a person with disability has this level of understanding, they are entitled to make a will.

## Precautions when making a will

If there is any likelihood a person's capacity to make a will may be challenged after their death, precautions to protect the validity of the will should be taken at the time the will is made and signed. It can be advantageous to:

- use a witness who can attest to the person's capacity. The witness could be a doctor, psychologist or psychiatrist who could sign a statement that they were satisfied that the testator had testamentary capacity, and knew and approved of the contents of the will
- draft the will in plain, clear language so that the testator understands it; however, they do not need to understand all of the legal terms

- use a solicitor experienced in will making and working with people with disability. The solicitor should keep detailed notes of the circumstances and state of mind of the testator at the time of making the will.

## Knowing and approving a will

A person making the will must know what is says and agree with it.

## Persons without testamentary capacity

A person can apply to the Supreme Court for an order that provides the authority to draft, amend or revoke a will on behalf of a person who does not have testamentary capacity (see ss 21–28 *Succession Act 1981* (Qld)). The court may only make the order if:

- the person in relation to whom the order is sought lacks testamentary capacity
- the person is alive when the order is made
- the court has approved the proposed will, alteration or revocation (s 21).

## Providing for a person with disability in a will

When a parent fails to provide adequately for their child in their will, that child is able to make a family provisions application (see the chapter on Wills and Estates). When providing for a person with disability in a will, it is important to consider the age of that person, their future needs and their ability to manage finances.

An intended beneficiary who is over the age of 18 and capable of managing property can be left property outright in a will—this is described as a direct gift.

If a direct gift is left to a person who lacks capacity to manage it, the executor may encounter difficulties when trying to administer the estate. If an intended beneficiary is not able to manage property due to their disability or their age, it may be left to them in a trust (a testamentary trust). The trust can be established in the will.

The share of the estate intended for the person with disability should not be left in a will to another family member on the understanding that they will provide for the person with disability. It immediately places the family member in a position that may give rise to a conflict of interest.

### What is a trust?

A trust is a concept by which property is transferred and managed by a person for the benefit of another person (called a beneficiary). Two main types of trusts are generally used—fixed trusts and discretionary trusts.

#### *Fixed trusts*

Fixed trusts clearly state the dollar amount or share of the property to be distributed to the beneficiary. For example, the trustee may be required to distribute \$10 000 annually to the beneficiary. A fixed trust does not allow the trustee to use their discretion to respond to changing circumstances and needs of the beneficiary.

### *Discretionary trusts*

The discretionary trust is a flexible way of making provisions for a person with disability. A discretionary trust allows the trustee to respond to needs of the beneficiary as they arise. For example, under a discretionary trust, the trustee may be directed to invest the capital and then to use the income from investing for the benefit of the person with disability. Alternatively, the trustee may have an absolute discretion to use both the income and the capital in the interests of the beneficiary.

A disadvantage of the discretionary trust is that it can be more difficult to hold the trustee accountable for the way in which they use the money generated from the trust.

Assets and money held in a trust for the benefit of a person with disability are considered to be assets for the purpose of determining a person's entitlement to the disability support pension and public housing. If a person with disability will be relying on the disability support pension and/or public housing, and they will receive a benefit from a will, it is important to get legal and accounting advice to ensure that these entitlements are managed.

One option is to establish a Special Disability Trust. These are special trusts that have been designed to enable people with 'severe disability' (the characteristics outlined in s 1209M of the *Social Security Act 1991* (Cth)) to benefit from funds that are not taken into consideration when determining that person's entitlement to the pension and/or housing. More information about special disability trusts is available from the Australian Government Department of Social Services and the Inquiry into Special Disability Trusts (Parliament of Australia - Social Security Act 1991).

### *The duties and powers of trustees*

In addition to the duties and powers stipulated in a will, a trustee also has certain powers and duties laid down by law (for further information, see the chapter on Wills and Estates).

### *Restrictions upon trustees*

One method of placing some restrictions upon the way a trustee exercises their discretion is to require the trustee to administer the trust fund in accordance with certain stated principles. If the trustee fails to exercise their discretion in accordance with the expressed principles of the trust, the beneficiary may seek to have the trustee's acts and decisions reviewed by the Supreme Court under the *Trusts Act 1973* (Qld).

It can be useful to include a memorandum of wishes in a trust deed. The memorandum of wishes is not binding on the trustee, but is a way for a testator to spell out to the trustee their wishes for the management of the trust fund. This is like providing the trustee with instructions regarding subjective aspects of the management of the trust fund, unable to be included in the trust deed itself.

### *Choosing a trustee*

It is common to appoint more than one trustee and to appoint the same people appointed as executors in a will. A testator should appoint trustees whom they can trust to carry out their wishes regarding the child with a disability. At least one trustee should be skilled in financial and property management or able to seek appropriate professional advice.

### *Professional trustees*

Parents of people with disability can appoint private trustee companies, the Public Trustee (a government organisation providing trustee services) or private individuals as trustees. Fees, which will change over time, charged by different entities should be requested and considered when making the decision to appoint these entities. Independent reviews regarding performance of their practices should also be examined.

### *Other children as trustees*

Parents sometimes consider appointing one or more of their other children to act as trustee for the child with disability. If those other children are residuary beneficiaries (i.e. they take the property that is left over when the person dies) there may be a conflict between their own interests and that of their sibling. This potential conflict may be avoided by appointing more than one trustee (e.g. one trustee who is a child and one who is not), so that any conflict of interest one trustee may have can be guarded against by the co-trustee.

### **Providing for children with a disability under 18 years of age**

When making provisions in a will for a child with a disability under the age of 18, two aspects of the child's needs must be considered—guardianship (personal welfare) and financial provision.

### *Testamentary guardian*

A testamentary guardian may be appointed by the parents in a will to take over the parents' role as guardians of their children after they die. A testamentary guardian has all the powers, rights and responsibilities for making decisions about the long-term care, welfare and development of the child that are ordinarily vested in a guardian such as education or religion. The testamentary guardian's powers only apply until the child reaches the age of 18 (pt 5A *Succession Act 1981* (Qld)). It is important that consideration is given to making an appointment that is in the best interest of the child to avoid disputes about the appointment.

### *Financial provision*

Children under the age of 18 cannot legally own or manage property in their own right. The property must be held in a trust until the child turns 18.

## **Elections, Capacity and Assistance for Voters with Disability**

It is compulsory for all eligible people to enrol and vote in any local, state or federal election, however, many people with disability do not vote, even though they are capable of understanding the electoral process.

### **People who can vote**

A person can vote if they:

- are 18 years of age or older
- are an Australian citizen

- have lived at their present address for at least one month.

## People who cannot vote

People are not entitled to vote if they are incapable of understanding the nature and significance of enrolment and voting. Usually, the doctor of a person with disability will decide whether they have the capacity to vote.

## Assistance with voting

At both federal and state elections, arrangements can be made to assist people with disability to exercise their right to vote. For example, people may be allowed a postal vote, a vote through an electoral visitor or pre-poll voting.

People who are able to understand the nature of voting but are physically unable to sign a form can either authorise another person to sign the enrolment form, fill in the voting form or make their mark on the enrolment form. The Electoral Commission of Queensland (ECQ) has offered blind and vision-impaired electors the opportunity to have a secret vote using a Braille ballot paper and postal voting.

Sections 234 and 235 of the *Commonwealth Electoral Act 1918* (Cth) provide for people with disability to seek assistance to vote or to vote outside of a polling booth. Additionally, ss 23 and 24 of the Disability Discrimination Act prohibit discrimination in relation to access to premises and to services. The administration of Commonwealth laws and programs (s 29 Disability Discrimination Act) is relevant to how federal elections are conducted.

# Legal Notices

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