



# Private Guardian's Handbook

INFORMATION FOR PRIVATE GUARDIAN'S IN TASMANIA



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## Definitions

**Act** means the *Guardianship and Administration Act 1995 (Tas)*;

**ACD** means Advance Care Directives;

**disability** means any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological, physiological or anatomical structure or function) of ability to perform an activity in a normal manner;

**enduring guardian** means a person appointed as an enduring Guardian under part 5 of the Act;

**guardian** means a person named as a Guardian in a Guardianship order or as an enduring Guardian in an instrument of appointment as such;

**guardianship order** means an Order of the Tribunal appointing a person as Guardian;

**HCPR** means a Health Care Professional Report by a health practitioner;

**Impaired decision-making ability** (\*only for the purposes of an ACD) means a person (adult) that is unable to: understand information relevant to the decision; retain information relevant to the decision; use or weigh information relevant to the decision; **or** communicate in relation to the decision (whether by speech, gesture or other means)

**medical or dental treatment or treatment** means –

- (a) Medical treatment (including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care) normally carried out by, or under, the supervision of a medical practitioner; or
- (b) Dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a dentist; or
- (ba) an intimate forensic procedure and a non-intimate forensic procedure normally carried out by a person authorised to carry out the procedure under section 40 of the *Forensic Procedures Act 2000*; or
- (c) any other act declared by the regulations to be medical or dental treatment for the purposes of this Act –

But does not include –

- (d) any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears); or
- (e) first-aid medical or dental treatment; or
- (f) the administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in the manufacturer's instructions (if the drug is one for which a prescription is not required and which is normally self – administered); or
- (g) any other kind of treatment that is declared by the regulations not to be medical or dental treatment for the purposes of this Act;

**person responsible** has the meaning given by section 4 of the Act;

**represented person** means a person –

- (a) in respect of whom –
  - (i) a Guardianship Order is in force; or
  - (ii) an Administration Order is in force; or
  - (iii) both a Guardianship Order and an Administration Order are in force; or

- (b) who appoints an enduring Guardian and who, by reason of disability, becomes unable to make reasonable judgments in relation to his or her personal circumstances.

***Tribunal*** means the Tasmanian Civil and Administrative Tribunal.

***Tribunal Act*** means the *Tasmanian Civil and Administrative Tribunal Act 2020*.

## *Guardianship and Administration Act 1995 (Tas)*

The functions of the Tribunal in relation to Guardianship stream proceedings are established by the *Guardianship and Administration Act 1995* (the Act).

The Act gives the Tribunal jurisdiction to hear and determine applications for Guardianship and Administration and reviews of those Orders.

Part 4 of the Act pertains to Guardianship, and Part 4 Division 3 sets out the powers and duties of a Guardian.

Part 5 of the Act sets out the law in relation to the appointment of Enduring Guardians and gives the Tribunal authority to review an instrument appointing an Enduring Guardian. Pursuant to section 89 of the Act, the Tribunal must keep a register of any instruments of appointment of an Enduring Guardian under Part 5.

Part 5A of the Act pertains to Advance Care Directives in Tasmania.

Part 6 of the Act provides for the consent to medical and dental treatment and gives the Tribunal power to consent to treatment.

Part 7 of the Act pertains to Administration. Division 4 of Part 7 sets out the powers and duties of an Administrator, including the reporting requirements of an administrator.

The Act can be found at [www.legislation.tas.gov.au](http://www.legislation.tas.gov.au)

## The Tasmanian Civil and Administrative Tribunal

The Tribunal is an independent statutory tribunal established under the *Tasmanian Civil and Administrative Tribunal Act 2020*. In relation to Guardianship stream proceedings, the Tribunal exercises a protective jurisdiction safeguarding the rights of people with a disability who because of their disability, are unable to make reasonable judgements and decisions.

The Tribunal is constituted by a President, Division Head and legal and other members from professional backgrounds.

The powers of the Tribunal are exercised under the Act, the *Powers of Attorney Act 2000*, *Disability Services Act 2011* and *Wills Act 2008*.

The Tribunal conducts hearings to determine applications about adults with a disability who are incapable of making some necessary decisions and who may require a legally appointed substitute decision maker. A substitute decision maker is a person who has been appointed with legal authority to make decisions on behalf of another person.

The Tribunal can appoint the following substitute decision-makers:

- A Guardian to make decisions about specific personal matters arising in the life of a person with decision making disability.
- An Administrator to manage the estate of a person with a disability.

The Tribunal can make substitute decisions on behalf of a person with a disability, by:

- Consenting to medical or dental treatment in some circumstances.
- Approving the use of a restrictive intervention under the *Disability Services Act 2011*.
- Making a statutory will for a person with a disability who has not previously made a purported will.

The Tribunal also keeps a register of instruments of appointment of Enduring Guardians, being privately appointed Enduring Guardians.

The Tribunal also keeps a register of advance care directives.

# Principles under the Guardianship and Administration Act 1995

The Act establishes principles that guide all powers used under the Act. This means that the principles apply to all decisions and actions that are undertaken as a Guardian or Administrator. The principles are set out in section 6 of the Act.

A function or power conferred, or duty imposed, by the Act is to be performed so that:

- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted,
- (b) the best interests of a person with a disability or impaired decision making capacity in respect of whom an application is made under this Act are promoted, and
- (c) the wishes, directions, preferences and values of a person with a disability or impaired decision making capacity in respect of whom an application is made under this Act are, if possible, carried into effect.

These principles can conflict with each other and it can be difficult to find a balance between them. For example, it may be difficult to ensure that a person's expressed wish is respected, while ensuring that they are adequately protected from exploitation or abuse. It is not always possible to make a decision that will be acceptable to the person under Guardianship or Administration and at the same time ensure their proper care, welfare and safety.

## Office of the Public Guardian

Part 3 of the Act establishes the Public Guardian and sets out the functions and powers of the Public Guardian.

The Office of the Public Guardian is an independent office established to protect the rights and interests of adults with disabilities.

The Tribunal can appoint the Public Guardian to be the Guardian for a person with disability, when satisfied there is a need for a Guardian, and where there is no available or eligible person for appointment as Guardian.

## National Standards of Public Guardianship

The National Standards of Public Guardianship provide standards for Public Guardians in making substitute decisions on behalf of people with decision-making disabilities. Private Guardians are not bound by the Standards, but they provide a guide to best practices for decision-making by Guardians.

The Standards acknowledge and explain the following duties of Guardians:

- Provide information
- Seek views
- Advocacy
- Protection
- Make decisions
- Record information
- Participate in Guardianship reviews
- Professional development
- Privacy and confidentiality

It is recommended that private Guardians read and consider the Standards, which can be found on the Tribunal's website: [www.tascat.tas.gov.au](http://www.tascat.tas.gov.au)

## Guardianship - Introduction

### What is a Guardian?

The Tribunal may appoint a Guardian for a person to make lifestyle, health or accommodation decisions. The appointment will be made at a hearing after an application is filed with the Tribunal in respect of the person. A Guardian may either be an individual or the Public Guardian.

Before making a Guardianship Order, the Tribunal must be satisfied under section 20 of the Act that the proposed represented person:

- a) is a person with a disability; and
- b) is unable by reason of that disability to make reasonable judgements in respect of all or any matters relation to his person or circumstances; and
- c) is in need of a Guardian.

A Guardianship Order must be made so as to be the means least restrictive of a represented person's freedom of decision and action, and taking into account the best interests of a person.

### Who can be appointed as Guardian?

Pursuant to section 21 of the Act, the Tribunal may appoint a full or limited Guardian of a person if the Tribunal is satisfied that:

- the person is of or over the age of 18 years; and
- consents to act as Guardian; and
- will act in the best interests of the person; and
- is not in a position where the person's interests will conflict or may conflict with the interests of the proposed represented person; and
- is a suitable person to act as Guardian of the proposed represented person.

In determining the suitability to act as Guardian, the Tribunal must take into account the following:

- the wishes of the proposed represented person, so far as they can be ascertained; and
- the desirability of preserving existing family relationships; and
- the compatibility of the person proposed as Guardian with the proposed represented person and with their administrator, if any; and
- whether the person proposed as Guardian will be available and accessible to the proposed represented person so as to fulfil the requirements of Guardianship of that person.

### Procedure

The Act requires the Tribunal to hold a hearing within 45 days after receiving an application for Guardianship. Following a hearing, the Tribunal may appoint a Guardian for a person if there is a need.

If an Order is made by the Tribunal at a hearing, the Guardian will receive a copy of the Guardianship Order appointing them.

The Tribunal will also provide a copy to the person (now referred to as the represented person), and other interested parties, if applicable. The Guardian should ensure all necessary parties are notified of their appointment such as residential aged care facilities, group homes and support providers.

## Powers of a Guardian

A Guardian has the power to make decisions, take action, or act in relation to the represented person subject to any limitations outlined in the Order.

Section 25 of the Act outlines the powers of a full Guardian. Pursuant to section 26, an Order appointing a guardian may limit the powers conferred on a Guardian. Examples of the kinds of limited powers the Tribunal confers include:

- **an accommodation power** – to decide where the represented person is to live, whether permanently or temporarily;
- **an employment power** – to decide whether the represented person should or should not be permitted to work and if so, the nature or type of work, and the person for whom the represented person is to work, and any related matters;
- **a restriction of visitors power** – to restrict visits to the represented person as may be necessary in his or her best interests and to prohibit visits by any person if the Guardian reasonably believes that they would have an adverse effect on the represented person;
- **a medical treatment power** – consent to any medical treatment that is in the best interests of the represented person and to refuse or withdraw consent to any such treatment;
- **a services power** – to decide which services the represented person is to receive and provide consent for those where necessary.

A Guardianship Order may also include a power to make decisions regarding the represented person's NDIS plan, restrict travel, advocate on the represented person's behalf or commence legal action if required. A Guardianship Order can also include powers to enforce the Guardian's decision – section 28 of the Act.

## Extent of Authority

The exercise of the above powers is subject to the terms of the Tribunal's Order. The Order will specify the Guardian's powers in relation to the represented person.

If there is a need for decisions to be made beyond the scope of the Order, the Guardian should contact the Tribunal to discuss a possible review of the Order.

## Best Interests

Under section 27(1) of the Act, a Guardian must act at all times in the best interests of the represented person.

Section 27(2) of the Act states that the Guardian does this if they act:

- in consultation with that person, taking into account, as far as possible, his or her wishes; and
- as an advocate for that person; and
- in such a way as to encourage that person to participate as much as possible in the life of the community; and
- in such a way as to encourage and assist that person to become capable of caring for himself or herself and of making reasonable judgments relating to his or her person; and
- in such a way as to protect that person from neglect, abuse or exploitation.

## Keeping of Records

A Guardian should keep documentation of all decisions and actions taken during the period of appointment as Guardian. A Guardian is required to report annually to the Tribunal on the circumstances of the represented person and the use of their powers under the order. Complete and accurate records need to be kept and the Tribunal may request these to be produced at any time.

Records that should be kept include decisions that are communicated to medical practitioners, accommodation providers, allied health professionals and decisions that are communicated to friends and relatives in the role as Guardian.

Such decisions include:

- Giving consent to the administration of a prescription drug, noting the dosage and frequency of application, the condition for which the drug is prescribed and any other relevant information.
- Deciding that the represented person should move to a new place of accommodation, due to their increasing care needs.

## Access to Information

When making decisions on behalf of a represented person, a Guardian has the right to access all the information to which the represented person would be entitled if the information is reasonably required for the purpose of exercising a power.

The Guardian is provided with certified copies of the Tribunal's Order as confirmation of their appointment.

# Getting Started as a Guardian

## First Steps

Upon receiving copies of the Order from the Tribunal, it is important that the Guardian reads the Order carefully to understand whether they have full or limited powers. It is usual for the Order to be limited as this is the least restrictive of the represented person's action and freedom.

If the Order is limited it will state what kinds of decisions the Guardian has the power to make.

A Guardian must take reasonable steps to ascertain whether the represented person has given an ACD and whether it is registered with the Tribunal. The Guardian should obtain a copy of any ACD.

## Consulting with the Represented Person and Others

Where possible, the Guardian should consult with the represented person regarding any decision they are to make in order to understand their wishes.

With some decisions it may be valuable for the Guardian to consult the represented person's family, friends and care providers, as they can assist to ascertain the needs and preferences of the represented person.

The Guardian needs to act with care in providing any information about the represented person to anyone except the represented person themselves.

## Conflict of Interest

A 'conflict of interest' means that a conflict exists between the Guardian's duties as Guardian for the represented person, and the Guardian's own interests, or the interests of a relative, business associate, or a close friend of the Guardian.

A Guardian cannot make a decision, take any action or consent to doing something on behalf of the represented person, where the Guardian has a conflict of interest in making that decision or taking that action on behalf of the represented person.

If a potential conflict of interest arises, the Guardian should notify the Tribunal in writing or seek Advice and Direction from the Tribunal.

## Decisions a Guardian Cannot Make

A Guardian cannot:

- consent to an unlawful act;
- vote in a State or Federal election on behalf of the represented person;
- make decisions on behalf of the represented person in relation to marriage, or the dissolution of marriage;
- make decisions about the represented person's children;
- consent to the assessment and treatment of a mental illness covered by the *Mental Health Act 2013 (Tas)*;

- make decisions concerning the represented person's finances that are within the scope and authority of an Administrator or Power of Attorney; or
- make, revoke or amend the represented person's Will, Enduring Power of Attorney or Advanced Care Directive.

A Guardian cannot consent, or refuse or withdraw consent to, special medical treatment. An application should be made to the Tribunal for any special treatment.

Special treatment is defined in the Act as:

- treatments likely to lead to infertility;
- termination of pregnancy;
- removal of tissue for transplant;
- psychosurgery; and
- any treatment involving an aversive stimulus.

The Guardian may not delegate their role to another person. They may, however, seek professional advice as to how to exercise their powers and duties.

### Seeking Advice or Direction from the Tribunal

Under section 31 of the Act, a Guardian may apply for Advice or Direction regarding any matter in relation to the scope of the Guardianship Order or the exercise of any power by the Guardian under the Order.

The Tribunal may approve or disapprove of any proposed action by the Guardian, give such advice or direction as it considers appropriate and/or vary the Order or make any other Order that it considers necessary.

Under this section, the Tribunal may also of its own motion, direct or offer advice to the Guardian in respect of any matter.

An Application for Advice or Direction form is available from the Tribunal's website.

### Review of Guardianship Order

When the expiry date of the Order is approaching, Tribunal Registry staff will contact the Guardian to seek review documentation. This is referred to as a statutory review of the Order. The Guardian is required to submit a Review of Order Application, a current Health Care Professional Report and their Guardian's Annual Report to the Tribunal. Often, a hearing will then be listed to review the current need for an order. At a review hearing, the Tribunal can continue, vary or revoke the Order.

Pursuant to section 67 of the Act, the Tribunal may at any time hold a hearing to review a Guardianship Order. This may be by the Tribunal's own motion, upon application of the represented person (or on their behalf), or upon application of any other person.

In some instances, a Guardian may have difficulty with being the appointed Guardian. This may be for varied reasons including ill health, meeting the Tribunal's requirements or preserving the relationship with the represented person. It may be appropriate for a Review Application to be lodged so the appointment of an alternative Guardian can be considered.

A review might occur if:

- The represented person regains the ability to make reasonable judgements concerning their person or circumstances.
- There is no continuing need for a Guardian.
- The Guardian cannot or does not wish to continue in their role.

A Review of Order application form can be found on the Tribunal's website.

## Signing Documents

It may be important when signing some documents to seek the advice of a solicitor. The usual way of signing a document on behalf of a represented person is:

Signed for and on behalf of the said JOHN SMITH by WANDA JONES, Guardian, (signature of W. Jones)

## If the Represented Person Dies

If the represented person passes away while under a current Guardianship Order, the Guardian is required to inform the Tribunal in writing within 7 days. A copy of the funeral notice or death certificate can be provided.

## If the Guardian Dies

Where a Guardian dies, the Tribunal will need to review the Guardianship Order and may need to appoint a replacement Guardian if there is still a need for the Order.

## Decisions a Guardian can make

Section 25 of the Act outlines the types of powers that may be conferred on a Guardian by the Tribunal.

### Consent to Medical or Dental Treatment

#### Person Responsible

Where a person lacks capacity to understand the nature and effect of medical or dental treatment, a person responsible can give consent on behalf of that person.

A person responsible is defined under the Act as the Guardian, spouse, a person having the care of the other person or close friend or relative of the other person.

A Guardian will automatically assume authority as the represented person's person responsible, meaning that a Guardian can give valid substitute consent on behalf of the represented person (when they are not capable) for medical or dental treatment.

#### Medical Treatment

The Act defines medical treatment as medical treatment normally carried out by, or under the supervision of a medical practitioner.

When consenting to medical treatment the Guardian must be satisfied that:

- the treatment is in the best interest of the represented person;

and, take into account:

- the wishes of the person; and
- any alternative treatment available to the person; and
- the consequences to that person if the proposed treatment is not carried out; and
- the nature and degree of any significant risks associated with the proposed treatment or any alternative treatment; and
- the treatment is to be carried out only to promote and maintain the health and wellbeing of the represented person.

As a person responsible, or a Guardian with an express power to consent or not to medical or dental treatment can do the following:

- Give or decline consent to health related interventions and procedures/treatments, for example, examinations, assessments, diagnostic procedures, health care monitoring and certain minor and major procedures, including some surgical procedures.
- Give or decline consent to the represented person being given certain medications.
- Give or decline consent to the represented person attending medical and other health care appointments.
- Decide from which health care services, or professionals, the represented person will

receive a service, such as who the person's general practitioner, dentist and psychiatrist should be.

- Request access to medical information that is relevant to the proposed treatment.
- Consent to the provision of palliative care where appropriate.
- Consent to the withdrawal of treatment, including end of life treatments.

Making decisions about the represented person's medical treatment is a serious responsibility.

A Guardian or Person Responsible must consider the represented person's ACD (if any) and give effect to the ACD.

The Guardian may find it helpful to:

- Obtain a comprehensive knowledge of the represented person's disability and its effect;
- Obtain as much medical history of the represented person as possible;
- Ensure that the represented person's GP and health care providers are aware of the Guardianship appointment;
- Ascertain the represented person's current health care providers and determine whether they are adequate;
- Ascertain which, if any, medications the represented person is taking and whether they have any detrimental side effects;
- Arrange for regular medical and dental check-ups;
- Request a treatment plan from healthcare providers, if appropriate.

## Health Care Powers

Health care is not defined in the Act but encompasses care provided by allied health practitioners, for example psychological counselling, physiotherapy and other forms of physical and mental rehabilitation not provided by medical or dental practitioners.

A Guardian appointed with health care powers will have powers to consent to the provision of allied health services, nutrition plans, exercise regimes and any matters related to the represented person's general health.

A Guardian or Person Responsible must consider the represented person's ACD (if any) and in respect to health care give effect to the ACD.

## Palliative Care and End of Life Decisions

A Guardian must consider the represented person's ACD (if any) before making a decision.

A Guardian can refuse medical treatment on behalf of the represented person.

If the represented person is dying, the Guardian may be asked to make a decision about whether active treatment should continue or whether the represented person is better served by the provision of palliative care.

This decision should be made in consultation with the represented person's treating doctor and medical team and with the represented person. If the represented person is unable to express a

wish, consideration should be given to any wishes regarding end of life decisions that may have been expressed prior to becoming incapable of making such decisions.

## Where to Live Powers

The Guardian may need to make decisions about where the represented person is to live temporary and/or permanently. This might include decisions about permanent or respite care in a residential aged care facility, accommodation in supported accommodation.

Accommodation decisions may also include deciding when or where the represented person may spend overnight visits to family, friends and partners.

Wherever possible the wishes of the represented person should be respected; however, the Guardian can override this where it would not be in the best interests of the person.

The following may be useful to consider when weighing up an accommodation decision:

- What options for accommodation are available?
- What is the layout of the accommodation or facility and how suitable is it for the person's needs?
- Is the accommodation close to family and friends, and will it enable existing community links to continue?
- Are there regular outings or activities that are sufficiently stimulating for the person?
- If the person wishes to remain in their own home, can management and support be altered to achieve this? Have all support options been considered?

## Support Services Powers

A Guardian can be appointed with a power to make decisions regarding which support services a represented person should access, and provide consent to these as required, to ensure the represented person is receiving the support they require.

## NDIS Powers

The Guardian may be granted a power to advocate on the represented person's behalf and make any decisions required in relation to the services a person should access under the National Disability Insurance Scheme (NDIS), and any decisions required in respect of any NDIS plan development, implementation and review.

NDIS Support Coordinators have a key role in sourcing service providers, to give effect to a NDIS plan, but cannot choose providers on behalf of the represented person.

An NDIS nominee can be appointed when it is not possible for the represented person to make or be supported to make decisions for themselves in relation to the preparation or review of the NDIS plan and the implementation of the plan. If there is an NDIS nominee appointed, there is usually no need for a Guardian to be appointed in relation to this power.

## Restriction of Visitors Powers

The Guardian may be granted a power to restrict visits from any person if the Guardian reasonably believes they would have an adverse effect on the person.

The Guardian can decide when such visits can occur, for how long and in what circumstances.

The Guardian must consider the wishes of the represented person regarding people they want to see, while ensuring they are protected from undue pressure or risk of exploitation, conflict or abuse.

## Litigation

The Guardian may be granted a power to undertake litigation on behalf of the represented person. Types of matters include restraint orders, family violence, family court matters and child protection matters.

There may be other legal matters in respect of the represented person such as their interest in settlement of deceased estates; however, such financial matters are dealt with by an Administrator. The Guardian can make an application to the Tribunal for the appointment of an Administrator if necessary to deal with such matters.

## Power to Enforce (s28 of the Act)

If the Tribunal makes a Guardianship Order appointing a full or limited Guardian, the Tribunal may specify in the Order that the Guardian, or some other specified person (such as police, ambulance officers, employees of the Tasmanian Health Service), can take certain measures or actions to enforce the decision of the Guardian.

Powers under section 28 are not stand alone and are to be used to ensure that the represented person complies with decisions made by the Guardian under the powers granted to them in the Order. This may be necessary where the represented person is resistant to moving to appropriate accommodation or resistive to receiving medical treatment, which is deemed appropriate or necessary and in their best interests.

Powers under section 28 cannot be used to ensure that any other person complies with a decision of the Guardian.

## Restrictive Practices

The Guardian, in some circumstances may be granted a power to make decisions about the use of restrictive practices for a represented person. A restrictive practice is any practice or intervention that has the effect of restricting the right or freedom of movement of the person. A restrictive practice can include physical restraint, mechanical restraint, environmental restraint, seclusion, and chemical restraint. A restrictive practice aims to address a represented person's behaviours of concern and is implemented for their own safety or the safety of others.

A restrictive practice should only be consented to as a last resort and when there are no less restrictive alternatives available.

Restrictive practices should be discussed with the service provider, who may need to obtain other approvals under other Commonwealth or State legislation or Rules before using restrictive practices on someone in their care.

## Reporting

### Statutory Requirements

Section 66 of the Act requires that the Tribunal receive a report from the Guardian within a 12 month period. The Tribunal can seek a report from a Guardian at any time it deems appropriate.

The Tribunal's usual practice is to send a request for the annual report in advance of the Order's expiry month each year. The Tribunal gives the Guardian two weeks from the date of the request to submit the report.

If the Guardian cannot submit the report in the timeframe given, they may contact the Tribunal to request a short extension. The Tribunal will grant extensions for submission of reports on a case-by-case basis.

If the report is to accompany documentation for a statutory review, as the Order is approaching expiry, it is important it is submitted by the due date to allow the Tribunal sufficient time to prepare for a hearing if necessary.

The Tribunal may also request detailed reports at other times from the Guardian.

### Completing the Annual Report

The Tribunal will send an annual report template with the request letter which must be used. The report template contains instructions in each section on how to complete it. The Guardian must keep thorough records of all decisions made under the Order and use these to complete the report.

The first annual report is to be completed for a period beginning from the date the Order was made appointing the Guardian. In the case of subsequent annual reports, it is to be completed for a period beginning from the end date of the previous report.



Protective Division – Guardianship Stream

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