



Enduring Guardian's Handbook

INFORMATION FOR ENDURING GUARDIANS IN TASMANIA

 TASCAT

TASMANIAN CIVIL &
ADMINISTRATIVE TRIBUNAL

Definitions

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

ACD means Advance Care Directive;

appointor in relation to an enduring guardian, means the person who appointed the enduring guardian to be the person's enduring guardian;

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;

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). (section 35D of the Act)

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 –

in respect of whom –

- (a) a guardianship order is in force; or
- (b) an administration order is in force; or
- (c) both a guardianship order and an administration order are in force; or
- (d) 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*.

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 7 of the Act pertains to Administration.

Part 5 of the Act pertains to the appointment of an Enduring Guardianship and gives the Tribunal authority to review an enduring guardian instrument of appointment. Pursuant to section 89 of the Act the Tribunal must keep a register of any instruments of appointment as an enduring guardian under Part 5.

Part 5A of the Act concerns Advance Care Directives.

Part 6 of the Act pertains to consent to medical and dental treatment, including consent for treatment by the Tribunal.

The Tribunal can give advice and directions to guardians (including enduring guardians), and administrators, and in respect to advance care directives.

The Act can be found at www.legislation.tas.gov.au

The Tasmanian Civil and Administrative Tribunal

The Tasmanian Civil and Administrative Tribunal is an independent statutory authority established under the *Tasmanian Civil and Administrative Tribunal Act 2020*. The Tribunal's Guardianship stream exercises a protective jurisdiction safeguarding the rights of people with disability who are unable to make reasonable judgements and decisions.

The Tribunal is constituted by a President, Division Head 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 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 a 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.
- Making a statutory will for a person with a disability who has not previously made a will.

The Tribunal keeps a register of Enduring Guardianship Instruments.

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 an Enduring Guardian. The principles are set out in section 6 of the Act. Section 6 provides: -

A function or power conferred, or duty imposed, by this 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 ability 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 ability 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 and at the same time ensure their proper welfare and safety.

Office of the Public Guardian

Part 3 of the Act establishes the Public Guardian and sets out his/her functions.

The Office of the Public Guardian is an independent office established to protect and advocate for the rights and interests of adults with disabilities. The Tribunal can appoint the Public Guardian to be the guardian for a person with a disability, when satisfied there is a need for a 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. Enduring Guardians are not bound by the Standards but they provide a good guide for the decision-making of an Enduring Guardian. The Standards acknowledge and explain the following duties of a guardian, to:

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

It is recommended that Enduring Guardians read and consider the Standards which can be found on the Tribunal's website: www.tascat.tas.gov.au

Enduring Guardianship

Who can appoint an Enduring Guardian?

A person over 18 years can appoint an Enduring Guardian. The person who appoints is called the “Appointor”.

The Appointor must have capacity to appoint an Enduring Guardian, that is, they must understand the nature and effect of the Enduring Guardianship Instrument at the time it is made and registered. The Appointor should also understand that the Instrument can be revoked if they continue to have capacity to make these decisions.

What is an Enduring Guardian?

An Enduring Guardian is someone the Appointor chooses to make lifestyle, health and medical decisions for them if and when they are not capable of doing this for themselves. An Enduring Guardian acts as a substitute decision maker and may make decisions such as where a person is to live, what services they receive at home and what medical treatment they should receive.

An Enduring Guardianship appointment comes into effect if or when the Appointor loses capacity and will only be effective during the period of incapacity.

Enduring Guardianship Instrument

To appoint an Enduring Guardian, it is necessary to complete an Enduring Guardianship Instrument of Appointment. This form can be downloaded from the Tribunal’s website. Once the form is completed, the Appointor needs to sign the form and have their signature certified by two witnesses. The person(s) being appointed as the Enduring Guardian(s) need to sign an acknowledgment that they will be the person’s Enduring Guardian.

The Enduring Guardianship Instrument of Appointment must be registered with the Tribunal to have legal effect.

Who can be appointed Enduring Guardian?

The person appointed as an Enduring Guardian should understand their responsibilities as a substitute decision maker. They should be someone trusted, who will take into account the views and wishes of the Appointor and be able to make decisions in the Appointor’s best interests.

An Enduring Guardian must be over the age of 18 years.

A person who is in a professional or administrative capacity directly or indirectly responsible for, or involved in, the medical treatment of the person cannot be appointed as an Enduring Guardian.

The Appointor can appoint:

1. One person as their Enduring Guardian;
2. One person as their Enduring Guardian and then name an Alternate Guardian in case the first Guardian cannot assume the role;
3. Joint Guardians; or
4. Appoint an Alternate Guardian for any of the Joint Guardians.

Joint Guardians must act jointly, which means they must reach agreement on any decisions they make on the Appointor’s behalf.

In circumstances where two persons are appointed to act jointly as Enduring Guardians, in the event that one dies (or resigns or is incapacitated), the remaining Enduring Guardian will not be authorised to act – unless there are clear instructions or an indication of a contrary intention in the Enduring Guardianship Instrument by which such persons are appointed.

An Alternate Enduring Guardian will only have authority to act if the original Enduring Guardian becomes unavailable, unwilling or unable to act.

It is not possible for an Appointor to appoint the Public Guardian as their Enduring Guardian.

When does the appointment of an Enduring Guardian take effect?

The appointment of an Enduring Guardian takes effect when an Appointor loses mental capacity and becomes unable to make their own personal, medical or lifestyle decisions.

It is worth considering obtaining a written medical opinion from a medical practitioner or psychologist before commencing to act as an Enduring Guardian, to ensure the Appointor has a disability (as defined in the Act) and is incapable because of that disability to make reasonable judgments about their person or circumstances.

Revocation of the Enduring Guardianship Instrument

An Appointer can revoke an Enduring Guardianship Instrument at any time while he or she has capacity to understand the nature and effect of that decision. The Appointer must use the form titled Instrument Revoking the Appointment of an Enduring Guardian available on the Tribunal's website. The completed form should be registered with the Tribunal Registry.

Decisions an Enduring Guardian can make

A person's ACD takes precedence over an Enduring Guardianship Instrument where any inconsistency arises.

The scope of authority given to an Enduring Guardian is determined by the Appointor when they complete the Enduring Guardianship Instrument.

An Enduring Guardian Instrument that does not specify any conditions usually provides the Enduring Guardian the authority to exercise powers under Section 25 of the Act. Section 25 of the Act confers on a full Guardian powers and duties which the full Guardian would have in Tasmania if he or she was a parent and the represented person his or her child. These powers include but are not limited to:

- **An accommodation power** - to decide where the Appointor is to live, whether permanently or temporarily and with whom;
- **An employment power** - to decide whether the Appointor should or should not be permitted to work and, if so, the nature or type of work, the person for whom the Appointor is to work, and any related matters;
- **Any restriction of visitors** - to restrict visits to an Appointor to such extent as may be necessary in his or her best interests and to prohibit visits by any person if the Enduring Guardian reasonably believes that they would have an adverse effect on the Appointor; and
- **A health care power** - to consent to any health care that is in the best interests of the Appointor and to refuse or withdraw consent to any such health care.

Enduring Guardianship Instruments may include a power to arrange and co-ordinate support

services to attend the Appointor's home, and consenting to an NDIS Plan or behavioural support plan.

A decision made by a validly appointed Enduring Guardian has legal effect as if it had been made by the Appointor with the capacity to do so. This means that the Enduring Guardian may, on behalf of an Appointor, sign documents and do all such things as are necessary to give effect to any power or duty vested in the Guardian.¹

Alternatively, the Appointor can limit the decision-making authority of their Enduring Guardian to specific duties and powers. For example, the Enduring Guardianship Instrument may authorise the Enduring Guardian to make decisions about any treatment and health care they receive, but not about where the Appointor lives or whom they associate with. The Enduring Guardian is only legally empowered to carry out the duties and powers set out in the Instrument and to act as the 'person responsible' (described in more detail below).

Consent to Medical Treatment and Other Health Care

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

Section 4 of the Act defines a person responsible for an adult as:

- (1) In this Act, person responsible for another person means –
- ...
- (e) where the other person is of or over the age of 18 years, one of the following persons, in order of priority:
- (i) his or her guardian;
 - (ii) his or her spouse;
 - (iii) the person having the care of the other person;
 - (iv) a close friend or relative of the other person. (*emphasis added*)

Section 3 of the Act defines the term 'guardian' as:

guardian means a person named as a guardian in a guardianship order or as an enduring guardian in an instrument of appointment as such. (*emphasis added*)

An Enduring Guardian will automatically assume authority as the Appointor's 'person responsible', meaning that only the Enduring Guardian can give valid substitute consent on behalf of an Appointor who cannot understand the nature and effect of medical treatment by reason of his or her disability.

The Enduring Guardian needs to ensure that any specific directions in the Enduring Guardianship Instrument that relate to medical treatment or other health care are observed. The Enduring Guardian must also consider the person's ACD in making decisions relating to medical treatment or health care.

Relevant publications listed below can be found on the Tribunal's website: www.tascat.tas.gov.au

- Consent to Medical or Dental Treatment (Fact Sheet)
- Consent to Medical Treatment by a Person Responsible (Fact Sheet).

¹ Section 25(1) *Guardianship and Administration Act 1995* (Tas)

For the purposes of determining whether any medical or dental treatment would be in the best interests of the Appointor, section 43(2) of the Act sets out matters to be taken into account:

“... subject to subsection (3), for the purposes of determining whether any medical or dental treatment would be in the best interests of a person to whom this Part applies, matters to be taken into account by the person responsible include—

- (a) the wishes of that person [Appointor], so far as they can be ascertained; and
- (b) the consequences to that Appointor if the proposed treatment is not carried out; and
- (c) any alternative treatment available to that Appointor; and
- (d) the nature and degree of any significant risks associated with the proposed treatment or any alternative treatment; and
- (e) that the treatment is to be carried out only to promote and maintain the health and wellbeing of that Appointor; and
 - (ea) in the case of proposed medical or dental treatment that is an intimate forensic procedure or a non-intimate forensic procedure –
 - (i) that a police officer or registered practitioner suspects that that person is a victim of a crime; and
 - (ii) that a police officer or registered practitioner has requested the treatment be carried out in relation to that person because the officer or practitioner suspects that that person is a victim of a crime;
- (f) any other matters prescribed by the Regulations.”

In practical terms, as a ‘person responsible’ an Enduring Guardian can:

- 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 most surgical procedures.
- Give or decline consent to the Appointor being given certain medications.
- Give or decline consent to the Appointor attending medical and other health care appointments.
- Decide from which health care services, or professionals, the Appointor will receive a service, such as who the person’s general practitioner, dentist and psychiatrist should be.
- Request access to 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.

Appointments as an Enduring Guardian with “Health Care” Powers

An Enduring Guardian with “health care” powers must consider a person’s ACD when exercising any power conferred to them.

‘Medical treatment’ under the Act is defined as: “medical treatment ... normally carried out by, or under, the supervision of a medical practitioner”. In other words, medical treatment only means treatment given by a medical practitioner. It excludes healthcare by physiotherapists, occupational therapists, etc.

“Health care” as it appears in section 25(2)(e) of the Act is not defined in the Act but can encompass care provided by allied medical practitioners, for example, psychological counselling, physiotherapy and other forms of physical and mental rehabilitation not provided by medical or dental practitioners.

An Enduring 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 Appointor’s general health.

Palliative Care and End of Life Decisions

An Enduring Guardian can refuse medical treatments on behalf of the Appointor, as long as it is not contrary to the Appointor’s ACD (if any).

If the Appointor under enduring guardianship is dying, the Enduring Guardian may be asked to make a decision about whether treatment should continue or whether the Appointor is better served by the provision of palliative care. This decision should be made in consultation with the Appointor’s treating doctor and after discussion, if possible, with the Appointor, family members and close friends. If the Appointor 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 incapacitated, if this is applicable.

Decisions an Enduring Guardian cannot make

An Enduring Guardian cannot:

- Make decisions concerning marriage, or the dissolution of marriage or significant relationship.
- Make decisions about the Appointor’s children.
- Consent to, or refuse or withdraw consent to “special treatment.” Only the Tribunal can give consent to Special Treatment.

Special Treatments are defined under the Act as:

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

- Consent to assessment and treatment of a mental illness covered by the *Mental Health Act 2013* (Tas).
- Vote in an election on behalf of the Appointor.
- Make decisions relating to the Appointor's finances that are within the scope and authority of an Administrator or a Power of Attorney.
- Make, revoke or amend the Appointor's Will, Enduring Power of Attorney, Enduring Guardian Instrument, or Advance Care Directive.
- Consent to an unlawful act.

An Enduring Guardian is restricted from acting when he or she has a conflict of interest.

Conflicts of Interest

A 'conflict of interest' means that the Enduring Guardian is conflicted between his or her duties as an Enduring Guardian for the Appointor and the Enduring Guardian's own interests or the interests of a relative, business associate, or a close friend of the Enduring Guardian.

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

If the Appointor does not want his or her Enduring Guardian restricted from acting in circumstances of a possible conflict of interest, the Appointor must expressly state that this decision or this class of decisions, is exempt from this restriction in the Enduring Guardianship Instrument.

Who needs to know of the Person's Enduring Guardian?

The Enduring Guardian assumes responsibility for decision making once the Appointor has lost capacity to make independent decisions, and should attempt to communicate this to the Appointor.

Depending on the functions and duties the Enduring Guardian has, it is a good idea to also inform all the relevant people who support or care for the Appointor of the appointment, and the assumption of responsibilities under the Enduring Guardianship Instrument. This might include the Appointor's doctor, dentist, case manager, and/or accommodation provider and it may be necessary to provide a copy of the Enduring Guardianship Instrument to relevant people.

The Appointor's Networks

An Enduring Guardian's primary responsibility is to the Appointor and ensuring the Appointor's wishes, directions, preferences and values; their best interests; and the least restrictive of their persona and freedom is considered, when making decisions on the Appointor's behalf.

It is important to recognise the value of the Appointor's existing relationship and networks, particularly family and friends but also case managers, social workers, care workers, medical practitioners etc, and to work closely with them. An Enduring Guardian is a decision maker in the areas the Enduring Guardianship Instrument provides for. The ongoing direct care, practical support and case management remain the responsibility of service providers and case managers.

Right to Information

In an enduring phase of the appointment (i.e. when the Appointor has lost capacity to make reasoned judgments about his or her person or circumstances) an Enduring Guardian has a right to all of the information to which the Appointor would have been entitled so long as that information is reasonably required for the purpose of exercising a power, or deciding to exercise a power as an Enduring Guardian.

An Enduring Guardian does not have the right to demand such information if the Appointor still has capacity to make reasoned judgments in respect of matters relating to his or her person or circumstances.

The Enduring Guardian's right to access information includes the right to obtain a copy of the Appointor's Will if it is reasonably relevant to the decision that the Enduring Guardian is contemplating.

If the Appointor does not want his or her Enduring Guardian to access a copy of his or her Will in the enduring phase, the Appointor must expressly state that the Enduring Guardian does not have this power in the Enduring Guardianship Instrument of Appointment.

Keeping of Records

Once an Enduring Guardian has commenced to act as Enduring Guardian he or she is required to keep a record of all decisions and actions that he or she has taken as Enduring Guardian. These records must be kept for at least 7 years after the person ceases to be the Enduring Guardian.

An Enduring Guardian should keep records of all decisions that he or she communicates to medical practitioners, accommodation providers, allied health professionals, friends and relatives in his or her role as enduring guardian. Such records would include activities such as:

- 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 Appointor should move to a new place of accommodation, due to their increasing care needs.

Records should include the reasons why and any relevant reports or opinions upon which the enduring guardian relied in making that decision.

The Tribunal can direct an Enduring Guardian to provide a record of all decisions and actions that he or she has taken as an Enduring Guardian. If an Enduring Guardian or former Enduring Guardian does not provide the records to the Tribunal within the time specified in the Tribunal's request (at least 14 days), the Enduring Guardian or former Enduring Guardian could face a penalty up to 20 penalty units.

Ensuring Privacy and Confidentiality

To ensure appropriate standards of privacy and confidentiality, Enduring Guardians are expected to:

1. Protect the privacy and confidentiality of the Appointor and the key people in their lives
2. Ensure that the Enduring Guardian releases only information relevant to the carrying out of the decision.

Section 86 of the *Guardianship and Administration Act 1995* states that a person must not disclose any information that deals with the personal history or records of a represented person (which includes a person who appoints an Enduring Guardian and, by reason of disability, becomes unable to make reasonable judgement about his or her person) obtained by the Tribunal or the Public Guardian except where such disclosure occurs at a hearing or has been approved by the Tribunal, the President of the Tribunal or the Public Guardian. A person who contravenes section 86 of the Act is guilty of an offence and is liable on summary conviction to a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 12 months or both.

Unless it is specified in the Enduring Guardianship Instrument or a Tribunal Order, the Enduring Guardian does not have a duty to provide personal information about the Appointor to any member of his/her family, their friends or networks.

Seeking Advice and Direction from the Tribunal

Pursuant to section 35 of the Act, an enduring Guardian may apply for advice or direction from the Tribunal on any matter relating to the scope of his or her appointment, the exercise of any power under the Enduring Guardianship Instrument, or regarding the Appointor's ACD. An application form for Advice and Direction and the application form regarding an Advance Care Directive is available on the Tribunal's website.

If the Tribunal makes an order or gives a direction it is binding, that is, the Guardian must comply with the order and/or direction of the Tribunal.

Review of Enduring Guardianship Instruments

An application to review an Enduring Guardianship Instrument may be made by –

- (a) the Public Guardian; or
- (b) the Enduring Guardian; or
- (c) the Appointor of the Enduring Guardian; or
- (d) the administrator of the Appointor's estate; or
- (e) any other person who the Tribunal is satisfied has a proper interest in the matter.

The Tribunal may, on an Application under section 34 of the Act and after a hearing, declare that the Enduring Guardianship Instrument of Appointment is *invalid* if the Tribunal is satisfied that:

- the Appointor did not have the mental capacity to make it;
- it is contrary to the provisions of the Act; or
- the Appointor was induced to make it by reason of dishonesty or undue influence.

The Tribunal after a review hearing, may *revoke* the Enduring Guardianship Instrument if:

- the Enduring Guardian seeks a revocation of his or her appointment;
- it is satisfied that the Enduring Guardian is not willing or able to act in that role; or
- the Enduring Guardian has not acted in the best interests of the Appointor or has acted in an incompetent or negligent manner.

If the Tribunal revokes the Enduring Guardianship Instrument or declares the Enduring Guardianship Instrument to be invalid, the Tribunal can only proceed to hear an Application for Guardianship if an Application for Guardianship has been filed with the Tribunal. If an Application for Guardianship has been filed, the Tribunal can determine at a hearing whether it will make a guardianship order.

See Review of Enduring Guardian Fact Sheet and Guardianship Fact Sheet on the Tribunal's website.

Interstate Recognition of Enduring Guardianship Instruments

All Australian States and Territories have their own legislation governing an Enduring Guardianship. Some, but not all, automatically recognise a Tasmanian Enduring Guardianship Instrument of Appointment as legally valid.

If the Appointor is planning to move to another State or Territory in Australia, it is appropriate to find out whether that State or Territory will recognise a Tasmanian Enduring Guardianship Instrument. If it is not recognised, the Appointor may consider appointing an Enduring Guardian under the law of that relevant State or Territory.



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