



# The Guardianship and Administration System: An Education Package for Professionals

Developed by the State Administrative Tribunal, Office of the Public Advocate and Public Trustee



## Purpose

This package has been developed for use by professionals in the health, disability, aged care and related sectors to give an overview of the guardianship and administration system.

Within the package, there is a range of links to relevant website pages that provide more detailed information. Many of these websites include downloads for related publications.

## Overview

The [Guardianship and Administration Act 1990](#) (the Act) provides protection for at-risk people not capable of making reasoned decisions for themselves. They may need additional support to ensure their quality of life is maintained and to safeguard them from neglect, exploitation and abuse.

There are three key government agencies involved in the guardianship and administration system, all of which come under the [Department of Justice](#) banner. They are:

- [State Administrative Tribunal \(“the Tribunal”\)](#)
- [Office of the Public Advocate](#)
- [Public Trustee](#)

## State Administrative Tribunal

An independent, statutory tribunal that:

- determines applications for the appointment of a guardian for adults with a decision-making disability
- determines applications for the appointment of an administrator for adults with a decision-making disability
- makes orders for the appointment of guardians and administrators
- reviews orders that have been made previously
- determines applications regarding enduring powers of attorney, enduring powers of guardianship, advance health directives and treatment decisions
- determines applications for young people with a decision-making disability, who are 17 years old, for the appointment of a guardian from when they turn 18 and for the immediate appointment of an administrator
- in rare circumstances, determines applications for the appointment of an administrator for children with a decision-making disability.

## Office of the Public Advocate

- Provides [advocacy and conducts investigations](#) on referral from the Tribunal and concerned members of the public, into the need for the appointment of substitute decision-makers (guardians and administrators).
- Can be appointed [guardian](#) of last resort by the Tribunal, if an adult with a decision-making disability is in need of a guardian but doesn't have anyone in their life suitable, willing and available to take on the role.
- Promotes awareness and understanding of the guardianship and administration system through website content, publications, a telephone advisory service and [information sessions](#).

## Public Trustee

- Offers independent, professional trustee and asset management services including trust management services, deceased estates administration and drafting Wills and enduring powers of attorney.
- Can be appointed administrator by the Tribunal, if a person with a decision-making disability needs an administrator but doesn't have anyone in their life suitable, willing and available to take on the role.
- When the Tribunal appoints a family member or friend as administrator, they receive the support of the Public Trustee's [Private Administrator Support Team](#). The private administrator is required to provide annual financial statements to the Public Trustee.

## Principles of the *Guardianship and Administration Act 1990*

- Best interests.
- Presumption of competence.
- Least restrictive alternative.
- Limited versus plenary.
- Respect for the person's wishes.

## Least Restrictive Alternatives

One of the five underpinning principles of the Act is **less restrictive alternative**. This means, when an adult cannot make decisions for themselves, the support provided to them for decision-making should be done in the least restrictive way possible.

The least restrictive way for a person to make decisions is for them to continue making their own decisions independently. But when a person has a cognitive impairment (from an intellectual disability, dementia, an acquired brain injury or mental illness), they may not be able to make their own decisions. Or, in making decisions, they might put themselves at risk of neglect, exploitation or abuse.

When this happens, the least restrictive way to support the person is to have a trusted family member or friend, who knows them well, to work with them in making decisions.

There doesn't need to be any formal or legal appointments made – the supported decision-making can happen in an informal way, with the family member or friend helping them to make decisions in their best interests.

## **Substitute Decision-Makers: Appointed by the Person**

Some people decide they want to formalise these arrangements ahead of time, so that if they ever do lose capacity, everyone is clear about who they want to make their decisions and/or their views on some aspects of their life.

Adults with capacity can plan for a time when they may not be able to make their own decisions by completing one or more of the following documents:

- an [enduring power of attorney](#): used to appoint an attorney (who can make property and financial decisions)
- an [enduring power of guardianship](#): used to appoint an enduring guardian (who can make personal, lifestyle and treatment decisions)
- an [advance health directive](#): not a substitute decision-maker but, in effect, the document “speaks” for the person to treating health professionals if they have lost capacity and are in need of treatment, which is outlined in their advance health directive.

In addition to the website information about these three planning documents, the Office of the Public Advocate has developed the following publications:

### **Enduring Powers of Attorney:**

- [A Guide to Enduring Powers of Attorney](#): a comprehensive publication broken down into three sections – one section for the person making the document, one for the person being asked to take on the role and a general section including step-by-step instructions on completing the form.
- [Enduring Powers of Attorney Information Kit](#): a summarised version of the guide, with the basics for the person making the document, including step-by-step instructions.

### **Enduring Powers of Guardianship:**

- [A Guide to Enduring Powers of Guardianship](#): a comprehensive publication broken into three sections – one section for the person making the document, one for the person being asked to take on the role and a general section including step-by-step instructions on completing the form.

- [Enduring Powers of Guardianship Information Kit](#): a summarised version of the guide, with the basics for the person making the document, including step-by-step instructions.

### **Advance Health Directives:**

- The Department of Health has developed a [Guide to Advance Health Directives](#).

## **Substitute Decision-Makers: Treatment Decisions**

With regard to medical, surgical and dental treatment decisions for an adult who lacks capacity, the legislation sets out the order of who treating health professionals should seek consent from. This order is referred to as the [hierarchy of treatment decision-makers](#).

Health professionals must first refer to a person's advance health directive, which is a document someone can make while they have capacity, which sets out treatment they would/would not consent to in particular circumstances.

If the person has not made an advance health directive, or it does not cover the treatment required, the health professional must seek a treatment decision from the first person on the list, who is 18 years of age or older, has full capacity and is willing and available to make the decision.

Where a person higher on the list is not willing or available to make the decision, the health professional can move down the list until they find someone who meets the criteria to make the decision.

If treatment is needed urgently and the treating health professional is not able to immediately obtain a treatment decision from the appropriate person in the hierarchy (or an advance health directive if applicable), the treating health professional can make the required treatment decision.

The following summarises the hierarchy of treatment decision-makers.

## Hierarchy of Treatment Decision-Makers

Where an AHD does not exist or does not cover the treatment decision required, the health professional must obtain a decision for non-urgent treatment from the first person in the hierarchy who is 18 years of age or older, has full legal capacity and is willing and available to make a decision.

### Advance Health Directive (AHD)

Decisions must be made in accordance with the AHD unless circumstances have changed or could not have been foreseen by the maker.

Enduring Guardian with authority

Guardian with authority

Spouse or de facto partner

Adult son or daughter

Parent

Sibling

Primary unpaid care giver

Other person with close personal relationship

## Substitute Decision-Makers: Appointed by the State Administrative Tribunal

For some people, they may not have completed an enduring power of attorney, enduring power of guardianship or advance health directive, or the documents may not be working properly, and informal supported decision-making arrangements might not be possible.

This might be because the person does not have anyone in their life willing to take on the role of a substitute decision-maker (whether formally or informally). Or they might have too many people wanting to take on this role, and these family members and/or friends might not be able to agree on what is in the person's best interests.

This is where the *Guardianship and Administration Act 1990* provides a safety net.

If someone believes there is the need for a guardian and/or administrator to be appointed for a person with a decision-making disability, they can apply to the State Administrative Tribunal. They can also apply if they think that someone who has been appointed as a guardian, enduring guardian, administrator or attorney is not acting in the person's best interests or if the arrangements are not working well.

The Tribunal can appoint a guardian and/or administrator if it is convinced:

- the person **lacks decision-making capacity** (which is determined by medical evidence), or
- in relation to the appointment of a guardian, the person is in need of oversight, care or control in the interests of their safety and welfare or to protect others
- **less restrictive** arrangements are **not achievable**, and
- there is a **need** for a substitute decision-maker being appointed.

## Appointment of a Guardian by the State Administrative Tribunal

- Guardians are appointed with the authority to make personal, lifestyle and treatment decisions, such as where a person lives, who they have contact with, what services they receive and what medical treatment they receive.
- In the first instance, the Tribunal always considers appointing a family member or friend as guardian (known as a **private guardian**) where possible and practical.
- As a last resort, the Public Advocate can be appointed as guardian. The Public Advocate then delegates her authority to a team of people working in the Office of the Public Advocate (known as **delegated guardians**).
- Administrators are appointed with the authority to make financial and property decisions. For example, they access income and pay expenses, sell/lease property and manage investments or contracts.
- An administrator may be appointed for an adult or a child.
- In the first instance, the Tribunal always considers appointing a family member or friend as administrator (known as a 'private administrator') where possible and practical.
- [Private Administrators](#) are supported by the Public Trustee's Private Administrator Support Team and must provide annual accounts to the Public Trustee.
- If family or friends are not willing or suitable, the Public Trustee can be appointed as administrator. If there is a conflict of interest for the Public Trustee to be appointed, the Public Advocate may be appointed as a last resort.

## **Review of guardianship and administration orders**

When the State Administrative Tribunal makes a guardianship and/or administration order, it specifies the period of the order, with the maximum period of any order being five years.

Before any order expires, there is an automatic process to ensure the order is reviewed by the Tribunal to see if the order needs to be changed, revoked or a new order made.

There are also a number of situations that result in a mandatory review of guardianship and administration orders. For example, if a guardian or administrator dies or no longer wants to take on the role.

Other than periodic and mandatory reviews, the Public Advocate, Public Trustee, the represented person (the person the order has been made for) or anyone else with an interest – who the State Administrative Tribunal allows – can apply to the Tribunal for a review of an order (under section 86 of the Act).

If a guardianship or administration order was made during a Tribunal hearing where an individual Member of the Tribunal was sitting on his/her own – and any party to the application is unhappy with that decision – they can appeal the decision to a full panel of the Tribunal (under section 17A of the Act).

A full panel of the Tribunal is a panel of three and includes either the President or one of the Deputy Presidents and two other Tribunal Members.

## A Summary of the Decision-Making Options: Independent, Informal and Substitute

| Type                                                                                                                      | Description                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|---------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Independent</b> decision-making                                                                                        | Person makes their own decisions.                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| <b>Informal</b> decision-making                                                                                           | A trusted family member or friend supports the person in making decisions in their best interests. This is an informal arrangement.                                                                                                                                                                                                                                                                                                                                     |
| <b>Substitute</b> decision-maker from 'hierarchy' making treatment decisions                                              | When a health professional requires consent to treat a person lacking capacity, the health professional must follow a set order in seeking this consent. This order (determined in the Act), is referred to as the <a href="#">hierarchy of treatment decision-makers</a> .                                                                                                                                                                                             |
| <b>Substitute</b> decision-maker appointed by person (while they have capacity)                                           | A person with capacity can appoint a substitute decision-maker to make financial decisions on their behalf by making an enduring power of attorney, and/or appoint a substitute decision-maker to make personal, lifestyle and treatment decisions on their behalf by making an enduring power of guardianship. An advance health directive can also be made by a person with capacity, which outlines their medical treatment wishes to treating health professionals. |
| Family member or friend appointed guardian and/or administrator by Tribunal ( <b>substitute</b> decision-makers)          | If the less restrictive alternatives above are no longer viable options, an application can be made to the State Administrative Tribunal to consider appointing a guardian and/or administrator. Preference is that a family member or friend is appointed.                                                                                                                                                                                                             |
| Public Advocate appointed guardian and/or Public Trustee appointed administrator by Tribunal (substitute decision-makers) | If the person does not have anyone in their life who is suitable, willing and available to be appointed, the Public Advocate can be appointed as guardian, and the Public Trustee as administrator.                                                                                                                                                                                                                                                                     |

## **Concerns About an Adult Client Who Lacks Decision-Making Capacity**

It is important to assume the people involved in your adult client's life are trying to do the right thing – but might not be succeeding for a number of reasons, including:

- not having the right information
- they don't properly understand their role
- being overwhelmed and possibly burnt-out as a carer
- trying to balance the needs of the person and other family members.

Try to work with your client and the people involved in their life to see if you can explore the situation and find solutions so that informal (less restrictive) arrangements can work in the person's best interests.

If you establish that a client is at risk, you have a duty of care to take reasonable precautions to protect the person from harm. This may involve referral to relevant agencies, contacting the Office of the Public Advocate for more advice and possibly making an application to the Tribunal.

## **Informal and Substitute Decision-Making in Practice: Personal and lifestyle decisions**

If a person (who had capacity) did not appoint an enduring guardian with authority to make personal and lifestyle decisions – and they no longer have capacity to make such decisions for themselves – a family member or friend can make these decisions on their behalf, without any formal authority.

This might include deciding where a person should live (such as remaining at home, moving to an aged-care facility or a supported share-house), what services a person should receive and what activities they participate in.

If these types of decisions are needed, and the adult with a decision-making disability, their family and the professionals involved in their life are all in agreement that a decision is in the person's best interests, the decision could be made informally.

If these informal arrangements breakdown for some reason (for example, there is conflict about what is in the person's best interests) there may be a need for an application to the Tribunal for the appointment of a guardian.

## Informal and Substitute Decision-Making in Practice: Medical treatment decisions

If a person does not have capacity to make their own treatment decisions, the Guardianship and Administration Act 1990 sets out an order of who/what health professionals should consult to seek informed consent for treatment.

This 'order' or [hierarchy of treatment decision-makers](#), was covered earlier.

**Treatment** is defined as “medical or surgical treatment including a life sustaining measure and palliative care, or dental treatment, or other health care”.

If the person does not have a valid advanced health directive (AHD) that covers the specific circumstances and does not have an enduring guardian or guardian with treatment authority, the health professionals go to the next person on the hierarchy. This will often result in the relevant decision-maker being a family member. There is no need for guardianship appointments for decisions to be made this way.

## Informal and Substitute Decision-Making in Practice: Financial decisions

Informal processes for **financial decisions** are possible, but often breakdown because most organisations that deal with money and contracts want to see a formal authority before they will talk to someone about another person's finances. This might be because the information is confidential and they want to make sure they don't talk to the wrong person.

Some companies may be open to finding informal ways of doing things, such as managing a bank account or receiving a Centrelink payment on behalf of an adult with a decision-making disability. It is more likely, however, that an application for an administrator may need to be made at some point if a person has not put nominees in place or made an enduring power of attorney.

## Making an Application to the Tribunal

If you are concerned about a client who lacks decision-making capacity and you have explored their situation; attempted to work with family/friends; been unable to find less restrictive alternatives; possibly sought further advice from the Office of the Public Advocate; and you reach the conclusion that you need to make an application to the State Administrative Tribunal regarding your client, the following information may be useful.

Firstly, you should make the application direct to the Tribunal rather than via a community referred investigation with the Office of the Public Advocate. A direct application is better because you have a duty of care to your client and you will already have information regarding your client and their situation – which will be needed for the application and the Tribunal will hear the matter in a shorter timeframe.

To make an application to the Tribunal, you will need to use the Department of Justice's [eCourts portal](#).

You will need to log-in and create a user account. Your organisation may choose to create a generic account for all staff, or individual staff may create their own accounts. Once you have a log-in, you will be able to generate, save, edit and submit your application.

The **quality** of information you include in the application is important.

Key information to include in the application:

- Demonstrate and provide evidence that the person **lacks decision-making capacity**.
- Demonstrate there is a **need** for a guardian and/or administrator to be appointed.
- What are the **key issues**? Explain why you are making the application. Detail what have you tried already in an **attempt to resolve the issue**.

Be cautious with marking applications to the Tribunal as urgent. If an application is urgent, detail the reasons for urgency so the Tribunal understands and can list it in a timely manner. The standard timeframe for a matter to be heard by the Tribunal is six to eight weeks from the date of the application.

# Tips For Attending a Tribunal Hearing for New Applications

Who should attend?

- you (as the applicant)
- proposed represented person (PRP)
- any other interested party.

Your role as applicant:

- ensure your client (the proposed represented person) attends
- answer questions as required by the Tribunal.

Advise the Tribunal of any special requirements ahead of time:  
phone/video links

- security concerns
- translator services.

# Elder Abuse

*“A single or repeated act, or lack of appropriate action, occurring within a relationship where there is an expectation of trust which causes harm or distress to an older person.”* (World Health Organisation definition)

This includes physical, financial, emotional, psychological and sexual abuse, social isolation and neglect.

If you know or suspect someone is being abused:

- Talk to the person to see if they want any help.
- Give the person information about how they can get help.
- Talk to an independent agency:
  - Advocare – if the person has capacity
  - Office of the Public Advocate – if the person may not have capacity.
- If there is physical, sexual abuse or any other criminal act, report to police.

## Elder Abuse: what can professionals do?

Where abuse places a person at immediate risk, it must be responded to with urgency:

- determine what can be done to ensure the person's safety
- report to the police if necessary.

If a person lacks capacity, an application to the State Administrative Tribunal can be made and ongoing support provided.

If a person has capacity, access counselling/support to assist them maintain safety.

## Elder Abuse: Who can help?

People over 65 years of age, who still have capacity to make their own decisions and who have concerns about potential abuse, should call the Elder Abuse Helpline on 1300 724 679 (country callers 1800 655 566) or email [rights@advocare.org.au](mailto:rights@advocare.org.au).

The Alliance for the Prevention of Elder Abuse ([APEA website](#)) has more information about elder abuse, including the elder abuse [protocol](#) which helps agencies make appropriate referrals when elder abuse is alleged.

## **Elder Abuse: Who else can help?**

- Office of the Public Advocate [publicadvocate.wa.gov.au](http://publicadvocate.wa.gov.au)  
Telephone: 9278 7300
- Public Trustee [publictrustee.wa.gov.au](http://publictrustee.wa.gov.au)  
Telephone: 1300 746 116
- Advocare [advocare.org.au](http://advocare.org.au)  
Telephone: 9479 7566
- [Older People's Rights Service](#)  
Telephone: 9440 1663

## **For more information on guardianship and administration:**

- State Administrative Tribunal [sat.justice.wa.gov.au](http://sat.justice.wa.gov.au)
- Office of the Public Advocate [publicadvocate.wa.gov.au](http://publicadvocate.wa.gov.au)
- Public Trustee [publictrustee.wa.gov.au](http://publictrustee.wa.gov.au)