

# Information Sheet

Protecting the human rights of adults with decision-making disabilities

## 4. Guardianship

The *Guardianship and Administration Act 1990* (the Act) recognises that people who are not capable of making reasoned decisions for themselves may need additional support and assistance not only to ensure their quality of life is maintained, but also to protect them from the risk of neglect, exploitation and abuse.

A decision-making disability may affect a person's ability to manage various aspects of their lives. People with decision-making disabilities are often dependent on varying levels of support from others to achieve a reasonable quality of life within the community. This support is often given by people who are already involved in their lives, such as family, friends and service providers.

The Act provides for a person with capacity to appoint an enduring guardian by completing an enduring power of guardianship form (see [Information sheet 9](#)). Where this is not possible or the person has chosen not to complete an enduring power of guardianship, the Act provides that the State Administrative Tribunal (the Tribunal) may appoint a guardian for a person with a decision-making disability. This allows a guardian to be appointed as a substitute decision-maker.

A guardian can be appointed to make personal, lifestyle, treatment and medical research decisions in the best interests of an adult who is not capable of making reasoned decisions for themselves because they may have dementia, intellectual disability, mental illness or an acquired brain injury.

Because the appointment of a guardian involves taking away a person's fundamental decision-making rights, it is a course of action which is taken by the Tribunal as a last resort — only after less restrictive measures of assuring the person's wellbeing and safety have been considered and found to be inadequate or unsuitable.

### What types of decisions?

A guardian has legal authority to make personal, lifestyle, treatment and medical research decisions on behalf of a person with a decision-making disability.

These decisions often relate to work, living arrangements or treatment and health care. The decision-making authority of a guardianship order may be limited to specific areas such as treatment and accommodation decisions (limited order) or apply to all areas of the person's life (plenary order).



There are some decisions a guardian cannot make. These include:

- Voting on behalf of the person they represent.
- Making or changing a will on behalf of the person they represent without an order from the Supreme Court.
- Giving consent to the marriage of the person they represent or their minor child.
- Consenting to the sterilisation of the person they represent without an order from the Tribunal.
- Consenting to an abortion. In the absence of a valid Advance Health Directive in which the represented person has expressed their wishes about the conduct of an abortion, only the Tribunal may consent to the performance of an abortion. Such a decision is made only if the Tribunal has determined that the person lacks capacity to make reasonable judgements about an abortion being performed on them, and that the performance of an abortion is in their best interests. The represented person's wishes are considered in determining best interests.
- Giving consent to the adoption of a child of the person they represent.
- Consenting to the making of an application to change the registration of sex or gender, or the issuing of an acknowledgement document, for a child of the person they represent.

## **Best interests**

A guardian is required to act in the best interests of the person they represent by:

- advocating for the person
- encouraging the person to participate as much as possible in community life
- encouraging and assisting the person to care for themselves and to make decisions about their own life
- protecting the person from neglect, abuse and exploitation
- consulting with the person and taking into account their wishes
- maintaining any supportive relationships the person may have
- maintaining the cultural, linguistic and religious environment of the person.

## **Who can be appointed a person's guardian?**

A person nominated as guardian must:

- be at least 18 years of age
- consent to act as guardian to the person about whom the application is being made
- be prepared to act in the person's best interests at all times and encourage the person's independence, personal decision-making and participation in community life
- not be in a position where their own interests conflict with the best interests of the represented person.

In situations where there is no-one willing, suitable or available to take on the role of guardian, the Public Advocate may be appointed by the Tribunal as Guardian of Last Resort.

## Review of Guardianship Orders

The State Administrative Tribunal is required to review all guardianship orders at least every five years but, depending on the circumstances, a review may be conducted sooner.

If an appointed guardian is no longer available to fulfil their responsibilities to the person they represent, an application can be made to the Tribunal for a new guardian to be appointed.

Any person who has an interest in the needs of the person with the decision-making disability can request that the State Administrative Tribunal review the order. If the issues are resolved and there is no longer a need for the order, the Tribunal may revoke the order or if someone is concerned that a guardian is not acting in the person's best interests, the Tribunal can appoint another guardian.

A review will be conducted by the Tribunal if the guardian:

- dies
- wishes to be discharged from their responsibilities
- is no longer able to carry out the role because of physical or mental incapacity
- is found to have been guilty of neglect or misconduct in relation to the person.

The powers of a guardian cease upon the death of the person they represent.

## Advice and support for guardians

If a guardian is uncertain about what decisions to make in the best interests of the represented person they may make an application to the State Administrative Tribunal for direction on what action should be taken (see [Information Sheet 3](#)).

Alternatively, they may contact the Office of the Public Advocate to discuss the options available to them.

## For further information contact

### Office of the Public Advocate

PO Box 6293, EAST PERTH WA 6892

Telephone: 1300 858 455

Email: [opa@justice.wa.gov.au](mailto:opa@justice.wa.gov.au)

Web: [www.publicadvocate.wa.gov.au](http://www.publicadvocate.wa.gov.au)

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