

National Public Guardianship Guidelines

Fourth Edition 2025

Introduction

The intention of these guidelines is to provide the minimum expectations of staff of Offices of the Public Guardian and Offices of the Public Advocate when acting as legal decision makers on behalf of people with impaired decision-making ability (referred to as public guardianship).

The Australian Guardianship and Administration Council (AGAC) developed the first edition of this document in 2001. The second edition was released in 2009 to reflect Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities* (UNCRPD), and to incorporate new expectations regarding the provision of advocacy within the guardianship role. The third edition of this document was released in 2016 following the publication in 2014 by the Australian Law Reform Commission (ALRC) of its *Equality, Capacity and Disability in Commonwealth Laws* report, which sought to operationalise Australia's commitments under the UNCRPD.

This fourth edition follows the release in 2023 of the final report from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. That report, among other things, calls for guardianship laws in Australia to be amended to better enable people to be supported to make their own decisions. The Royal Commission (Recommendation 6.15) specifically called on AGAC to update this document.

AGAC has long had a focus on the prevention of physical, sexual, emotional and financial abuse, and the exploitation and neglect of people with impaired decision-making ability. AGAC has also long had a focus on recognising and responding to abuse when it occurs.

Preamble

The UNCRPD was ratified by Australia on 17 July 2008. The Convention promotes, protects and ensures the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. The Convention defines these rights in each area of life and includes, amongst others, access to justice, freedom of expression, independent life in the community, education, work, standard of living, health care, rehabilitation, and involvement in political and public life.

In particular Article 12 'Equal recognition before the law' obliges parties to the Convention to recognise and ensure that:

- 'persons with disabilities have the right to recognition everywhere as persons before the law';
- 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life';
- 'appropriate measures [are taken] to provide access by persons with disabilities to the support they may require in exercising their legal capacity'; and that
- 'measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body'.

The National Public Guardianship Guidelines need to be applied in the context of the particular guardianship and related legislation in force in each State and Territory jurisdiction, which in many cases was enacted prior to Australia's ratification of the UNCRPD.

At the same time, it is an accepted principle of Australian law that international conventions to which Australia is a party are an important guide to the interpretation of domestic laws, even when the provisions of such conventions are not directly incorporated into domestic legislation.

As the High Court of Australia held in the 1995 *Teoh* case:

'It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law ...'.

The ALRC in 2014 sought to operationalise Australia's commitments under Article 12 of the UNCRPD in proposing the following 'National Decision-Making Principles':

'Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: Will, preferences and rights

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.’

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in its 2023 final report, supported many of the ALRC’s proposals, particularly in its call (Recommendation 6.6) for the adoption of the following ten ‘supported decision-making principles’:

‘Principle 1 – Recognition of the equal right to make decisions

Principle 2 – Presumption of decision-making ability

Principle 3 – Respect for dignity and dignity of risk

Principle 4 – Recognition of informal supporters and advocates

Principle 5 – Access to support

Principle 6 – Decisions directed by will and preferences

Principle 7 – Inclusion of safeguards

Principle 8 – Co-designed processes

Principle 9 – Recognition of diversity

Principle 10 – Cultural safety’.

The National Public Guardianship Guidelines draw on these principles, as well as on common cross-jurisdictional legislative requirements, in articulating eleven key components of the role of public guardians in Australia.

The National Public Guardianship Guidelines

The following eleven guidelines set out the principles for a guardian in their role. The guidelines complement policies, practice standards, and procedures as well as complaint and review mechanisms for people affected by guardians’ decisions, and a range of government requirements relating to areas such as appropriate professional behaviour, privacy and confidentiality, conflicts of interest and ethical work practices.

The National Guidelines apply to agencies with a statutory mandate to provide guardianship services. These are known as the Office of the Public Advocate in Victoria, South Australia, and Western Australia; and the Office of the Public Guardian in New South Wales, Queensland, Tasmania, the Northern Territory, and the Australian Capital Territory.

These National Guidelines cover the following topics:

1. Providing information
2. Supporting decision making
3. Ascertaining will and preferences

4. Ensuring culturally appropriate engagement
5. Advocacy
6. Preventing violence, abuse, exploitation and neglect
7. Making decisions
8. Recording information
9. Participating in guardianship reviews
10. Promoting professional development
11. Observing privacy and confidentiality requirements.

1. Providing information

Public guardianship agencies will ensure that information about their vision or mission, their services and the legislative and ethical principles and policies underlying their services are accessible to all consumers, stakeholders and staff.

Staff providing public guardianship services will ensure that:

- information is available to the represented person (the term given to a person who is the subject of a current Order made by a Tribunal or Court) and other key people in their life about:
 - the role of the office
 - the principles of relevant legislation
 - the authority of the guardian in relation to the represented person
 - customer service standards
 - the use of interpreters
 - how to request reasons for a decision
 - how to make a complaint or have a decision reviewed
 - how to apply for a review of an Order
 - other complaints processes
 - how they can access further relevant information;
- information about substitute consent and the guardian's decision-making authority is provided to all relevant service providers, including medical and dental practitioners providing services to the represented person (unless an Order inhibits this); and that
- information is made available on request in appropriate formats to ensure it is accessible.

2. Supporting decision making

Staff providing public guardianship services will ensure that all reasonable efforts are made to support represented persons to exercise their own decision-making capacity to the extent possible under relevant legislation.

Staff providing public guardianship services in jurisdictions where their office has legislative responsibility to practice supported decision making will ensure that:

- represented persons are encouraged to express their own decisions, and are supported to develop their own decision-making ability; and that

- the role of people who provide decision-making support is acknowledged and respected – including family members, carers and any other significant people chosen by the person to provide support.

3. Ascertaining will and preferences

Staff making legal decisions at public guardianship agencies, subject to the requirements of the legislation operating in their jurisdiction, will endeavour to:

- meet in person or use audio-visual technology to have direct contact with the represented person at least once a year;
- ascertain the will and preferences of the represented person in relation to the subject matter of any prospective decision;
- ascertain what the person would likely have wanted to happen in relation to any prospective decision, where it is not possible to determine the person's current will and preferences. This should be determined through having regard to all available information, including by consulting with family members, carers and other significant people in the person's life where they are available;
- make decisions that accord with the represented person's will and preferences wherever possible;
- override the person's will and preferences only where necessary to protect and safeguard them from unreasonable risk (such as an imminent risk of serious harm);
- if the represented person objects to the proposed decision, make reasonable attempts to ascertain the reasons for their objection and consider possible ways to meet their wishes or resolve any dispute;
- seek and consider the views of key parties involved with the represented person as the proposed decision requires;
- seek and consider the views of relevant medical and other professionals, as the proposed decision requires; and
- consider the potential strengths and weaknesses of advice from service providers, and if there is reason to consider the advice inadequate in some way, seek a second opinion on behalf of the represented person.

4. Ensuring culturally appropriate engagement

Public guardianship agencies will ensure that:

- the engagements of their staff members with First Nations represented persons are respectful, promote cultural safety, and wherever possible enable the represented person to maintain relevant cultural, connection to Country, and language rights; and
- the engagements of their staff members with represented persons from Culturally and Linguistically Diverse communities, and with represented persons from GLBTIQ+ communities, are respectful, promote cultural safety, and wherever possible enable the represented person to maintain relevant linguistic and cultural connections.

5. Advocacy

Represented persons have a right to access housing, health care, support services, and to participate in the community, including through education, employment, recreation, and membership of groups.

Staff making legal decisions at public guardianship agencies will:

- assess whether appropriate options for support and social service provision have been presented to the guardian by service providers, and seek to recognise when a preferable option has not been presented; and
- make all possible attempts to advocate for the represented person, and where appropriate seek advocacy support for the person, so that any decisions that are made will contribute positively to the person's quality of life.

6. Preventing violence, abuse, exploitation and neglect

Guardianship can serve a safeguarding function for represented persons who are at risk of harm by third parties. People with impaired decision-making ability may be vulnerable to physical, sexual, emotional and financial abuse, as well as exploitation and neglect.

Public guardianship agencies will ensure that their staff are appropriately screened through a police check, working with children check, or working with vulnerable people check as required by the law in their jurisdiction and the policy of the employing agency.

Staff providing public guardianship services will:

- in both the initial assessment and subsequent reviews, consider whether the represented person is safe, and whether they have experienced abuse, exploitation or neglect;
- consider the need of the represented person, or those in the person's life, to receive education about the risk of abuse, and how to prevent abuse; and
- take action where there is any reasonable suspicion that a represented person has experienced abuse, exploitation or neglect. This may include contacting an appropriate authority, while taking account of the represented person's wishes.

7. Making decisions

Staff making public guardianship decisions will:

- make decisions according to relevant legislative provisions and principles and the authority of the current Order;
- only make decisions according to the authority delegated to them;
- make decisions following relevant office policies and procedures;
- communicate decisions to the represented person and key parties in a meaningful manner;

- provide written reasons for any decision at the request of the represented person or a key party; and
- review their decision making on a regular basis with their manager.

8. Recording information

Staff making public guardianship decisions will:

- record guardianship decisions in a way that also notes the views of the represented person and other relevant parties, as well as timeframes, conditions and the reasons for decisions;
- identify the reasons for making any decision that diverges from the will and preferences of the represented person; and
- record significant information that has been obtained, including details of key contact people who have been identified.

9. Participating in guardianship reviews

Staff providing public guardianship services will request a review of a guardianship Order if at any time there is a need to extend, review or revoke the powers given under the Order, including in situations where the Order is not working in the way least restrictive of the rights of the represented person.

During a guardianship review, staff providing public guardianship services will:

- consult with the represented person and other relevant people to ascertain their views;
- recommend continuation of any Order for the shortest time possible and only when there is evidence that the represented person needs particular decisions to be made for them; and
- provide a written or verbal report detailing their assessment and recommendation regarding the continuing need for an Order.

10. Promoting professional development

Public guardianship agencies will ensure that:

- all staff have access to individual supervision, support and guidance in the performance of their guardianship role;
- the case of each represented person is reviewed periodically through individual supervision, file reviews or in professional team meetings; and that
- all staff have access to training opportunities during their employment.

Staff making public guardianship decisions will:

- engage in meetings on a regular basis with their manager or colleagues to discuss decision making and professional development needs; and
- undertake continuing professional development in areas relevant to their role.

11. Observing privacy and confidentiality requirements

Public guardianship agencies will develop policies and procedures that protect the privacy and confidentiality of represented persons and the key people in their lives and comply with relevant legislative requirements.

All staff making public guardianship decisions will ensure that they comply with relevant government privacy and confidentiality requirements, as well as any relevant Codes of Conduct.