

# National Standards of Public Guardianship

Third Edition 2016

## Introduction

National Standards of Public Guardianship were first introduced by the Australian Guardianship and Administration Council (AGAC) in 2001. The intention of these standards 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 decision-making disabilities.

These standards were updated in 2009 to reflect Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), and to incorporate new standards for the provision of advocacy within the guardianship role.

In 2014 the Australian Law Reform Commission (ALRC) published its review on *Equality, Capacity and Disability in Commonwealth Laws*, a review that seeks to operationalise Australia's commitments under the UNCRPD. This report will inform future Commonwealth, State and Territory law reform, and informs best practice in upholding the equality of people with disability before the law.

AGAC has long had a focus on the prevention of physical, sexual, emotional and financial abuse, and the exploitation and neglect of at-risk people with decision-making disabilities. AGAC has also long had a focus on recognising and responding to abuse when it occurs. The 2001 standards referred to the

protective role of guardians. This 2016 edition further develops the standards in the context of new safeguarding strategies being developed to uphold the right to safety and freedom from exploitation of people with disabilities as outlined in Article 16 of the UNCRPD.

## 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 participation 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’
- ‘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 Standards of Public Guardianship need to be applied in the context of the particular guardianship and related legislation in force in each State and Territory jurisdiction, which in most 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 has 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 National Standards of Public Guardianship draw on these principles, as well as on common cross-jurisdictional legislative requirements, in articulating ten key components of the role of public guardians in Australia.

## The National Standards of Public Guardianship

The following ten standards set out the principles for a guardian in their role. The standards 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, conflict of interest and ethical work practices.

The National Standards are:

1. Provide information
2. Support decision-making capacity
3. Ascertain will and preferences
4. Advocate
5. Protect
6. Make decisions
7. Record information
8. Participate in guardianship reviews
9. Promote professional development
10. Observe privacy and confidentiality requirements

### 1. Provide information

Agencies with a statutory mandate to provide guardianship services 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 a guardianship service will ensure that:

- Information is made available to the represented person (the term given to a person who is the subject of a current Order made by a Board, Tribunal or Court) and other key people in their life about:
  - > the role of the office
  - > the principles of the legislation
  - > the authority of the guardian in relation to the represented person

- > customer services 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
- > freedom of information provisions.

- 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.
- Information is made available on request in appropriate formats to ensure it is accessible.

### 2. Support decision-making capacity

Staff providing a guardianship service 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 guardianship services in jurisdictions where their Office practices supported decision making as an alternative to substitute decision making will ensure that:

- Any supported decision-making arrangements assist supported persons to express their will and preferences, and to develop their own decision-making capacity.
- The role of people who provide decision-making support is acknowledged and respected – including family members, carers or any other significant people chosen to provide support.

### 3. Ascertain will and preferences

Guardianship staff making legal decisions, subject to the requirements of the legislation operating in their jurisdiction, will endeavour to:

- Meet in person or use audiovisual technology to have direct contact with the represented person at least once a year.
- Ascertain the will and preferences of the represented person.
- Ascertain what the person would likely want, 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 the person from significant risk to their personal or social wellbeing.
- 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.
- Seek and consider the views of relevant medical and other professionals, as the proposed decision requires.
- Consider the 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. Advocate

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 guardianship decisions will:

- Assess whether all 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.
- Make all possible attempts to advocate for the best option so that a decision can be made that improves both the quality of life and opportunity for the represented person.

### 5. Protect

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

Guardianship services 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 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, for education about the risk of abuse, and how to prevent abuse.
- Take action including the referral of the represented person to an appropriate authority where there is any reasonable suspicion that a represented person has experienced abuse, exploitation or neglect, taking into account the person's wishes.

## 6. Make decisions

Staff making 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.
- Review their decision making on a regular basis with their manager.

## 7. Record information

Staff making 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.
- Record significant information that has been obtained, including details of key contacts which have been identified.

## 8. Participate in guardianship reviews

Staff participating in guardianship reviews will:

- Request a review of the current Order by the Board, Tribunal or Court 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.
- Recommend continuation of the Order for the shortest time possible and only when there is evidence that the represented person needs

particular decisions to be made for them.

- Consult with the represented person as far as possible to ascertain their views.
- Consult with relevant key parties and professionals and document their comments.
- Provide a written or verbal report detailing their assessment and recommendation to the Board, Tribunal or Court regarding the continuing need for an Order.

## 9. Promote professional development

Offices with the statutory mandate of guardianship decision making 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.
- All staff have access to training opportunities during their employment.

Staff making guardianship decisions will:

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

## **10. Observe privacy and confidentiality requirements**

Offices with the statutory mandate of guardianship decision making 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 guardianship decisions will ensure that:

- They comply with relevant government privacy and confidentiality requirements, as well as any relevant Codes of Conduct.