

Office of the Public Advocate Systems Advocacy

Autonomy and decision-making support in Australia

A targeted overview of guardianship legislation

February 2014

The document is available online at www.publicadvocate.qld.gov.au or you may contact our Office for access to a hard copy.

Feedback on this document is welcomed. A publication survey is available online and may be submitted electronically. Alternatively, a hard copy may be requested from our Office.

The Queensland Government is committed to providing accessible services to Queenslanders from all culturally and linguistically diverse backgrounds. If you have difficulty in understanding this document, you can contact us on telephone (07) 3224 7424 or by emailing public.advocate@justice.qld.gov.au and we will arrange an interpreter to effectively communicate the report to you.



Disclaimer

Any views or opinions expressed in this document do not necessarily reflect the views of the Department of Justice and Attorney-General or the Queensland Government.

Every effort has been made to ensure this document is accurate, reliable and up to date at the time of publishing. The Office of the Public Advocate will not accept any responsibility for loss caused by reliance on this information and makes no representation or warranty regarding the quality or appropriateness of the data or information.

This work is copyright, however material from this publication may be copied and published without permission on the condition that the meaning of the material is not altered.

© The State of Queensland (Department of Justice and Attorney-General) 2014

Table of contents

- Introduction.....1
- Summary2
- Jurisdictional overview of guardianship legislation6
- Australian Capital Territory6
- New South Wales7
- Northern Territory10
- Queensland12
- South Australia15
- Tasmania17
- Victoria19
- Western Australia22

Introduction

The Office of the Public Advocate is examining the provision of decision-making support to adults with impaired decision-making capacity who interact with the Queensland guardianship system. More specifically, the Office is undertaking research to identify the systemic barriers and enablers in relation to protecting and supporting the right of a person to make their own decisions.

A suite of four documents form the foundation of the research: the conceptual framework, a literature review, a synopsis of the legislation underpinning Queensland's guardianship system, and a targeted overview of guardianship legislation in other Australian jurisdictions (this document). Together, these documents will inform the subsequent phases of the research.

Each Australian State and Territory has developed a legislative framework for guardianship and administration, which all feature different structures and inclusions. This document presents a synopsis of the provisions and considerations relating to the appointment of a guardian or administrator, including when an appointment is required, who should be appointed and the responsibilities of the appointed person. It is based on legislation as at 1 October 2013 and reflects the language used in the legislation of each jurisdiction.

This document is not a comprehensive audit of State and Territory guardianship legislation; it presents broad descriptions of key aspects of legislation. It does not include all aspects of legislation that relate to the provisions and considerations relating to the appointment of a guardian or administrator. For example, the report does not discuss emergency guardianship and administration provisions, review of appointments, making financial gifts, enduring powers of attorney and policies or activities of relevant agencies. Furthermore, the document does not include an overview of relevant case law or other interacting legislation.

The exact nature of how guardians and administrators exercise their functions in each jurisdiction differs according to the duties and responsibilities of guardians and administrators, and the principles that apply in respective legislation. The tables presented in this document summarise the relevant provisions in each jurisdiction that lend support to maximising a person's decision-making autonomy and the use of informal supporting mechanisms to assist people to make decisions instead of resorting to substitute decision-making through guardianship. The inconsistency of terminology across jurisdictions reflects the differing provisions in each jurisdiction.

Summary

In **New South Wales, Western Australia** and the **Northern Territory**, legislation provides an obligation for guardians and administrators, as far as possible, to consult with and take into account the views of the person they are responsible for, however the paramount consideration is a responsibility to act in the best interests of the person, that is, in a protective capacity, rather than in accordance with the wishes or expressed opinions of the person. In **Victoria** and **Tasmania**, guardians and administrators are obliged to give equal consideration to the best interests of the person, the wishes of the person and the least restrictive alternative; however subsequent provisions give additional weight to the requirement to act in a person's best interests. In **Queensland** and the **Australian Capital Territory**, guardians are obliged to the greatest extent possible (without resulting in harm to the person) to act in a way that, in **Queensland**, encourages the person to make their own decisions and to take into account the views and wishes of those under guardianship, and in the **Australian Capital Territory**, to give effect to the person's wishes so far as they can be determined. **South Australia** applies a substituted judgement obligation so that the paramount consideration for a guardian must be what, in the opinion of the guardian, would be the wishes of a person if they were not mentally incapacitated.

In the **Australian Capital Territory**, under the ***Guardianship and Management of Property Act 1991***, a guardian has an obligation to give effect to the person's wishes, so far as they can be determined. If giving effect to the person's wishes would have a significant adverse affect on the interests of the person, then the guardian must give effect to those wishes as far as possible without causing a significant adverse affect. If this is not possible, then the protected person's interests must take precedence over their wishes. A guardian or manager is only appointed if: the person has impaired decision-making ability in relation to a matter; there is likely to be a need for a decision or the person is likely to subject their health, welfare or property to unreasonable risk; and without an appointment the person's needs will not be met or their interests will be significantly adversely affected. When appointing a guardian or manager, the ACT Civil and Administrative Tribunal must consider the views and wishes of the protected person as well as the preservation of existing relationships and compatibility of the proposed appointee with the protected person. The powers of a guardian are limited to the scope of the order made by the ACT Civil and Administrative Tribunal and the guardian's obligations, duties and powers must be exercised in accordance with the decision-making principles. The powers provided to a guardian or administrator must be the least restrictive possible. There is provision for health attorneys to make health decisions, but there are no other informal decision-makers identified in the Act.

In **New South Wales**, under the ***Guardianship Act 1987***, the welfare and interests of the person must be given paramount consideration, however the general principles also recognise that: the person's freedom of decision and action should be restricted as little as possible; that their views should be taken into consideration in the exercise of any functions under the Act; and that they should be encouraged to be as self-reliant as possible. A guardian is only appointed by the Guardianship Tribunal of New South Wales if a person with a disability is totally or partially incapable of managing his or her person. In considering whether to make the appointment, the Tribunal must have regard to the views of the person, their spouse and carer/s, the preservation of existing family relationships and the practicability of services being provided without a guardianship order.

The Tribunal must also consider the compatibility of a prospective guardian with the person. When a guardian is appointed, a plenary guardianship order cannot be made in circumstances where a limited guardianship order would suffice. The Tribunal may also make a financial management order when a person lacks capacity, there is a need for a manager, and the order is in the best interests of the person. The Supreme Court and Mental Health Review Tribunal also have authority to appoint a manager. An appointed guardian or manager can only act within the scope of the functions provided in the order. There is provision for a person responsible (which may include a spouse, close friend or relative) to make health decisions. There are no informal decision-makers identified in the Act.

In the **Northern Territory**, the ***Adult Guardianship Act 1988*** provides that every function or power exercised under the Act must be done in a way that is least restrictive of the person's freedom, ensures the best interests of the person are promoted and gives effect, wherever possible, to the wishes of the represented person. When determining a guardianship application, the Guardianship Panel must consider: the extent of a person's intellectual disability; the nature and extent of support systems available to maintain the proposed represented person in the community; the suitability of the proposed guardian; and the implications, effects or results of the order on the person. When appointing a person as guardian, matters for consideration include the wishes of the proposed represented person, the preservation of existing family relationships and whether the proposed appointee will act in the person's best interests. The powers of a guardian are limited to those specified in the order. A guardian must act in the person's best interests and is obliged to act in a way that will encourage the person to participate in their community, to become capable of caring for themselves and to make reasonable judgements. A guardian may also be appointed as a manager of a person's estate if competent, however if they are not competent an alternative manager may be appointed by the Supreme Court. There are no provisions for informal decision-makers in the Act, including informal health care decision-makers. It is important to note that the ***Advanced Personal Planning Act 2013*** and the ***Advanced Personal Planning (Consequential Amendments) Act 2013*** were assented to on 19 December 2013. These Acts will commence on the day fixed by the Administrator by Gazette notice. As notice had not been given at the time of publishing this document, these Acts have not been included.

In **Queensland**, the ***Guardianship and Administration Act 2000*** places an overriding responsibility on guardians and administrators to perform their functions or exercise their powers in a way that promotes the care and protection of adults under guardianship. Guardians and administrators must also take into account the right of the adult to participate to the greatest extent practicable in decisions affecting their life and the importance of preserving, to the greatest extent practicable, the right of the adult to make their own decisions. This includes providing the adult with any necessary support and access to information to enable their participation and seeking and taking into account, to the greatest extent practicable, the views and wishes of the adult. Guardians and administrators must also act in the way that is least restrictive of the adult's rights. The Queensland Civil and Administrative Tribunal will appoint a guardian or administrator if: the adult has impaired capacity for a matter; there is a need for a decision or the person is likely to subject their health, welfare or property to unreasonable risk; and without an appointment the person's needs will not be adequately met or their interests will not be adequately protected. When making an appointment, the Tribunal must consider whether the proposed appointee will apply the general and health care principles, the compatibility of the adult and proposed appointee and the availability, accessibility, appropriateness and competence of the proposed appointee. Guardians and administrators must apply the general principles, act honestly and with reasonable diligence and comply with any terms of the order. Members of an adult's support network may exercise power for an adult on an informal basis, which may be ratified by the Tribunal. A statutory health attorney (a spouse, carer, friend or relative) may consent to medical treatment if no formal arrangements have been made.

In **South Australia**, under the ***Guardianship and Administration Act 1993***, the paramount consideration is what, in the decision maker's opinion, would be the wishes of the person if they were not mentally incapacitated. There is also an obligation to seek and consider the wishes of the person. When making a guardianship order, consideration must be given to the adequacy of existing informal arrangements for the person's care and financial management and the desire to not disturb these arrangements. All decisions or orders must be the least restrictive of the person's rights and personal autonomy as is consistent with their proper care and protection. A guardian can only be appointed if the Guardianship Board of South Australia is satisfied that the person has a mental incapacity and that the appointee and the person would be compatible. The Board may make a limited or full guardianship or administration order and the guardian's or administrator's powers are then limited to the particular aspects of the protected person's care or welfare contained in the order. A person can give effective consent for medical and dental treatment whether or not they are subject to a guardianship and/or administration order. Where a person lacks capacity and does not have a medical agent or appointed guardian, a relative (including a person with responsibility for the day-to-day supervision, care and wellbeing of the person) may make medical decisions for the person. There are no other provisions for informal decision-making identified in the Act.

In **Tasmania**, a guardian or administrator acting under the ***Guardianship and Administration Act 1995*** must, when exercising powers or functions, give equal consideration to the best interests of the person, the wishes of the person and the least restrictive alternative. A guardian or administrator can only be appointed if: the person has a disability; is unable by reason of that disability to make reasonable judgements in relation to matters relating to their person, circumstance or estate; and is in need of a guardian or administrator. In appointing a guardian or administrator, the Guardianship and Administration Board must consider the suitability of the proposed appointee with regard to: the wishes of the proposed represented person; the preservation of existing family relationships; the compatibility with the proposed represented person and any other appointees; and the availability and accessibility of the appointee to the proposed represented person. Limited guardianship or administration orders can be made, which limit the powers of the guardian or administrator to those specified in the order. The Board may only make a full guardianship order when it is determined that a limited order will be insufficient. A guardian or administrator has a duty to act in the best interests of the person, encourage community participation and self-reliance, act in consultation with the person and take into account their wishes, act as an advocate and protect them from abuse, neglect and exploitation. A spouse, carer, relative or friend of a person may consent to medical treatment if there is no guardian appointed, but there are otherwise no provisions for informal decision-making identified in the Act.

In **Victoria**, a power, function or authority exercised under the ***Guardianship and Administration Act 1986*** must be done in the least restrictive manner and in a way that promotes the best interests of the person, and wherever possible, gives effect to their wishes. A guardian or administrator may be appointed if: the person has a disability; is unable by reason of that disability to make reasonable judgements in relation to their person, circumstances or estate; and is in need of a guardian or administrator. In appointing a guardian, the Victorian Civil and Administrative Tribunal must take into account the: wishes of the person; the desirability of preserving existing family relationships; the compatibility with the proposed represented person and any other appointees; and the availability and accessibility of the appointee to the proposed represented person. Similar considerations apply in respect of the appointment of an administrator. Limited or plenary guardianship orders can be made, and a limited guardian can only exercise the powers specified in the Tribunal's orders.

An administrator may also be vested with limited functions or powers by the Tribunal. A guardian or administrator must act in the best interests of the person. A guardian is considered to do so if they: encourage community participation; encourage and assist the person to become capable of caring for themselves and of making reasonable judgements; act in consultation with the person; and, as far as possible, take into account the person's wishes. Similar criteria apply to administrators. If no formal appointment has been made then a spouse, carer or relative of a person may consent to medical treatment, but there are otherwise no provisions for informal decision-making.

In **Western Australia**, under the ***Guardianship and Administration Act 1990***, the primary concern of the State Administrative Tribunal, guardians and administrators must be the best interests of the person, which includes taking into account, as far as is possible, a person's wishes. Every person is presumed to be capable of looking after their own health and safety and making reasonable judgements about matters relating to themselves and their estate. The Tribunal will not make a guardianship or administration order if a person's needs could be met through other less restrictive means, and where an appointment is made it must impose the least restrictions possible. The Tribunal may appoint a plenary or limited guardian if satisfied that a person is: incapable of looking after their own health and safety; unable to make reasonable judgement about personal matters or requires oversight to do so; and is in need of a guardian. The Tribunal may appoint an administrator if satisfied that a person due to mental disability is unable to make reasonable judgements regarding their estate, and is in need of an administrator. When considering any appointment, the Tribunal must consider the wishes of the represented person. In relation to guardianship orders, the Tribunal must also consider any actual or potential conflicts of interest, the preservation of existing relationships, compatibility with any administrator, and whether the appointee will fulfil the functions. In relation to administration orders, the Tribunal must consider the compatibility with the represented person and any guardian, and the ability of an appointee to perform the role. The Tribunal is not required to consider conflicts of interest. Factors that indicate that a guardian or administrator has acted in the best interests of the represented person include: encourage community participation; encourage and assist the person to become capable of caring for themselves and of making reasonable judgements; maintain the represented person's existing supportive relationships; act in the least restrictive way; and, as far as possible, take into account the wishes of the person. Where a person lacking capacity has no advanced health directive, guardian or enduring guardian, then a spouse, close relative, unpaid carer or other person with whom there is a close personal relationship may make treatment decisions on the person's behalf. The Act also makes provision for persons who are unable, due to mental disability, to make reasonable judgements in respect of their estate but do not need to have an administrator appointed on a continuing basis. The Tribunal may, without appointing an administrator, authorise a person who could be appointed as an administrator to perform any function specified by the Tribunal.

Jurisdictional overview of guardianship legislation

Australian Capital Territory – *Guardianship and Management of Property Act 1991*

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant sections: 4, 5A	Relevant sections: 32A-32F	Relevant sections: 7, 7A, 7B, 8, 9	Relevant sections: 9, 10	Relevant sections: 4, 5A, 7, 7B, 8, 11
<p>Decision-making principles:</p> <ul style="list-style-type: none"> The protected person's wishes, so far as they can be determined, must be given effect to, unless a decision is likely to significantly adversely affect the protected person's interests; If giving effect to the protected person's wishes is likely to significantly adversely affect the protected person's interests, then the decision must give effect to protected person's wishes as far as possible without causing significant adverse affect; If the protected person's wishes cannot be given effect to at all, then the protected person's interests must be promoted; Minimal interference with the protected person's life and lifestyle; Encouragement of self-reliance and community involvement; and The decision-maker must consult all carers, unless this would adversely affect a protected person's interests (s 4). 	<p>Where a person cannot consent to treatment and does not have an appropriate attorney or guardian, a health attorney (priority order: domestic partner, carer or close relative/friend) who is best able to represent the protected person's views may consent to medical treatment of the person (ss 32B, 32D).</p> <p>Health professionals and health attorney must follow decision-making principles (s 32E).</p>	<p>A guardian or manager is appointed if:</p> <ul style="list-style-type: none"> a person has impaired decision-making ability in relation to a matter relating to their health, welfare, finances or property; and during that impairment there is or is likely to be a need for a decision, or the person is likely to subject their health, welfare or property to unreasonable risk; and a guardian or manager is not appointed, the person's needs will not be met or the person's interests will be significantly adversely affected (ss 7, 8). <p>The Supreme Court may give a direction under the <i>Crimes Act 1900</i>, which requires the Tribunal to appoint a guardian as directed (s 7A).</p>	<p>Relevant considerations affecting appointment are:</p> <ul style="list-style-type: none"> person must follow the decision-making principles and be suitable for appointment; and ACAT must consider the: views and wishes of protected person, preservation of existing relationships, compatibility of proposed appointee with protected person, location of proposed appointee, availability and accessibility of proposed appointee to protected person, competency of proposed appointee to exercise required functions and any conflicts of interests (s 10). <p>Public Advocate or an individual may be appointed as guardian; Public Advocate, Public Trustee, trustee company or individual may be appointed as a manager; however priority is given to an individual (s 9).</p>	<p>A guardian has the powers necessary and desirable to make decisions for the person in accordance with decision-making principles. These may relate to: residence, education, employment, medical and legal matters (ss 7(2), 7(3)).</p> <p>A manager may be appointed to manage all or part of a person's property, with the powers that are necessary or desirable to make decisions in accordance with the decision-making principles (s 8(2)).</p> <p>The powers given to a manager are the powers that the person would have had, if the person were legally competent to exercise powers in relation to their property (s 8(3)).</p> <p>Powers given to a guardian or manager must be no more restrictive of a person's freedom of decision and action than is necessary to achieve the purpose of the order (s 11).</p>

New South Wales - Guardianship Act 1987 (GA) and New South Wales Trustee and Guardian Act 2009 (TGA)

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
<p>Relevant section GA: 4 Relevant section TGA: 39</p>	<p>Relevant sections GA: 32, 33A, 36, 40</p>	<p>Relevant sections GA: 3, 6, 6B, 14-16, 25E, 25G, 25M Relevant sections TGA: 40-41, 44-46, 52, 71</p>	<p>Relevant sections GA: 14, 15, 17, 25M Relevant section TGA: 68</p>	<p>Relevant sections GA: 6E, 6F, 16, 21, 21A, 21B, 26, 28 Relevant sections TGA: 16, 55-59, 59, 63-68, 71-76</p>
<p>The general principles:</p> <ul style="list-style-type: none"> • welfare and interests of the person should be given paramount consideration; • freedom of decision and action of a person should be restricted as little as possible; • the person should be encouraged, as far as possible, to live a normal life in the community; • the views of the person in relation to the exercise of those functions should be taken into consideration; • the importance of preserving family relationships and the cultural and linguistic environments should be recognised; • the person should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs; and • the person should be protected from neglect, abuse and exploitation (s 4, 39). 	<p>A person responsible (hierarchy: guardian with power to consent, spouse with close relationship who is not under guardianship, carer, close friend or relative) may consent to minor or major medical or dental treatment (ss 33A, 36).</p> <p>A person responsible must, when considering whether to provide consent, have regard to the views of the patient, the details of the treatment and section 32 of the Act (s 40).</p>	<p>An adult may appoint another adult as their enduring guardian, provided the other adult is not involved or related to someone involved in the administration or provision of the person's accommodation, medical services or other support (s 6B).¹</p> <p>The Tribunal may make a guardianship order if it is determined that the person is a person in need of a guardian, which is a person who, because of a disability, is totally or partially incapable of managing his or her person (ss 3, 14).</p> <p>When deciding whether to make a guardianship order, the Tribunal will have regard to:</p> <ul style="list-style-type: none"> • the views of the person, their spouse and carer/s; • the preservation of existing family relationships and cultural and linguistic environments; and • the practicability of services being provided to the person without the need for a guardianship order (s 14(2)). 	<p>A person may be appointed as a guardian if:</p> <ul style="list-style-type: none"> • their personality is generally compatible with the person; • there is no conflict between their interests and the interests of the person; and • they are willing and able to exercise the functions of the order (s 17). <p>The Public Guardian must not be appointed where there is another person who could be appointed as guardian (s 15).</p> <p>If the Tribunal makes a financial management order, they may appoint a suitable person as manager² or commit the management of the estate to the NSW Trustee (s 25M(1)).³</p>	<p>An enduring guardian may perform the following functions:</p> <ul style="list-style-type: none"> • deciding the place of residence and the health care and personal services received; • giving consent for medical and dental treatment; and • performing other functions specified in the instrument (s 6E(1)). <p>A plenary guardianship order gives the guardian full custody of the person and authority to perform all of the functions a guardian has at law or in equity (s 21(1)).</p> <p>A limited guardianship order must specify the extent to which the guardian has custody of the person and which of the functions of a guardian the guardian has in respect of the represented person (s 16(2) GA).</p>

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
<p>The <i>Guardianship Act 1987</i> also provides that the community should be encouraged to apply and promote the principles (s 4).</p>		<p>A plenary guardianship order cannot be made in circumstances where a limited guardianship order would suffice (s 15(4)).</p> <p>A guardianship order may be made subject to such conditions as the Tribunal considers appropriate to specify (s 16(1)).</p> <p>The Tribunal may make a financial management order if:</p> <ul style="list-style-type: none"> the person does not have capacity for those matters; there is a need for another person to manage those affairs on behalf of the person; and the order is in the best interests of the person (s 25E, 25G). <p>The Tribunal may exclude a specified part of an estate from a financial management order (s 25E).</p> <p>Whilst a person’s estate is subject to management, the New South Wales Trustee (NSW Trustee) may authorise the person to deal with as much of the estate as is considered appropriate (s 71).</p>	<p>If a private person is appointed as manager, they must not interfere with the estate in any way unless directions have been obtained from the Supreme Court or the NSW Trustee has (under division 2, part 4.5 of the <i>NSW Trustee and Guardian Act 2009</i>) authorised the person to exercise functions in respect of the estate. The person, however, may act to protect the estate pending direction or authorisation (s 25M(2)-(3)). A private manager may be required to give security to the NSW Trustee (s 68).</p>	<p>Where a person’s estate is managed by the NSW Trustee, the Trustee may exercise all functions necessary to the management and care of the estate, and any other functions directed or authorised by the Supreme Court or Tribunal (s 56).</p> <p>In relation to its protective capacities, the NSW Trustee may:</p> <ul style="list-style-type: none"> exercise all functions the person has and can or would have and could exercise if not incapacitated (s 57(1)); make decisions regarding the person’s real property, business and legal matters (s 16 <i>TGA</i>); and apply a person’s money for expenses related to the person’s estate, debts, shares and the maintenance of the person, their spouse and dependents (s 59). <p>Where an individual is appointed as manager, the Supreme Court or NSW Trustee may make orders in relation to the administration and management of an estate and in connection with authorising, directing, enforcing and supervising the exercise of the functions of managers (s 64).</p> <p>These orders may be made generally regarding debts, maintenance of family and management of the estate and also in respect of more specific property matters (s 65).</p>

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
		<p>The Supreme Court (on application or their own motion) and the Mental Health Review Tribunal (MHRT) (on application or when detaining a person to a mental health facility) may declare that a person is incapable of managing their own affairs and order that the person's estate be subject to management. The Supreme Court may appoint a suitable person or commit the management of the estate to the NSW Trustee, while the MHRT may do only the latter (ss 41, 44-46, 52).</p> <p>An order by the Supreme Court or the MHRT may be for the management of the whole or part of a person's estate (s 40).</p>		<p>The NSW Trustee (subject to an order by the Supreme Court or Tribunal) may authorise a manager to have and exercise specified functions necessary and incidental to the management and care of an estate or otherwise required and give directions to a manager (s 66).</p> <p>Before taking action in respect of a person's estate, the NSW Trustee must determine if friends or relatives should be consulted, conduct any necessary consultation and consider any submissions (s 72).</p> <p>At the request of a person or their relatives a manager must, as far as is practicable, preserve items of a personal nature (s 75).</p>

¹ The legislation in New South Wales does not set a threshold for the appointment of an enduring guardian or include any statutory requirements regarding a person's capacity to make such an appointment, however see *Gibbons v Wright* (1953) 91 CLR 423. In that decision, the High Court stated that there is no 'fixed standard of sanity' that can be required to establish the validity of all transactions; rather, in respect of each transaction, each party must have the capacity to understand the general nature of what he or she is doing by participating in the transaction (437). In relation to a written instrument, that requirement is satisfied if a party can understand what they have done by executing the instrument, when the general purport of the instrument is explained to them (438). An instrument is void if at the time of signing the instrument, the signatory was incapable of understanding that he or she was making a signature (443). Further, a power of attorney is void if given by a person who is incapable of understanding its effect (448). However, any instrument (other than a power of attorney) that is executed by a person incapable of understanding the effect or the general purport of the document is not for that reason void, but may be voidable (449). If an instrument is voidable for this reason, unless and until that person or their representative elects to avoid the instrument, the instrument is valid (439).

² There is no definition of the term 'suitable person' in the Act, however see *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 241-243. In this decision, Kirby P (with whom Sheller JA and Windeyer A-JA agreed) stated that it was inappropriate for the court's discretion to appoint or remove a manager to be confined by rules or guidelines, other than a need to consider all relevant circumstances. However, Kirby P provided a checklist of considerations that were intended to suggest a framework of approach but were not intended to limit other applicable considerations. These included: the purposes of the legislation; demonstration of some reason for removal of an appointed manager; the abiding rule when exercising a power is the achievement of the protected person's best interests; an appointee may be removed and replaced if incompetent or acting improperly or unlawfully; a conflict of property-related interests, particularly amongst family, may be 'more apparent than real' and may not present an absolute bar to appointment; the appointment of the Protective Commissioner may have the advantages of independence, a dispassionate and neutral approach, expertise and security against loss or damage; the appointment of a family member may have the advantages of familiarity with the estate, no management costs, increased ability of the protected person (if disabled) to interact with the appointed family member (and therefore as far as possible to have charge of or influence over the management), love and affection for the protected person, special features of the case and special qualities of the applicants; and the Court should satisfy itself that the income and assets of the estate are devoted to the protected person's interests.

³ For information regarding the hierarchy of appointees, see *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 238-239. In this decision, Kirby P (with whom Sheller JA and Windeyer A-JA agreed) observed that the equivalent section 22 of the *Protected Estates Act 1983* provided first that a 'suitable person' should be appointed as manager and only secondly that the management of an estate should be committed to the Protective Commissioner. Kirby P stated that this was 'a sensible hierarchy of choices' and that in many instances it would be appropriate for a family member to act as manager, with the court historically intervening only when family are unwilling or unsuitable for appointment. Kirby P stated that there was a danger in the administration of the Act overlooking not only this natural order but also the way in which parliament has reflected this order in the Act. These observations apply equally to the current *Guardianship Act 1987*.

Northern Territory - Adult Guardianship Act 1988 (AGA) and Aged and Infirm Persons' Property Act 1979 (AIPPA)

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant section AGA: 4		Relevant sections AGA: 8-9, 14-16 Relevant sections AIPPA: 5-7, 9, 11-16	Relevant sections AGA: 14, 16 (1)	Relevant sections AGA: 16-18, 20 Relevant section AIPPA: 17
<p>Every function, power, authority, discretion, jurisdiction and duty conferred or imposed by the Act is to be exercised or performed so that:</p> <ul style="list-style-type: none"> • people adopt means of execution that are the least restrictive of a represented person's freedom of decision and action; • best interests of represented person are promoted; and • wishes of represented person are, wherever possible, given effect to (s 4). 	<p>Nil provisions regarding consent to medical treatment without appointment.</p>	<p>When considering an application for guardianship, a Guardianship Panel of the Local Court must obtain information about:</p> <ul style="list-style-type: none"> • extent of intellectual disability of proposed represented person; • nature and extent of support systems available to maintain proposed represented person in the community or that have previously been used for that person; • matters of cultural significance to the person or their community; and • whether a guardian should be appointed and if so: suitability of proposed guardian, limitations or conditions that should be placed on the guardianship order and the implications, effects or results of the order on the proposed represented person, their family and their community (s 9(3) AGA). <p>The order may be full, conditional or temporary (s 15 AGA).</p>	<p>A person may be appointed guardian if:</p> <ul style="list-style-type: none"> • they will act in the best interests of proposed represented person; and • there is no actual or possible conflict between their interests and the interests of the person; and • they are a suitable person. Considerations for determining suitability are: wishes of the proposed represented person, preservation of existing family relationships, compatibility with the proposed represented person and manager (if any), availability and accessibility to proposed represented person (s 14). <p>The Public Guardian may be appointed as guardian if there is no other person who fulfils the requirements of an appointee (s 14).</p>	<p>If a person is appointed by a full guardianship order, they will have all powers and duties that would exist if they were the parent and the represented person were their infant child. The powers of a guardian include (without limitation) decisions about residence, employment and health care. The guardian may be made subject to conditions and restrictions as the Court thinks fit (s 17(1)-(3) AGA).</p> <p>If a person is appointed under a conditional guardianship order, they will be given powers and duties as specified by the Court in the guardianship order and subject to conditions and restrictions as the Court thinks fit (s 18).</p>

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
		<p>Under the <i>Aged and Infirm Persons' Property Act 1979</i> the Supreme Court (on application or their own motion) may make, vary or rescind a protection order in respect of the estate or part of the estate of any person (ss 7, 11).</p> <p>The Supreme Court must be satisfied that due to a person's age, disease, illness or mental or physical infirmity, it is necessary in the interests of the person or their dependants that their estate be protected (s 12(1)). The Supreme Court must take into account relevant reports and whether the person is either unable (wholly or partly) to manage their affairs or is being or liable to be unduly influenced regarding their estate (s 12).</p> <p>The protection order will appoint the Public Trustee or another person/s as manager of the estate or part thereof. A person/s may be required to give a security to the Public Trustee (s 13).</p> <p>A protection order may be made subject to terms and conditions as the Supreme Court considers necessary, including the continuation of payments to dependents, the use of money or powers, and the preservation of property (s 16 <i>AIPPA</i>).</p>	<p>A guardian may also, if competent, be appointed as the manager of the person's estate. If the guardian is not competent, the Court may order that the Public Trustee or another person make an application under the <i>Aged and Infirm Persons' Property Act 1979</i> for a protection order (s 16(1)).</p>	<p>A guardian must act in the best interests of the represented person, and does so if they act as far as possible for the represented person:</p> <ul style="list-style-type: none"> • as an advocate; • in a way that will encourage them to participate in the community, to become capable of caring for themselves and to make reasonable judgements; • to protect them from neglect, abuse or exploitation; and • in consultation with them and taking into account, so far as is possible, their wishes (s 20). <p>A manager may deal with the person's estate, effects and business and may apply the person's money for the maintenance of the person and their dependants. Other powers and duties may be specified in a protection order. If the Public Trustee is the manager then the powers, obligations and duties in the <i>Public Trustee Act</i> will also apply (s 17 <i>AIPPA</i>).</p>

Note: The *Advanced Personal Planning Act 2013* and *Advanced Personal Planning (Consequential Amendments) Act 2013* were assented to on 19 December 2013. These Acts will commence on the day fixed by the Administrator by Gazette notice. As notice had not been given at the time of publishing this document, these Acts have not been included.

Queensland - Guardianship and Administration Act 2000 (GAA) and Powers of Attorney Act 1998 ss 62-63 (PAA)

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant sections GAA: 5-7, schedule 1	Relevant sections GAA: 9, 66, 154 Relevant sections PAA: 62-63	Relevant sections GAA: 12, 19-20, 36	Relevant sections GAA: 15-18, 30	Relevant sections GAA: 11, 33-37, 40, 50-51, 54-55, schedule 2
<p>The general principles:</p> <ul style="list-style-type: none"> adults are presumed to have capacity; guardians and administrators must recognise and take into account the following: <ul style="list-style-type: none"> adults have the same basic human rights and should be empowered to exercise them; adults have a right to respect for their human worth and dignity as an individual; adults are valued members of society and must be encouraged and supported to perform valuable social roles; adults must be encouraged and supported to live and participate in the community; adults must be encouraged and supported to achieve their maximum potential and become as self-reliant as possible; adults' existing supportive relationships should be maintained; adults' cultural and linguistic environment and values should be maintained; 	<p>The exercise of power for a matter for an adult with impaired capacity may be done on an informal basis by members of the adult's existing support network (s 9(2)).</p> <p>The Tribunal may, by order, ratify an exercise of power or approve a proposed exercise of power for a matter by an informal decision-maker if:</p> <ul style="list-style-type: none"> the informal decision-maker has acted or will act honestly and with reasonable diligence; and the matter is not a special personal matter, health matter or special health matter (ss 154(1)-(2)). 	<p>The Tribunal may appoint a guardian for personal matters or an administrator for financial matters, if satisfied that:</p> <ul style="list-style-type: none"> the adult has impaired capacity for the matter; and there is a need for a decision in relation to the matter, or the adult is likely to do something that will or is likely to involve unreasonable risk to the adult's health, welfare or property; and without an appointment the adult's need will not be adequately met or the adult's interests will not be adequately protected (s 12(1)). <p>The appointment of a guardian or administrator may be on terms considered appropriate by the Tribunal (s 12(2)) and a guardian or administrator must exercise their power as required by the terms of the order (s 36).</p> <p>The Tribunal may impose a requirement, including a requirement to give a security on a person who is or is to become a guardian or administrator, and the person must comply with this requirement (s 19).</p>	<p>In determining whether a person is an appropriate guardian or administrator, the Tribunal must consider:</p> <ul style="list-style-type: none"> whether the person is likely to apply the general principles and, if applicable, the health care principle; any conflicts of interests; the compatibility of the proposed appointee with the adult (e.g. communication skills, social and cultural knowledge) and other proposed appointees; the availability and accessibility of proposed appointee to adult; and the appropriateness and competence of proposed appointee to perform functions and exercise powers (includes criminal history, previous refusals or removals from appointment, and bankruptcy or administration proceedings) (s 15). 	<p>A person or entity who performs a function or exercises a power must apply the general principles and the health care principle (s 11(1)).</p> <p>Unless ordered otherwise by the Tribunal, a guardian or administrator is authorised to do, in accordance with the terms of their appointment, anything in relation to personal or financial matters respectively that the adult could have done if the adult had capacity (s 33).</p> <p>Personal matters include decisions regarding accommodation, employment, training, daily issues such as diet and dress, health care, legal matters (other than financial or property matters) and restrictive practices matters (sch 2, part 2).</p> <p>Financial matters include decisions regarding maintenance and accommodation for the adult and their dependents, debts, real and other property, investments, legal matters related to financial or property matters, and dealing with the adult's money (sch 2, part 1).</p>

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
<p>- adults' confidentiality of information must be taken into account;</p> <ul style="list-style-type: none"> adults have a right to participate in decisions and make their own decisions, if possible. Adults must be supported and informed to enable their participation, their views must be considered and actions must be least restrictive of their rights. Substituted judgement must be used when possible, but actions must be consistent with the adult's proper care and protection; power must be exercised in a way that is appropriate to the adult's characteristics and needs (sch 1). <p>The Act acknowledges an adult's:</p> <ul style="list-style-type: none"> right to make decisions, including those with which others may not agree, is fundamental to their inherent dignity; decision-making capacity may differ according to the nature and extent of impairment, type and complexity of decision and support available from existing support networks; right to make decisions should be restricted and interfered with to the least possible extent; and right to adequate and appropriate decision-making support (s 5). 	<p>Where a person cannot consent to medical treatment and does not have an advanced health directive or a guardian or an attorney, then a statutory health attorney (hierarchy: spouse with close and continuing relationship, unpaid carer, close friend or relative, adult guardian) may make a decision. The statutory health attorney may make any decision about a health matter that an adult could lawfully have made if the adult had capacity (s 66).</p>	<p>A proposed administrator must provide a financial management plan to the Tribunal, or its appropriately qualified nominee, for approval (s 20).</p>	<p>The proposed appointee must advise the Tribunal of matters that are relevant to these considerations and, if appointed, must continue to advise the Tribunal of any relevant matters that arise following the appointment and on review (ss 16-17, 30).</p> <p>The Tribunal may make enquiries about a person's appropriateness and competence to perform functions and exercise powers (s 18).</p>	<p>A guardian or administrator must:</p> <ul style="list-style-type: none"> apply the general principles (s 34); exercise their power honestly and with reasonable diligence to protect the adult's interests (s 35); exercise their power as required by the terms of any Tribunal order (s 36); and consult with other appointees regularly to avoid any prejudice to the adult's interests by way of a breakdown in communication between them (s 40). <p>An administrator must also:</p> <ul style="list-style-type: none"> avoid conflict transactions unless authorised by the Tribunal (s 37); keep records and produce them when required (s 49); keep their property separate from the adult's property, unless jointly owned (s 50); invest only in authorised investments, except in cases where existing non-authorised investments are continued (s 51); and provide for the needs of the adult's dependents, to the extent reasonable in the circumstances (s 55).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
<p>The purpose of the Act is to balance the adult's rights to maximum autonomy in decision-making and appropriate support for decision-making (s 6).</p> <p>The Act achieves its purpose by:</p> <ul style="list-style-type: none"> • presuming that an adult has capacity for a matter (s 7(a)); • stating principles to be observed (s 7(c)); and • encouraging decision-making involvement by adult's support network (s 7(d)). <p>The community is encouraged to apply and promote the general principles (s 11(3)).</p>				

South Australia - Guardianship and Administration Act 1993

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant section: 5	Relevant sections: 3, 58-59	Relevant sections: 25, 29, 35, 50-51	Relevant sections: 29, 50-51	Relevant sections: 17, 25(5), 29, 31, 39
<p>Where a decision or an order in relation to a person or their estate is made pursuant to the Act or to powers conferred by or under the Act:</p> <ul style="list-style-type: none"> • paramount consideration must be given to what would, in the decision-maker's opinion, be the wishes of the person if they were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion; • the person's wishes should, unless not possible or reasonably practicable, be sought and considered; • consideration must, when making or affirming a guardianship or administration order, be given to the adequacy of existing informal arrangements for the person's care and financial managements, and to the desirability of not disturbing those arrangements; and • a decision or order must be least restrictive of the person's rights and personal autonomy as is consistent with the proper care and protection of the person (s 5). 	<p>A person can give effective consent for medical and dental treatment, whether or not they are subject to a guardianship and/or administration order (s 58).</p> <p>Where a person cannot consent to medical treatment and does not have a medical agent, an appropriate authority (an available and empowered guardian, relative or the Board following a proper application) may consent to the treatment (ss 58, 59).</p> <p>A relative includes a person who is responsible for the day-to-day supervision, care and wellbeing of the person (s 3).</p>	<p>An adult may appoint another adult as their enduring guardian, provided the other adult is not involved in the person's medical care or treatment (s 25(1)-(4)).</p> <p>A guardian may be appointed if the Board is satisfied that:</p> <ul style="list-style-type: none"> • the subject person has a mental incapacity; • the subject person does not have an enduring guardian; and • an order should be made in respect of the person (s 29(1)). <p>The Board may place a person under limited guardianship, by which the Board will specify aspects of the person's care or welfare that are the responsibility of the guardian or, if limited guardianship is inappropriate, under full guardianship. An order may be subject to conditions or limitations as the Board thinks fit and specifies in the order (s 29(1)-(2), 29(6)).</p>	<p>In determining the suitability of a person as guardian or administrator, the Board must have regard to:</p> <ul style="list-style-type: none"> • whether appointee and person would be incompatible; • if there is an existing family arrangement or relationship that should be preserved or should not be disturbed; • if the appointee would be competent to perform the functions of guardian or administrator and would do so in accordance with the principles; • if the appointee would be readily available; and • if any conflict would arise from the appointment (s 50(1)). <p>The Public Advocate may be appointed as guardian only if no other order would be appropriate (s 29(4)).</p>	<p>An enduring guardian may exercise the powers of a guardian at law or in equity and make decisions regarding medical treatment, unless a medical agent has been appointed (s25(5)).</p> <p>A person appointed as a guardian under this Part has and may exercise, subject to the Act and the terms of the Board's order, all the powers a guardian has at law or in equity (s 31).</p> <p>A limited guardianship order is an order by which the Board specifies the particular aspects of the protected person's care or welfare that are to be the responsibility of the appointed guardian or guardians (s 29).</p> <p>An order may be subject to conditions or limitations as the Board thinks fit, or may confer additional powers that are necessary and desirable for proper administration, as specified in the order (s 29(1)-(2), 29(6)).</p> <p>An administrator has powers regarding the control and management of the estate, subject to the Act and the terms of the administration order (s39(2)).</p>

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
		<p>An administrator may be appointed if the Board is satisfied that:</p> <ul style="list-style-type: none"> the person the subject of the application has a mental incapacity; and an order should be made in respect of the person (s 35(1)). <p>The Board may appoint an administrator for a specified part of a person's estate under a limited administration order or, if a limited order is not appropriate, appoint an administrator for the person's whole estate under a full administration order (s 35(1)).</p>		<p>An administrator may make decisions regarding the person's real and other property, business and legal matters and may apply the person's money for the maintenance of the person and their dependants (s 17).</p>

Tasmania - Guardianship and Administration Act 1995

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant section: 6	Relevant sections: 4, 20, 39, 43, 51	Relevant sections: 20, 21, 32, 51, 54, 77	Relevant sections: 21, 54	Relevant sections: 17, 25-27, 32, 56-57
<p>A function or power conferred, or duty imposed, by this Act is to be performed so that the:</p> <ul style="list-style-type: none"> • means that are least restrictive of a person's freedom of decision and action as is possible in the circumstances are adopted; • best interests of person with a disability or person who is subject of an application under the Act are promoted; and • wishes of a person with a disability who is the subject of an application under the Act are, if possible, carried into effect (s 6). 	<p>A person responsible (priority order: guardian, spouse, carer or close friend/relative) may consent to a relevant person receiving medical or dental treatment, other than special treatment (ss 4, 39).</p>	<p>An adult may appoint another adult as their enduring guardian, provided the other adult is not involved in the person's medical care or treatment (s 32).</p> <p>A guardian or an administrator will be appointed if the Board concludes that a proposed represented person:</p> <ul style="list-style-type: none"> • is a person with a disability; • is unable, by reason of that disability, to make reasonable judgements in respect of any or all matters relating to their person or circumstance, or to all or any part of their estate; and • is in need of a guardian or administrator (ss 20(1), 51(1)). <p>In determining whether a person needs a guardian or administrator, the Board must consider whether the needs of the proposed represented person could be met by other means that are less restrictive of the person's freedom of decision and action (ss 20(2), 51(2)).</p> <p>The Board must not appoint a guardian or administrator unless satisfied that this would be in the person's best interests (ss 20(3), 51(3)).</p>	<p>A person may be appointed as guardian if they are an adult and consent to act as guardian, and if the Board is satisfied they:</p> <ul style="list-style-type: none"> • will act in the best interests of the proposed represented person; • do not have an actual or potential conflict of interest; and • are a suitable person (s 21(1)). <p>Considerations for determining suitability are:</p> <ul style="list-style-type: none"> • wishes of proposed represented person; • preservation of existing family relationships; • compatibility with proposed represented person and administrator; and • availability and accessibility to proposed represented person (s 21(2)). 	<p>An enduring guardian may exercise all powers of a guardian (s 32(5)).</p> <p>A full guardian has all powers and duties as if they were the parent and the represented person were their child. They can make decisions about residence, employment and the restriction or prohibition of visits by others (ss 25(1), (2)).</p> <p>A limited guardian has one or more of the powers and duties which may be conferred on a full guardian, as specified in the order (s 26(1)).</p> <p>A guardian must act in the best interests of the person under guardianship, which is achieved if the guardian acts:</p> <ul style="list-style-type: none"> • in consultation with the person and taking into account as far as possible the person's wishes; • as an advocate for the person; • to encourage the person to participate in the community; • to encourage and assist the person to become capable of caring for themselves and making reasonable judgements; and • to protect the person from neglect, abuse or exploitation (s 27).

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
		<p>The Board may make a limited guardianship order. It must be the least restrictive of the represented person's freedom of decision and action as is possible in the circumstances and may be subject to conditions or restrictions (ss 20(1), (5)).</p> <p>If the Board is satisfied a limited guardianship order would be insufficient to meet the represented person's needs, then an order for full guardianship may be made and subject to such conditions or restrictions (ss 20(1),(4)).</p> <p>When appointing an administrator, the order must be the least restrictive of the represented person's freedom of decision and action as is possible in the circumstances and may be subject to such conditions or restrictions (ss 20(4)-(5)).</p> <p>If the Supreme Court considers that a party to a proceeding before the Court requires a guardian and/or administrator, the Supreme Court may refer the issue to the Board (s 77).</p>	<p>A person (including an existing guardian) may be appointed as administrator if they consent to act as administrator, and if the Board is satisfied they:</p> <ul style="list-style-type: none"> • will act in the best interests of the proposed represented person; • do not have an actual or potential conflict of interests; • are a suitable person; and • have sufficient expertise to administer the estate (s 54(1)). <p>In determining suitability of an administrator, the Board must take into account:</p> <ul style="list-style-type: none"> • wishes of proposed represented person; and • compatibility with proposed represented person and guardian (s 54(2)). 	<p>An administrator is responsible for the care and management of the person's estate and to make decisions about the person's property, business and legal matters. They may apply the person's money for the maintenance of the person and their dependants (ss 17, 56(1)).</p> <p>The Board may limit an administrator's power or direct that the represented person remains responsible for some of the property or estate (s 56(3)).</p> <p>An administrator must act in the best interests of the represented person, which is achieved if they act:</p> <ul style="list-style-type: none"> • to encourage and assist the person to become capable of administering their estate; and • in consultation with the person and taking into account as far as possible the person's wishes (s 57).

Victoria - Guardianship and Administration Act 1986

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant section: 4	Relevant sections: 22, 37, 38, 39, 42H	Relevant sections: 22, 46, 66	Relevant sections: 23, 47	Relevant sections: 24, 25, 28, 35(B), 38, 42U, 48, 49, 50A, 58B
<p>The provisions of the Act should be interpreted and every function, power, authority, discretion, jurisdiction and duty conferred or imposed be performed so that:</p> <ul style="list-style-type: none"> the means that are the least restrictive of a person's freedom of decision and action as is possible in the circumstances are adopted; the best interests of a person with a disability are promoted; and the wishes of a person with a disability are, wherever possible, given effect to (s 4(2)). 	<p>A person responsible may consent to medical or dental treatment on behalf of another person. The person responsible is the first person reasonably available from the following list:</p> <ul style="list-style-type: none"> person appointed under section 5A <i>Medical Treatment Act 1988</i>; person appointed by the Tribunal or under a guardianship order to make medical treatment decisions; enduring guardian; a person appointed in writing by the person; spouse or domestic partner who is not under guardianship and has a close and ongoing relationship with the person; primary carer; then nearest relative (s 37). 	<p>The Tribunal may appoint a plenary or limited guardian, if it is satisfied that the person:</p> <ul style="list-style-type: none"> has a disability; is, by reason of that disability, unable to make reasonable judgements about matters relating to their person or circumstances; and is in need of a guardian (s 22(1)). <p>When determining whether a person needs a guardian, the Tribunal must consider:</p> <ul style="list-style-type: none"> whether the needs of the person could be met by other means less restrictive of the person's freedom of decision and action; the wishes of the person, as far as they can be ascertained; the wishes of any nearest relatives or other family members; and preserving existing family relationships (s 22). <p>The Tribunal may make a guardianship or administration order only if satisfied that the order would be in the best interests of the person (ss 22(3), 46(3)).</p>	<p>The Tribunal may appoint as a guardian an adult who consents to act as guardian, if it is satisfied that that person:</p> <ul style="list-style-type: none"> will act in the best interests of the person; is not in a position where their interests conflict or may conflict with the interests of the person; and is a suitable person to act as the guardian of the person (s 23). <p>In determining the suitability of a potential guardian, the Tribunal must take into account:</p> <ul style="list-style-type: none"> the wishes of the person; the desirability of preserving existing family relationships; the compatibility of the proposed guardian with the person and any administrator; and whether the proposed guardian will be available and accessible to the person to fulfil their guardianship requirements (s 23). 	<p>To the extent that the person becomes unable to make reasonable judgements, an enduring guardian will have the powers and duties specified or, if no powers are specified, the powers of a plenary guardian, but cannot consent to special procedures (s 35B).</p> <p>A plenary guardian has all powers and duties that would exist if they were the parent and the represented person were their child. They can make decisions regarding residence, health care, employment, and the restriction or prohibition of visits by others (ss 24(1), (2)).</p> <p>A limited guardian may have one or more of the powers conferred on a plenary guardian, as specified in the order (s 25).</p> <p>A guardian must act in the best interests of the person, which is achieved if they act:</p> <ul style="list-style-type: none"> as an advocate; to encourage participation in community life;

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
	<p>The person responsible must act in the best interests of the patient and take into account the following:</p> <ul style="list-style-type: none"> • wishes of the patient, so far as they can be ascertained; • wishes of nearest relative or family member (subject to s 38(2)); • consequences if treatment not carried out; • alternative treatments; • nature and degree of significant risks associated with proposed and alternative treatments; and • whether the treatment is only to promote the patient’s health and well-being (s 38(1)). 	<p>The Tribunal may only make a plenary guardianship order when satisfied that a limited order would be insufficient to meet the person’s needs (s 22(4)).</p> <p>Where the Tribunal makes an order appointing a limited guardian or an administrator, the order must be the least restrictive of that person’s freedom of decision and action as is possible in the circumstances (ss 22(6), 46(4)).</p> <p>The Tribunal may appoint an administrator if it is satisfied that the person:</p> <ul style="list-style-type: none"> • is a person with a disability; • is, by reason of that disability, unable to make reasonable judgements in respect of the matters relating to all or any part of their estate; and • needs an administrator (s 46(1)). <p>When determining whether a person needs an administrator the Tribunal must consider:</p> <ul style="list-style-type: none"> • whether the needs of the person could be met by other means less restrictive of the person's freedom of decision and action; and • the wishes of the person, so far as they can be ascertained (s 46(2)). 	<p>The Public Advocate may be appointed if no other person fulfils the guardianship requirements (s 23(4)).</p> <p>The Tribunal may appoint a person as an administrator if the person consents and the Tribunal is satisfied the person:</p> <ul style="list-style-type: none"> • will act in the best interests of the person; • is not in a position where their interests conflict or may conflict with the interests of the person; • is a suitable person to act as the administrator of the person’s estate; and • has sufficient expertise to administer the estate (s 47(1)). <p>In determining the suitability of a potential administrator, the Tribunal must take into account the:</p> <ul style="list-style-type: none"> • wishes of the person; and • compatibility of the proposed administrator with the person and with any guardian (s 47(2)). 	<ul style="list-style-type: none"> • to encourage and assist the person to become capable of caring for themselves and of making reasonable judgements in relation to personal matters; • to protect the person from neglect, abuse or exploitation; and • in consultation with the represented person, taking into account, as far as possible, their wishes (s 28). <p>An administrator has the powers and duties conferred by part 5, division 3 of the Act and such of the powers and duties in division 3A as specified by the Tribunal (s 48(1)).</p> <p>An administrator has the general care and management of the person’s estate and has a duty to administer and deal with the property and estate, manage the person’s affairs and exercise the person’s rights (s 58B(1)).</p> <p>An administrator may make decisions and take actions regarding the person’s real and other property, business and legal matters and may apply the person’s money for the maintenance of the person and their dependants, and the education of their children. They may also, if expedient and reasonable, give to the person for their personal use any money or personal property belonging to the person (s 58B(2)-(3)).</p>

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
		<p>If in any civil proceedings before the Supreme, County or Magistrates Court, the Court considers that a party may need to have a guardian and/or administrator appointed, the Court may refer the issue to the Tribunal for determination (s 66).</p>		<p>An administrator must act in the best interests of the person, including by acting, as far as possible:</p> <ul style="list-style-type: none"> • to encourage and assist the represented person to become capable of administering the estate; and • in consultation with the represented person, taking into account as far as possible their wishes (s 49).

Western Australia - Guardianship and Administration Act 1990

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
Relevant sections: 4, 51, 70	Relevant sections: 66, 110ZD, 110ZJ	Relevant sections: 43, 44, 64, 65, 68	Relevant sections: 43, 44, 64, 68	Relevant sections: 17, 45, 43, 46, 51, 64, 70, 71, 110G
<p>In dealing with proceedings under this Act, the Tribunal must observe these principles:</p> <ul style="list-style-type: none"> the primary concern of the Tribunal will be the best interests of any represented person or person in respect of whom an application is made; every person shall be presumed to be capable of looking after their own health and safety, making reasonable judgements about matters relating to their person and estate and managing their own affairs until the contrary is proven to the satisfaction of the Tribunal; a guardianship or administration order will not be made if the needs of the person could be met by other means less restrictive of the person's freedom of decision and action; a plenary guardian shall not be appointed if the appointment of a limited guardian would be sufficient to meet a person's needs; 	<p>When a person is unable, by reason of a mental disability, to make reasonable judgements in respect of matters relating to all or part of their estate, but does not need to have an administrator appointed on a continuing basis, the Tribunal may, without making an appointment, by order authorise or require a person who could be appointed as administrator to perform any specified function (s 66(1)).</p> <p>If a patient cannot make reasonable judgements in respect of any proposed treatment, the decision may be made by reference to, in priority order:</p> <ul style="list-style-type: none"> an advance health directive; an enduring guardian who is authorised to make treatment decisions and is available and willing to do so; a guardian who is authorised to make treatment decisions and is available and willing to do so; then 	<p>A Tribunal may make a guardianship appointment if satisfied that a person is:</p> <ul style="list-style-type: none"> 18 years of age; incapable of looking after their own health and safety; is unable to make reasonable judgement in respect of matters relating to their person; or is in need of oversight, care or control in the interests of his own health and safety or for the protection of others; and in need of a guardian (s 43(1)). <p>A Tribunal may appoint an administrator if satisfied that a person:</p> <ul style="list-style-type: none"> is unable, by reason of a mental disability, to make reasonable judgements in respect of matters relating to all or any part of their estate; and is in need of an administrator of his estate (s 64(1)). 	<p>A person may be appointed as guardian if they are over 18 years, consent to the appointment and:</p> <ul style="list-style-type: none"> will act in the best interests of the proposed represented person; must not have an actual or potential conflict of interest with the proposed represented person; and is otherwise suitable to act as guardian (s 44(1)). <p>Considerations for determining suitability are:</p> <ul style="list-style-type: none"> desirability of preserving existing relationships with the family of the proposed represented person; compatibility of proposed appointee with the proposed represented person and any appointed administrator; wishes of proposed represented person; and if proposed appointee will be able to perform functions vested in them (s44(2)). 	<p>An enduring guardian has the same functions and limitations as a plenary guardian, but these will be directed by the appointing instrument (s 110G).</p> <p>A plenary guardian will, unless the appointment is restricted, have all powers and duties that would exist if they were the parent and the represented person were their child but cannot chastise or punish the person. They can make decisions regarding residence, employment, treatment, education/training, associations and legal proceedings not related to the person's estate (ss 45(1), (2)).</p> <p>A limited guardian will have the functions in section 45 as per the guardianship order (ss 43(4), 46).</p> <p>The appointment of a guardian or administrator may be made subject to such conditions and restrictions as the Tribunal thinks fit (ss 43(3), 64(3)).</p>

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
<ul style="list-style-type: none"> an order appointing a limited guardian or administrator shall be in the terms that impose the least restrictions possible in the circumstances on the person’s freedom of decision and action; and in considering any matter, the Tribunal shall, as far as possible, seek to ascertain the views and wishes of the person concerned as expressed, in whatever manner, at the time or as gathered from the person’s previous actions (s 4). <p>Guardians and administrators must act in the best interests of a represented person (ss 51, 70).</p>	<ul style="list-style-type: none"> a person responsible for the patient (s 110ZJ). <p>The person responsible is the first of the following persons who is 18 years of age, has full legal capacity, is reasonably available, is willing to make a treatment decision and maintains a close personal relationship (frequent personal contact and genuine interest in patient’s welfare):</p> <ul style="list-style-type: none"> spouse or de-facto partner; child, parent or sibling; primary unpaid carer; or any other person who maintains a close personal relationship with patient (ss 110ZD(1)-(7)). <p>The person responsible for the patient must act according to the person’s opinion of the best interests of the patient (s 110ZD(8)).</p>		<p>The Public Advocate must be appointed as guardian or administrator only where no other person or corporate trustee is suitable and willing to act, except in the case of joint appointments (ss 44(5), 68(5)).</p> <p>A person over 18 years or a corporate trustee may be appointed as administrator if they consent to the appointment and in the opinion of the Tribunal:</p> <ul style="list-style-type: none"> will act in the best interests of the proposed represented person; and is otherwise suitable to act as administrator of the estate (s 68(1)). <p>In determining those matters in section 68(1), the Tribunal must take into account:</p> <ul style="list-style-type: none"> the compatibility of proposed appointee with the proposed represented person and any appointed guardian; the wishes of proposed represented person; and whether proposed appointee will be able to perform the functions vested in them (s68(3)). 	<p>The Tribunal may appoint a plenary administrator who can perform any function the person could have performed if they had full legal capacity, except making a testamentary disposition (ss 71(1)-(2a)).</p> <p>If a plenary appointment is not made, the Tribunal may authorise an administrator to perform a specified function (s 71(3)).</p> <p>The functions of an administrator may relate to decisions regarding the person’s real and other property, business and legal matters and accommodation/maintenance/education of the person and their dependants (s 71).</p> <p>The Tribunal may also require a function by an administrator to be performed and give directions as to the time, manner or circumstance of performance (s 71(4)).</p> <p>A guardian/administrator will act in the best interests of a represented person if they act:</p> <ul style="list-style-type: none"> as an advocate for the represented person; to encourage the represented person to live and participate in the community;

Principles and objects	Decision-makers who are not formally appointed	Threshold for appointment	Relevant requirements of proposed appointee	Relevant obligations, duties and powers
				<ul style="list-style-type: none"> • to encourage and assist the represented person to become capable of caring for themselves and making reasonable judgements regarding matters related to their person; • to protect the represented person from neglect, abuse or exploitation, both financial and otherwise; • in consultation with the represented person and take into account as far as is possible the wishes of that person, expressed in whatever manner at the time, or as gathered from the person’s previous actions; • in a manner that is least restrictive of the rights, while consistent with the proper protection, of the represented person; • to maintain any supportive relationships the represented person has; and • to maintain the person’s familiar cultural, linguistic and religious environment (ss 51(1), (2)), 70 (1),(2)).



Queensland Government

