



Reply to questionnaire for the country reports – Australia



Anita Smith

1. What legislation is relevant for the protection of adults? (If applicable, differentiation between federal law or the law of individual federal states)

Australia is a Federation of 6 States and 2 Territories. Each State and Territory has its own adult protection (guardianship) scheme and its own laws relating to enduring powers of attorney.

No two jurisdictions are the same, but there is a high level of uniformity for basic principles and structures.

In some areas, there is also separate legislation to provide for the establishment and operations of the Tribunals that conduct guardianship hearings.:

Jurisdiction	Guardianship	Enduring powers	Tribunal
Australian Capital Territory	<i>Guardianship and Management Of Property Act 1991</i>	<i>Powers of Attorney Act 2006</i>	<i>ACT Civil and Administrative Tribunal Act 2008</i>
New South Wales	<i>Guardianship Act 1987</i>	<i>Powers of Attorney Act 2003</i>	<i>Civil and Administrative Tribunal Act 2013</i>
Northern Territory	<i>Adult Guardianship Act</i>	<i>Powers of Attorney Act</i>	
Queensland	<i>Guardianship and Administration Act 2000</i>	<i>Powers of Attorney Act 1998</i>	<i>Queensland Civil and Administrative Tribunal Act 2009</i>
South Australia	<i>Guardianship and Administration Act 1993</i> <i>Advance Care Directives Act 2013</i>	<i>Powers of Attorney And Agency Act 1984</i>	<i>South Australian Civil and Administrative Tribunal Act 2013</i>
Tasmania	<i>Guardianship and Administration Act 1995</i>	<i>Powers of Attorney Act 2000</i>	

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Victoria	<i>Guardianship and Administration Act 1986</i>	<i>Powers of Attorney Act 2014</i>	<i>Victorian Civil and Administrative Tribunal Act 1998</i>
Western Australia	<i>Guardianship and Administration Act 1990</i>	<i>Guardianship and Administration Act 1990</i>	<i>State Administrative Tribunal Act 2004</i>

All legislation can be viewed at www.austlii.edu.au

2. What are the types of formal measures that exist to support people with disabilities in exercising their legal capacity? (Especially private mandates or legal representatives appointed by a court/authority)

In guardianship proceedings, the person who is the subject of the application is expected to participate in proceedings wherever possible. They are entitled to legal representation, which is sometimes funded by Legal Aid. There are also non-legal disability advocates who may attend hearings with them for support.

Where a person with a decision-making disability is involved in civil legal proceedings, the Courts will recognise an appointed guardian or administrator (financial manager) or may appoint a litigation guardian (guardian *ad litem*/case guardian, next friend etc.) on behalf of that person to represent the person with a disability in litigation.

3. Who decides on the appointment of a supporter/legal representative and what are the requirements for the respective measures?

In States and Territories, the relevant Tribunal appoints legal representatives (guardians, administrators, financial managers). Although it differs between states and territories, a Tribunal generally has to be satisfied after a hearing of an application that:

- a. The person has a disability,
- b. The disability causes the person to be incapable of making decisions relating to their finances or personal welfare,
- c. The person is in need of a guardian, administrator or financial manager, and
- d. A nominee for appointment meets eligibility requirements in the legislation.

Under some Federal legislative schemes, specific Nominees are approved by the Secretary of the relevant Department, for example: Centrelink nominees (for welfare payments) and National Disability Insurance Scheme nominees (for access to support from the universal disability fund). These appointments, unlike State and Territory appointments, are administrative appointments that do not require a hearing.

4. Who is involved in the procedure of determining the need for support in legal affairs and in what capacity?

For general transactions in banking and property, a Tribunal appoints an administrator or financial manager after a hearing.

In specific litigation matters, a Court might appoint a litigation guardian (guardian *ad litem*/case guardian, next friend etc.).

5. How significant is the legal capacity of the adult concerned and is there a constitutive ascertainment of (lack of/limited) legal capacity?

The making of a guardianship or administration (financial management) order has limited impact on the legal capacity of a represented person (i.e. a person under guardianship or administration/financial management). Orders are always as limited in time and content as possible, so depending on what orders are made and the level of capacity of the person, the person can still exercise legal capacity in most domains. For instance a represented person can:

- vote - and in fact voting is compulsory in Australia, so a person with a disability must seek exemption from voting if they cannot cast a vote,
- stand as a candidate in an election,
- marry – a marriage celebrant may refuse to marry a person if he or she does not consider they have capacity, but the existence of an order is not generally an issue that is taken into account,
- divorce and conduct property and child residence actions in the family court - however a guardian or administrator/financial manager may assist them to instruct counsel to protect their rights in those proceedings.
- make a will, if they have testamentary capacity – an order is not determinative of testamentary capacity,
- engage a solicitor - in the discretion of the solicitor as to whether they have capacity to instruct
- be a party to any challenge or review of the guardianship or administration (financial management) order,
- be a party or witness to other legal proceedings, although counsel may attack their credit if they have been deemed incapable in some domains,
- conduct their own defence in criminal matters, including engaging solicitors to act in the discretion of the solicitor as to whether they have capacity to instruct,
- seek compensation – a financial manager/administrator may be appointed to ensure the represented person's rights are observed in the action,
- enter into contracts - but a contract may be voided by an administrator or financial manager if the other party was on notice that the represented person lacked capacity to enter into that contract, the existence of the order is not determinative but may be persuasive in that issue,
- be employed,
- be eligible for pension and welfare benefits, universal health care insurance and universal disability insurance,

- inherit under a will or intestacy – but if they are specifically incapable of receiving the funds, an administrator or financial manager may take over the management of the funds of their behalf,
- own property, bank accounts, etc. subject to the management and protection of an administrator/financial manager, and
- conduct discrimination or ombudsman proceedings if they consider their treatment as a represented person has been substandard.

Because capacity can be fluctuating and episodic, the principles and duties of guardians, administrators or financial managers (see answer 6 below) require them to monitor the capacity of the person for whom they represent. If they consider that the person has recovered capacity to make decisions, they are expected to encourage that person to take over management of their affairs and to seek a review of the order when appropriate. In other words, the decision of the Tribunal about capacity is reversible and can be operated flexibly within the terms of the order.

6. What are the responsibilities of a supporter /representative and what are the obligations and principles he/she must comply with?

The decision-making principles vary between Australian jurisdictions, however as an example, a guardian (for personal or welfare decisions) appointed by the Tasmanian Tribunal is required to comply with the following requirements:

- (1) A guardian must act at all times in the best interests of the person under guardianship.
- (2) ... A guardian acts in the best interests of a person under guardianship if the guardian acts as far as possible –
 - (a) in consultation with that person, taking into account, as far as possible, his or her wishes; and
 - (b) as an advocate for that person; and
 - (c) in such a way as to encourage that person to participate as much as possible in the life of the community; and
 - (d) in such a way as to encourage and assist that person to become capable of caring for himself or herself and of making reasonable judgements relating to his or her person; and
 - (e) in such a way as to protect that person from neglect, abuse or exploitation.

In some jurisdictions, a guardian must submit a written report to the Tribunal that appointed him or her annually and their appointments are subject to review hearings periodically.

An administrator or financial manager is required to adhere to these requirements:

- (1) An administrator must act at all times in the best interests of the represented person.
- (2) ... An administrator acts in the best interests of the represented person if the administrator acts as far as possible –
 - (a) in such a way as to encourage and assist the represented person to become capable of administering his or her estate; and

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(b) in consultation with the represented person, taking into account as far as possible the wishes of the represented person.

Like guardians, administrators submit a written report to the Tribunal that appointed him or her annually and their appointments are subject to review hearings periodically.

In some jurisdictions, the decision-maker must consult with the carer or family in making decisions for the person.

7. What role do family members play and what are the requirements imposed on them?

In proceedings, family members can be applicants, nominees for appointment and witnesses.

Family members are eligible to be appointed as guardians, administrators or financial managers if they meet the legislative eligibility requirements. Some legislation requires the Tribunal to consider the importance of preserving existing family relationships. This might be taken into account as a reason to, or not to, appoint a family member.

If they are appointed as a guardian, administrator or financial manager they are expected to meet the same requirements as any other person appointed as described in answer to question 6.

It is important to note that Public Guardians and Public or State Trustees are generally appointed as guardians or administrators of last resort in the absence of a suitable individual.

8. What role do volunteers play and what are the requirements imposed on them?

The Australian jurisdictions do not place emphasis on volunteers. There are various non-Government support groups in Australia, but none routinely present themselves for appointment as guardians, administrators or financial managers.

9. Are there professional supporters/legal representatives and what requirements/ qualifications do they have to satisfy?

In Australia, there are Government funded Public Trustees or State Trustees who can be appointed as administrators or financial managers where no suitable family member or friend is available for appointment.

There are also Government funded Adult Guardians, Public Guardians and Public Advocates available for appointment as guardians (personal or welfare decisions) where no suitable family member or friend is available for appointment.

These statutory officials are appointed by the Governors or by a Board of Directors and they generally are professionally qualified persons with exemplary performance in disability or public service. They employ delegates as public servants to carry out the work of the agency. Delegates are required to meet the usual public service eligibility criteria. These may include 'vulnerable persons' checks related to any prior criminal convictions.

10. Who bears the costs for procedures and the supporter/legal representative?

Public Trustees or State Trustees may charge a small commission from the estate of the represented person if their wealth is sufficient to do so. Otherwise these services are Government funded.

Adult Guardians, Public Guardians and Public Advocates are entirely Government funded.

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If a private person is appointed, they are generally expected to act in a voluntary capacity.

If a professional person is appointed as an administrator/ financial manager, he or she may seek approval from the Tribunal to be remunerated, although this is a rare occurrence.

11. How are supporters/legal representatives supervised and what is done to ensure that the rights, the will, and the preferences of the adult concerned are respected? (cf. Art. 12 section 4 UN CRPD)

See answer to question 6.

- Annual written reports from appointees.
- Regular review hearings to monitor the appointments.
- Ability (by represented person or any other person) to seek review at any time of the orders.

Also any person engaged in guardianship legislation is required to adhere to basic principles. These differ between jurisdictions, but their basic expression is as follows:

“Principles to be observed

A function or power conferred, or duty imposed, by this Act is to be performed so that –

(a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and

(b) the best interests of a person with a disability or in respect of whom an application is made under this Act are promoted; and

(c) the wishes of a person with a disability or in respect of whom an application is made under this Act are, if possible, carried into effect.”

12. Who decides on deprivation of liberty and involuntary medical measures and what requirements does this decision underlie? Is there a distinction between self-endangerment and endangerment of others?

A guardian is generally empowered to approve deprivation of liberty and involuntary medical measures if that falls within their powers. In contentious cases, these decisions may be referred directly to the Tribunal to decide.

A guardian can only decide in the best interests of the represented person. In general the endangerment of others is not considered in guardianship laws, but is frequently considered in Mental Health legislation, which is separate legislation for people with mental illnesses (schizophrenia, bipolar affective disorder, depression, anxiety etc.).

13. Additional comments (elements of your country's system that may be of interest and are not covered above)

Australia differs from other countries in:

- The distinction between guardianship (personal and welfare decisions) and administration/financial management (matters relating to one's estate).

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- The decision making by informal tribunals rather than by Courts.
- Separating mental health issues from guardianship and administration matters when it comes to detention and treatment in hospital for a mental illness.
- Provision of universal health care and (part-complete) universal disability insurance provided by Government.

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