

**T A S M A N I A**  
**LAW REFORM**  
**I N S T I T U T E**

## **Submission Template**

### **Review of the *Guardianship and Administration Act 1995 (Tas)***

This Issues Paper reviews the *Guardianship and Administration Act 1995 (Tas)*. The Act covers the law relating to people with disability who, because of disability are unable to make decisions about their personal or financial matters, or medical treatment.

The Issues Paper examines the roles of administrators, guardians, persons responsible, the Guardianship and Administration Board and the Public Guardian in making substitute decisions for people with disability who are unable to make their own decisions. The Issues Paper also considers how informal and formal support arrangements for people with disability are working outside of the Act, and whether legislative reform could better facilitate these informal support arrangements.

The TLRI is seeking your feedback on the desirability of, and options for, reforming the *Guardianship and Administration Act 1995 (Tas)*.

**You can answer any or all of the questions and provide as little or as much information as you wish.**

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted.

- The form is designed to be completed electronically by entering responses. The space provided for your answer will expand (if necessary) as you type. You are invited to include as much or as little information as you choose.
- Alternatively, you may print out the form and either fill it in manually or use a separate answer sheet (if you use a separate answer sheet, please ensure that you clearly number your answers to correspond with the questions in the Issues Paper). Again, you are invited to include as much or as little information as you choose.

After you have completed your submission please either email or post the document to the Institute:

**Email:** [law.reform@utas.edu.au](mailto:law.reform@utas.edu.au)

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Private Bag 89  
Hobart TAS 7001

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Name

Organisation (if any)

Address

Email

Phonenumber

## Publication of Submissions

The Institute uses any submissions received to inform its research. Submissions may be referred to or quoted from in a final report which will be published on the Institute's website. Extracts may also be used in published scholarly articles and/or public media releases. However, if you do not wish your response to be referred to or identified, the Institute will respect that wish.

**Therefore, when making a submission to the Institute, please tick the applicable box to identify how you would like it to be treated based on the following categories:**

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Providing a submission is completely voluntary. You are free to withdraw your participation at any time, by contacting Kira White on (03) 6226 2069 or email [Law.Reform@utas.edu.au](mailto:Law.Reform@utas.edu.au). You can withdraw without providing an explanation. However, once the report has been sent for publication, it will not be possible to remove your comments.

All responses will be held by the Tasmania Law Reform Institute for a period of five (5) years from the date of the first publication and then destroyed. Electronic submissions will be stored on a secure, regularly backed-up University network drive. Hard copy submissions will be stored in a locked filing cabinet. At the expiry of five years, submissions be deleted from the server, in the case of electronic submissions, or shredded and securely disposed of in the case of paper submissions.

## QUESTIONS

Chapter 1 – Introduction	
1.1	<p>Should reform to the Act be founded upon the ALRC’s National Decision-Making Principles?</p> <p>The principles are</p> <ul style="list-style-type: none"><li>• That all adults have an equal right to make decisions that affect their lives and to have those decisions respected.</li><li>• People who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.</li><li>• Decisions that affect a person’s life must be directed by the person’s will, preferences and rights.</li><li>• Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.</li></ul>
1.2	<p>What developments in policy, law and practice require change to Act?</p>
1.3	<p>What improvements would make the Act more sustainable and responsive to the needs of Tasmanians?</p>

## Chapter 2 – Guiding Principles of the Act

2.1	What principles should guide the operation of the Act?
2.2	<p>Should the Act adopt the ALRC’s approach to giving effect to a person’s rights, will and preferences?</p> <p>The ALRC provides:</p> <p>Where a representative is appointed to make decisions for a person who requires decision-making support:</p> <ul style="list-style-type: none"><li>• The person’s will and preferences must be given effect.</li><li>• Where the person’s current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.</li><li>• If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person’s human rights and act in the way least restrictive of those rights.</li><li>• A representative may override the person’s will and preferences only where necessary to prevent harm.</li></ul>
2.3	<p>(i) Should the term ‘best interests’ remain part of the Act?</p> <p>(ii) If so, should ‘best interests’ be explained?</p>

### Chapter 3 – Decision-Making Capacity

3.1	(i) Should the need for a disability remain part of the test that assesses a person's capacity? (ii) If 'disability' remains part of the test, how should it be defined?
3.2	Should the Act provide a single test of decision-making capacity for all matters?
3.3	What test(s) should the Act provide to assess a person's decision-making capacity?
3.4	Should the Act include a presumption that all people have capacity to make their own decisions?
3.5	Should the Act list matters that must not be considered when assessing a person's capacity?
3.6	Who should be able to conduct a capacity assessment?
3.7	(i) Should the Board and/or the Public Guardian have power to require a person to submit to a medical examination? If so, in what circumstances? (ii) Should there be any consequences for people who prevent or obstruct a capacity assessment?
3.8	Should there be consequences for failing to properly conduct a capacity assessment? What might this include?

## Chapter 4 – Representative Decision-Making

4.1	What test should apply to appoint a guardian or administrator?
4.2	(i) If the ‘need’ to have a representative remains part of the test to appoint a representative, should it be defined? (ii) If so, what should ‘need’ mean?
4.3	Should an applicant need to satisfy the Board that all reasonable support options have been attempted before a representative is appointed?
4.4	(i) Should representatives have a duty to monitor a represented person’s capacity whilst they are acting? (ii) Should the Act state that representatives may only make decisions when a represented person does not have decision-making capacity?
4.5	Should the Public Trustee or Public Guardian be automatically appointed as a temporary representative upon the death of a representative?
4.6	Should one representative be able to make both personal and financial decisions, or should the roles remain separate?

## Chapter 5 – Powers and Duties of Guardians

5.1	What duties should a guardian have?
5.2	What should be the consequence if a guardian breaches their duties?
5.3	Should the description that a guardian's powers and duties are akin to those 'that a parent has over a child' be removed?
5.4	(i) Does the list of powers of a guardian need to be revised, and if so, how? (ii) Should the list confirm guardians' powers to conduct litigation?
5.5	(i) Does the term 'health care' need to be defined? (ii) If so, how should it be defined?
5.6	Should plenary (full) guardianship Orders continue, and if so, in what circumstances?
5.7	Should guardians have any other or different rights?
5.8	Should the Act list matters that a guardian does <i>not</i> have power over?
5.9	How else could the Act be improved in relation to the powers and duties of guardians?

## Chapter 6 – Powers and Duties of Administrators

6.1	What duties should an administrator have?
6.2	What should be the consequence if an administrator breaches their duties?
6.3	Does the list of powers of an administrator need to be revised and if so how?
6.4	Should the Act list matters that an administrator does <i>not</i> have power over?
6.5	Should administrators have any other or different rights?
6.6	How else could the Act be improved in relation to the powers and duties of administrators?

## Chapter 7 – Safeguards for Representative Decision-Making

7.1	<ul style="list-style-type: none"> <li>(i) Should the Act enable internal reviews of the Board’s decisions?</li> <li>(ii) Who should be eligible to obtain a statement of reasons from the Board?</li> </ul>
7.2	<ul style="list-style-type: none"> <li>(i) Should the Act provide for alternative dispute resolution, for example mediation, before a hearing?</li> <li>(ii) Should the Public Guardian have increased powers in relation to resolving disputes?</li> <li>(iii) Should the Act require compulsory alternative dispute resolution prior to a hearing?</li> <li>(iv) Should there be a default priority given to the decisions of a guardian, or administrator/attorney?</li> <li>(v) How else could the Act better resolve disputes or disagreements between representatives?</li> </ul>
7.3	<ul style="list-style-type: none"> <li>(i) What test should apply to revoke the appointment of a representative?</li> <li>(ii) Should the appointment of a representative be automatically revoked in certain circumstances? If so, when?</li> <li>(iii) Should the Act impose requirements upon former representatives to facilitate the transfer of their role and assets upon their powers ending?</li> </ul>
7.4	<ul style="list-style-type: none"> <li>(i) Who should representatives report to?</li> <li>(ii) How frequently should reports be required?</li> </ul>
7.5	Should an enduring guardian have to notify the Board or the Public Guardian that their appointment has become operative, or to have their powers confirmed?
7.6	Should enduring guardians need to periodically report to the Board?
7.7	Does there need to be any change to the time periods in which administrators must report to the Board after the death of a represented person?
7.8	How long should orders appointing representatives be able to last?
7.9	<ul style="list-style-type: none"> <li>(i) Should the Act provide a test to apply when reviewing an order appointing a representative?</li> <li>(ii) If so, what test should apply?</li> </ul>
7.10	What test should a person need to meet to be appointed as a guardian?
7.11	What test should a person need to meet to be appointed as an administrator?
7.12	Should the Act require the Board to give priority to family or close friends acting as representatives?
7.13	<ul style="list-style-type: none"> <li>(i) When should conflicts or potential conflicts of interest prevent a person from acting as a representative?</li> <li>(ii) Should the term ‘conflict of interest’ be defined or explained?</li> </ul>
7.14	<ul style="list-style-type: none"> <li>(i) Should administrators be able to make gifts without the Board’s prior approval?</li> <li>(ii) If so, what gifts ought to be authorised?</li> </ul>

7.15	<p>Does there need to be any changes to:</p> <ul style="list-style-type: none"> <li>• when and how information can be provided to the Board;</li> <li>• when and how information obtained by the Board or representatives is disclosed;</li> <li>• whether hearings are conducted in public or in private; and</li> <li>• who is able to search the register of instruments?</li> </ul>
7.16	<p>(i) Should the Act provide offences for representatives who breach the Act?  (ii) If so, what consequences should be imposed?</p>
7.17	<p>How else could the Act be improved in relation to safeguards for representative decision-making?</p>

**Chapter 8 – Functions, Powers and Duties of the Board**

8.1	What period of notice of a hearing should the Board need to give interested parties?
8.2	Should the Act clarify who the parties to a hearing are?
8.3	Should the Act require mandatory representation for people in respect of whom a hearing is being held?
8.4	What is the best way to ensure that a person who is subject of an application is included in the process?
8.5	Does there need to be any changes to the way in which evidence is given at a hearing?
8.6	Are there any situations where the Board should not need to hold a hearing before it can make orders?
8.7	(i) Does there need to be any changes to the powers and processes for the Board to make orders in urgent situations? (ii) Should the Board be able to appoint private guardians or administrators in urgent situations?
8.8	Should there be any changes made to the powers of the Board?
8.9	Should the Board have any additional, or different, duties?
8.10	How else can the Act be improved in relation to the functions, powers and duties of the Board?

**Chapter 9 – Functions, Powers and Duties of the Public Guardian**

9.1	Is there merit to further investigating the establishment of a separate Office of the Public Advocate?
9.2	Is there merit to further investigating the combining of the role and functions of the Public Guardian and the Public Trustee?
9.3	How else can the Act be improved in relation to the functions, powers and duties of the Public Guardian?
9.4	Should there be any changes made to the powers of the Public Guardian?
9.5	Should the Public Guardian have any additional, or different, duties?

## Chapter 10 – Consent to Medical and Dental Treatment

10.1	Should provisions relating to consent to medical and dental treatment be included in the Act, or separate legislation?
10.2	(i) Should the Act deal with consent to medical treatment for children? (ii) Should any different provisions apply to matters involving consent to treatment for children?
10.3	How should 'medical and dental treatment' be defined, or should a different term be used?
10.4	(i) When should consent to treatment not be needed? (ii) Should medical practitioners be required to make attempts to locate a person responsible and/or advance care directive before giving treatment without consent?
10.5	What treatment should be able to be given without consent in an urgent situation?
10.6	Should separate decision-makers be able to be appointed for medical treatment decisions, separate to personal and financial matters?
10.7	(i) What should a person responsible be able to consent to?
10.8	(i) Should there be any changes made to the definition of the person responsible? (ii) Should there be an order of priority to determine the person responsible? If so, should the current order be revised? (iii) Should the Act provide any other test to be eligible to be a person responsible other than their relationship? (iv) Who should assess whether a person responsible is ineligible or incapable of acting?
10.9	Should a guardian only be the person responsible if they have been given express authority to make treatment decisions?
10.10	If consent is required and there is no person responsible, should the Public Guardian have power to act as the person responsible of last resort to consent to treatments other than special treatment?
10.11	Should the Act set out how a request for consent is made to a person responsible?
10.12	What test should a person responsible need to apply when deciding whether to consent to treatment?
10.13	(i) What 'special treatment' should the Board need to consent to? (ii) Do any of the current descriptions or classifications of treatments need to be revised, and if so, how?
10.14	(i) What test should the Board need to apply when deciding whether to consent to treatment? (ii) Are there any types of treatments that should involve a special test for the giving of consent? If so, what?

10.15	Should any special test apply where the patient is likely to shortly gain capacity to consent?
10.16	Are there any matters where substitute consent should never be permitted?
10.17	Should the Act require mandatory legal representation for people for whom consent to special treatment is sought?
10.18	(i) What improvements could be made to the way in which consent to the continuation of special treatment can be given? (ii) How could the Act better deal with the giving of consent to long-term or indefinite treatment?
10.19	Who should be able to consent to the admission of patients to secure treatment and care facilities where the provisions of the <i>Mental Health Act</i> do not apply?
10.20	If the Act incorporates special provisions in relation to research: (i) How should 'research' be defined? (ii) What, if any, research should be able to be performed without consent? (iii) What, if any, research, should a person responsible be able to consent to? (iv) What, if any, research, should the Board need to consent to? (v) What test(s) should apply to the giving of consent to participation in research?
10.21	(i) Should the Act provide separate provisions dealing with withholding or withdrawing life sustaining measures? (ii) If so, who should be able to consent and when? (iii) Should a patient's advance directions about withdrawing or withholding life sustaining measures be binding? Should there be any exceptions?
10.22	How else can the Act be improved in relation to consent to treatment?

**Chapter 11 – Safeguards for Consent to Medical and Dental Treatment**

11.1	If a patient objects to treatment, should substitute consent still be able to be given and, if so, when? Should the Act confirm how a patient can indicate an objection?
11.2	Should a person responsible be able to apply to the Board for advice?
11.3	Should the Act provide a mechanism to object to a person responsible's decision? How could this work?
11.4	What should the consequences be for breaches of the Act in relation to consent to treatment?
11.5	Does the Act need to provide additional protections for health care professionals?
11.6	How else could the Act better safeguard the giving of consent to medical and dental treatment?

## Chapter 12 – Advance Care Directives

12.1	<ul style="list-style-type: none"><li>(i) Should Tasmania have legislation dealing with advance care directives?</li><li>(ii) If so, should this be part of the Act or separate legislation?</li></ul>
12.2	If advance care directives were not adopted in legislation, are there ways that the Act could be improved to confirm how people are able to document their wishes and views?
12.3	<p>If advance care directives were given legislative force, then:</p> <ul style="list-style-type: none"><li>(i) Who should be able to make an advance care directive?</li><li>(ii) What should be the witnessing requirements?</li><li>(iii) Should there be a prescribed form?</li><li>(iv) Should directions in an advance care directive be binding on decision-makers? Should there be any exceptions? Who should determine whether an exception applies?</li><li>(v) What penalties should apply where directions are not followed?</li><li>(vi) Should medical practitioners and decision-makers have a duty to take steps to ascertain whether a patient has an advance care directive?</li><li>(vii) Should a person be able to appoint a medical treatment decision-maker in an advance care directive?</li><li>(viii) Should advance care directives be registered? If so, who should maintain the register?</li></ul>

**Chapter 13 – Informal and Formal Supported Decision-Making Frameworks**

13.1	<ul style="list-style-type: none"> <li>(i) What informal support arrangements are working well and what is not working well?</li> <li>(ii) Are there barriers to informal support arrangements working effectively? How could these be resolved?</li> <li>(iii) How can we improve how informal support arrangements are recognised?</li> <li>(iv) How could we better support people who do not have family or other networks of support?</li> </ul>
13.2	<p>Do you support legislation in Tasmania enabling the formal appointment of supporters to support people with decision-making impairments, and/or co-decision-makers to make joint decisions?</p>
13.3	<p>If a supported decision-making model was incorporated into the Act:</p> <ul style="list-style-type: none"> <li>(i) Should supported decision-making be available for: <ul style="list-style-type: none"> <li>– personal decisions?</li> <li>– financial decisions?</li> <li>– medical decisions?</li> </ul> </li> <li>(ii) Who should be able to appoint a supporter?</li> <li>(iii) Who should be able to be appointed as a supporter? Who should not be able to be appointed?</li> <li>(iv) Who should oversee the activities of supporters?</li> <li>(v) What safeguarding measures should be put in place to prevent abuse?</li> </ul>
13.4	<p>If a co-decision-making model was incorporated into the Act:</p> <ul style="list-style-type: none"> <li>(i) Should co-decision-making be available for: <ul style="list-style-type: none"> <li>– personal decisions?</li> <li>– financial decisions?</li> <li>– medical decisions?</li> </ul> </li> <li>(ii) Who should be able to appoint a co-decision-maker?</li> <li>(iii) Who should be able to be appointed as a co-decision-maker? Who should not be able to be appointed?</li> <li>(iv) Who should oversee the activities of co-decision-makers?</li> <li>(v) What safeguarding measures should be put in place to prevent abuse?</li> </ul>

## Chapter 14 – Interrelationship between the Act and other Legislation

14.1	<p>(i) Are there any gaps between the Act and the <i>Mental Health Act 2013</i> that need to be resolved?</p> <p>(ii) Is there any overlap between the Act and the <i>Mental Health Act 2013</i> that needs to be resolved?</p>
14.2	<p>Is there merit in establishing an Official Visitor scheme for individuals without decision-making capacity who are admitted to secure facilities outside of the <i>Mental Health Act 2013</i>?</p>
14.3	<p>(i) Are there any issues relating to the interaction between the <i>Disability Services Act</i> and the <i>Guardianship and Administration Act</i> that need to be resolved?</p> <p>(ii) If so, how could these be resolved?</p>
14.4	<p>(i) Should the Act contain provisions regulating the use of restrictive practices that do not fall under the <i>Disability Services Act 2011</i> or <i>Mental Health Act 2013</i>?</p> <p>(ii) If so, are there any restrictive practices that only the Board should be able to consent to rather than a person responsible?</p>
14.5	<p>(i) Should the Act mandate a statutory review of the Act?</p> <p>(ii) If so, what timeframe is appropriate?</p>
14.6	<p>(i) Are there any gaps between the Act and the <i>Alcohol and Drug Dependency Act 1968</i> that need to be resolved?</p> <p>(ii) Is there any overlap between the Act and the <i>Alcohol and Drug Dependency Act 1968</i> that needs to be resolved?</p>
14.7	<p>Are there any issues relating to the interrelationship between the Act and any other legislation that needs to be resolved, for example:</p> <ul style="list-style-type: none"><li>• the <i>Powers of Attorney Act 2000</i>;</li><li>• the <i>Public Trustee Act 1930</i>;</li><li>• the <i>Trustee Act 1898</i>; or</li><li>• any other legislation?</li></ul>

## Chapter 15 – Other Matters: Appointment of Enduring Guardians

15.1	<ul style="list-style-type: none"><li>(i) Should a person under the age of 18 years be able to appoint an enduring guardian?</li><li>(ii) Should a person under the age of 18 be able to be appointed as an enduring guardian?</li></ul>
15.2	<ul style="list-style-type: none"><li>(i) Who should be eligible to act as an enduring guardian?</li><li>(ii) Should the Public Guardian be eligible to be appointed as an enduring guardian?</li><li>(iii) Who should be ineligible?</li></ul>
15.3	Should there be any changes to the witnessing requirements for instruments?
15.4	Should there be a penalty for a person who acts as a witness when they are ineligible?
15.5	When accepting the role: <ul style="list-style-type: none"><li>(i) should an enduring guardian have to undertake to do anything, and if so, what?</li><li>(ii) should enduring guardians be required to confirm that they have a certain level of knowledge and understanding of the document or other circumstances?</li></ul>
15.6	Should the appointment of an enduring guardian be automatically revoked in certain circumstances? If yes, then in what circumstances?
15.7	Should an enduring guardian be able to resign by completing and registering a standard form?
15.8	Should a fee be payable for the registration of an instrument/revocation of an instrument?
15.9	How else could the Act better safeguard the granting of authority to an enduring guardian?