Understanding **Substitute Decision-Making (NSW)**

Opal HealthCare

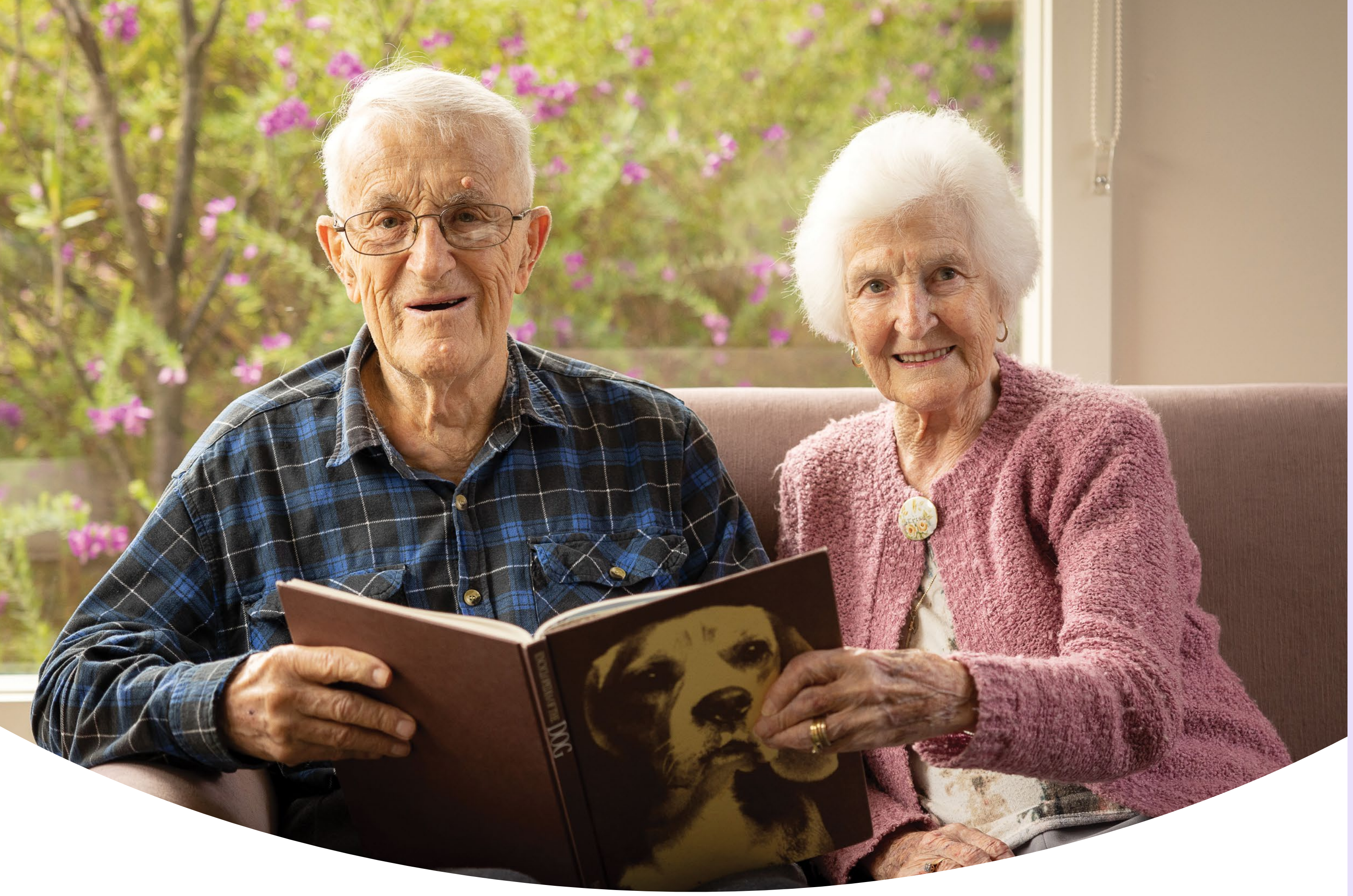
Your right to make your own decisions

At Opal HealthCare, we recognise the importance of encouraging older Australians to be as physically, socially, and emotionally autonomous as possible.

That's why we safeguard and support your right to make decisions about your care and services. If you lack the capacity to make certain decisions in your own best interest, it's important you have the right support, and a substitute decision-maker to make decisions on your behalf.

This resource will support you or someone you care about, to appoint a substitute decision-maker.

It's intended for general information only and doesn't constitute legal or financial advice. We recommend you consider your personal circumstances and seek professional advice, if needed.



What does it mean to have capacity? Having capacity means you can...

- Understand the nature and effect of your decisions about the matter.
- Freely and voluntarily make decisions about the matter.
- Communicate your decision in a way that can be understood.

Registered Supporters

You may wish to consider appointing and registering a trusted family member or friend as a 'Supporter' to help you to make decisions. The Supporter's role is to help you understand options, access information and communicate your decisions if you would like them to, but unlike substitute decision-makers, **they can't make decisions on your behalf.**

Supporters can only act with your consent and always in your best interest. Supporters do not replace authorised decision-makers. Supporters must be registered with My Aged Care.

Guiding Principles

- The presumption is that you have capacity to make your own decisions; substitute decision-making is a last resort.
- Your age, disabilities, appearance or behaviour are not indicators of whether or not you can make your own decisions.
- A substitute decision-maker may make decisions about the matters they were appointed for but not others.
- Substitute decision-makers must always act in your best interest and take into account your views and wishes, be these expressed verbally, in writing or via any other way of communication.

What type of decision needs to be made?

Legal and financial

An **Enduring Power of Attorney** needs to be appointed to make legal and financial decisions on your behalf if you are not able to make them for yourself.

Health and lifestyle

An **Enduring Guardian** needs to be appointed to make health and lifestyle decisions on your behalf if you are not able to make them for yourself.

Medical treatment

If you cannot consent to medical or dental treatment and you have not appointed an Enduring Guardian, a **Person Responsible** can make these decisions for you. A Person Responsible can be a life partner, relative, friend or unpaid carer.

Substitute decision-making for legal and financial matters

Enduring Power of Attorney (EPOA)

An Enduring Power of Attorney is a **legal document** that appoints a trusted person to make **financial, legal** and **property** decisions for you if you lose capacity to make these types of decisions for yourself.

- The arrangement comes into effect on the date you specify in the document or immediately upon loss of capacity.
- An EPOA must be appointed by you while you still have capacity to appoint one. If you don't have capacity, only a tribunal can appoint one.
- More than one Enduring Power of Attorney can be appointed.

Who can be an EPOA?

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- **A person formally appointed by you if you have capacity.** You can appoint anyone you choose over the age of 18 years to assist you with legal, money or property decisions. An EPOA can be a relative or friend and doesn't need to be a solicitor or professional.
- **A person appointed for you by a court or tribunal.** If you have lost capacity to appoint an EPOA (or there is an initiative to replace an EPOA appointed by you), a tribunal may appoint a private financial manager (someone known to you) to act on your behalf. If there is no trusted person available, the tribunal may appoint a Public Trustee.

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- A family member, next of kin, health professional or your representative under the Aged Care Act **cannot** act as your EPOA unless they have been legally appointed by you with an authorising document or by a tribunal.

What can an EPOA do?

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- Make legal and financial decisions
- Operate your bank accounts
- Sell your property and shares
- Enter into contracts on your behalf

✗

- Draft or change your will
- Make decisions about medical, health or wellbeing

Next steps

1. You must select a person to be your EPOA while you have capacity.

2. Discuss your wishes and request with the person you hope to appoint as your EPOA.

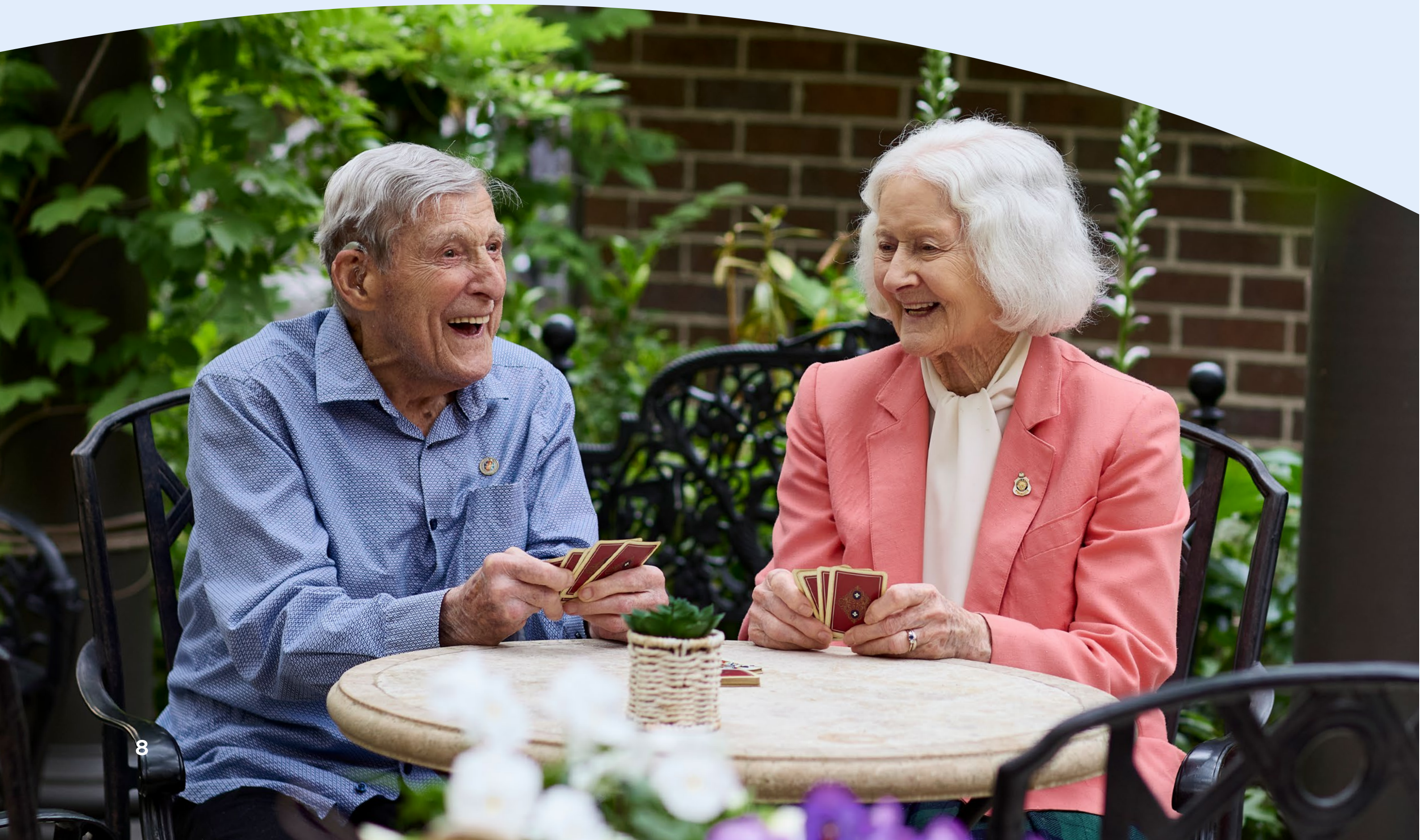
3. Contact a private solicitor or call NSW Trustee and Guardian on **1300 109 290** and request an appointment to make an EPOA. You can also access this service via **www.tag.nsw.gov.au/wills/make-power-attorney**

4. Complete the correct form signed by both you and the person you appoint. Your signature must be witnessed by a 'prescribed person'.

   * Prescribed persons include a legal practitioner, licensed conveyancer, a registrar of the local court or an employee of the NSW Trustee and Guardian.

5. Store your document securely and ensure that your Care Community has a copy.

6. Remember that the Power of Attorney only takes effect when you decide, which is usually when you lose capacity to make legal and financial decisions for yourself.



What happens if you lose capacity before you have appointed an Enduring Power of Attorney?

If you have lost capacity and have **not** appointed an EPOA, the only option is for a trusted person to apply to **NSW Civil and Administrative Tribunal (NCAT)** to appoint a person to act as your Financial Manager.

What orders can NCAT make?

Appoint a private financial manager to manage your financial, legal and business affairs.

NCAT may appoint a family member, friend or trusted professional who is willing and able to take on the role of private financial manager.

OR

Appoint a public trustee to manage your financial, legal and business affairs.

If **no** family member or friend is willing or able to take on the role of private financial manager, then the NSW Trustee and Guardian can be appointed to manage all, or part, of your financial and legal affairs.

OR

Decide that you still have capacity and can either appoint your own EPOA or make financial decisions for yourself.

If you believe that someone has lost capacity to make decisions for themselves, please discuss your concerns with the General Manager in your Care Community.

Frequently asked questions about Power of Attorney

Q. **A.**

Who can assess a resident's capacity to make decisions?

To safeguard the rights of our residents to make autonomous decisions, Opal HealthCare will involve a medical practitioner such as a general practitioner or geriatrician to make a determination when capacity is in question.

What's the difference between a Power of Attorney (POA) and an Enduring Power of Attorney (EPOA)?

A Power of Attorney is valid only while a person has capacity. A Power of Attorney ceases when a person loses capacity. An Enduring Power of Attorney remains in place even when a person loses capacity to make decisions.

Q. **A.**

What's the difference between a Registered Supporter and a Substitute Decision-Maker?

A Registered Supporter is a close family member or friend chosen by you to help you to make your own decisions. Registered Supporters need to be registered with My Aged Care. The Supporter's role is to help you understand options, access information and communicate your decisions if you would like them to, but **not to make decisions on your behalf.**

Only an authorised substitute decision-maker legally appointed by you can make a decision on your behalf. If a Registered Supporter is also an authorised substitute decision-maker, they should support you to make decisions, and only step in and make a decision on your behalf if you are unable to assess the information and make an informed decision for yourself.

Can I appoint more than one EPOA?

If you have appointed more than one EPOA, you can specify if you want decisions to be made jointly (all decision-makers must agree for a decision to be binding) or if you're satisfied for decisions to be made by any one of the appointed decision-makers (severally). You can also appoint an alternative substitute decision-maker so that if the first is unwilling or unable to act (or relinquishes their role), the second person may step in to assume their responsibility.

Can I revoke or change an EPOA?

Yes. As long as you still have capacity, you can revoke any appointment you have made by informing the previously appointed EPOA in writing that you wish to terminate their appointment. You should let any relevant bodies know (such as banks) that you have terminated their appointment and destroy the appointment document. Appointing a new EPOA does not automatically cancel an existing EPOA. The appointing document must clearly state that it revokes previous appointments.

Substitute decision-making for health and lifestyle matters

Enduring Guardian

An Enduring Guardian is **a legal document** that appoints a trusted person to make **health and lifestyle** decisions on your behalf, if you lose capacity to make these decisions for yourself.

An Enduring Guardian must be appointed by you while you still have capacity to appoint one. If you don't have capacity, only a tribunal can appoint one.

Enduring Guardianship only comes into effect if or when you lose capacity, and is only effective during the period of incapacity, so it may never become operational.

Who can be an Enduring Guardian?

- **A person formally appointed by you if you have capacity.** You can appoint anyone you choose over the age of 18 years to assist you with health and lifestyle decisions. An Enduring Guardian can be a relative or friend and doesn't need to be a solicitor or professional.
- **A person appointed for you by a court or tribunal.** If you have lost capacity to appoint an Enduring Guardian (or there is an initiative to replace an Enduring Guardian appointed by you), a tribunal may appoint a private guardian (someone known to you) to act on your behalf. If there is no trusted person available, the tribunal may appoint a public guardian.

- A family member, next of kin, health professional or your representative under the Aged Care Act **cannot** act as your Enduring Guardian unless they have been legally appointed by you with an authorising document or by a tribunal decision.

What can an Enduring Guardian do?

- Make decisions about health, medical, and lifestyle
- Make decisions about your living arrangements
- Make decisions about your personal services
- Make decisions about medical treatment

- Draft or change your will
- Make decisions about legal, financial or property
- Consent to special medical treatments (e.g. experimental treatments)
- Override your previously stated objections to medical treatment

Who is a Person Responsible?

If there's no Enduring Guardian appointed by you or for you and a decision about medical or dental treatment is required, the law nominates a hierarchy of people who can make that decision. They are called a 'Person Responsible', which may include:

- A spouse or partner
- A close relative or friend
- An unpaid carer of the person

A Person Responsible cannot consent to medical treatment if you indicate that you do not want the treatment carried out.

Next steps

1. Select a person to be your Enduring Guardian.
2. Discuss your wishes and request with the trusted person you hope to appoint as your Enduring Guardian.
3. Download the **Enduring Guardian Appointment digital form** (also available **tag.nsw.gov.au**) or contact a private solicitor or the NSW Trustee and Guardian on **1300 109 290** for assistance.
4. You and the person you appoint as your Enduring Guardian must sign the form in the presence of an eligible witness.

   * An eligible witness includes a legal practitioner, overseas registered foreign lawyer, a registrar of the local court or an employee of the NSW Trustee and Guardian.
5. Store your document securely and ensure that your Care Community has a copy.
6. Remember that the powers of your appointed guardian only take effect when you lose capacity to make decisions for yourself.

What happens if you lose capacity before you have appointed an Enduring Guardian?

If you have lost capacity and have **not** appointed an Enduring Guardian, the only option is for a trusted person to apply to **NSW Civil and Administrative Tribunal (NCAT)** to appoint a person to act as your guardian.

What orders can NCAT make?

Appoint a private guardian to manage your health and lifestyle affairs.

NCAT may appoint a family member, friend or trusted professional who is willing and able to take on the role of private guardian.

OR

Appoint a public guardian to manage your health and lifestyle affairs.

If **no** family member or friend is willing or able to take on the role of private guardian, then the NSW Trustee and Guardian will manage all, or part, of your personal and lifestyle affairs.

OR

Decide that you still have capacity and can either appoint your own guardian or make health and lifestyle decisions for yourself.

If you believe that someone has lost capacity to make decisions for themselves, please discuss your concerns with the General Manager in your Care Community.

Frequently asked questions about Guardianship

Q.

A.

Who can assess capacity to make health and lifestyle decisions?

To safeguard the rights of our residents to make autonomous decisions, Opal HealthCare will involve a medical practitioner such as a general practitioner or geriatrician to make a determination when capacity is in question.

Can I revoke an Enduring Guardianship?

Yes. As long as you still have capacity, you can revoke any appointment you have made. However, you must complete a formal Revocation of Appointment of Enduring Guardian Form, which must be witnessed by an eligible witness.

Q.

A.

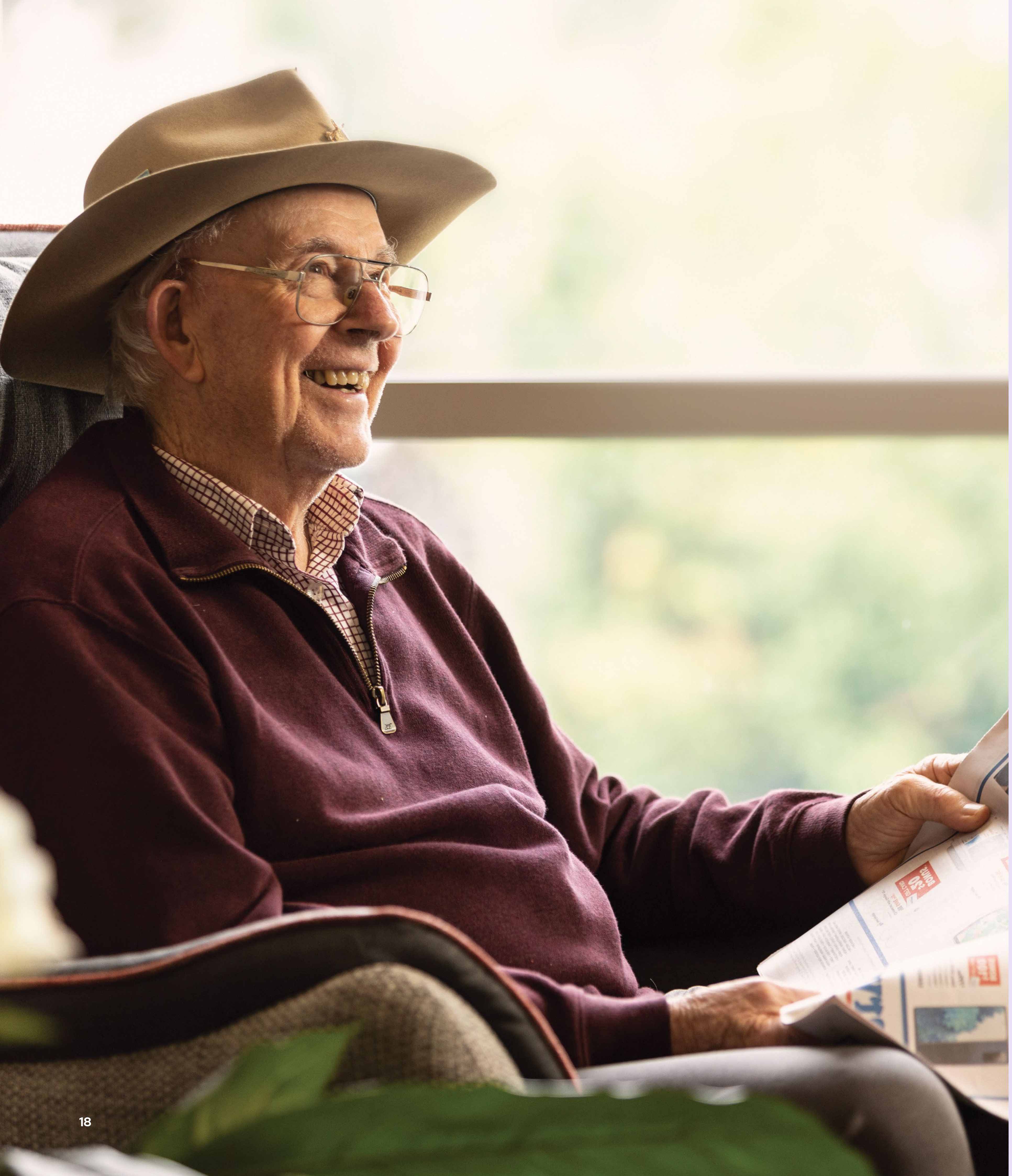
Can I appoint more than one Enduring Guardian?

If you've appointed more than one Enduring Guardian, you can specify if you want decisions to be made jointly (all decision-makers must agree for a decision to be binding) or if you are satisfied for decisions to be made by any one of the appointed decision-makers (severally).

You can also appoint an alternative substitute decision-maker so that if the first is unwilling or unable to act (or relinquishes their role), the second person may step in to assume their responsibility.

What's the difference between an Advance Care Directive and an Enduring Guardian?

An Advance Care Directive can be in addition to, or instead of, appointing an Enduring Guardian. Whilst an Advance Care Directive sets out your wishes and preferences for medical treatment, an enduring guardianship legally appoints someone to make these medical decisions on your behalf (which can be based on your Advance Care Directive if made). We recommend having both an Advance Care Directive and an Enduring Guardian on separate forms.



Contacts

NSW Trustee and Guardian
Phone: 1300 109 290
Email: tag.nsw.gov.au/contact-us
Website: tag.nsw.gov.au

NSW Civil and Administrative Tribunal (NCAT)
Phone: 1300 006 228
Website: ncat.nsw.gov.au

Older Persons Advocacy Network (OPAN)
Phone: 1800 700 600
Website: opan.org.au

Aged Care Quality and Safety Commission
Phone: 1800 951 822
Email: info@agedcarequality.gov.au
Website: agedcarequality.gov.au

Resources

For a comprehensive range of resources to help you navigate substitute decision-making, please visit: **opalhealthcare.com.au/welcome/substitute-decision-making**