



DISPUTE RESOLUTION SERVICE

MEDIATION

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(*Advance Care Directives Act 2013 & Consent to Medical Treatment & Palliative Care Act 1995*)

Everyone has the right to make their own decisions about their health, accommodation and personal areas of their life for as long as they are able to. Sometimes a person's ability to make their own decisions may be reduced due to circumstances such as having a serious illness, following an accident or having dementia.

At times, when a person has difficulty in making their own decisions, disagreements can arise between family, friends, health professionals and service providers about the decisions that need to be made. This can lead to difficulties for the person who the decision is about. Sometimes, the level of conflict between the people involved can cause relationships to break down and leave the person without the interaction and support that they want and need.

Dispute Resolution

From July 1st 2014, the Public Advocate has had legislative authority to provide assistance with resolving these kinds of disputes, as an alternative to the more formal approach of applying for Tribunal orders.

The authority is provided by the *Advance Care Directives Act 2013*, and amendments to the *Consent to Medical Treatment and Palliative Care Act 1995* (the Consent Act). They authorise the Public Advocate to assist in the following circumstances:

- If the person has made an advance care directive and there is a disagreement about a health, accommodation or personal decision that has to be made for that person. This includes people who have made an Enduring Power of Guardianship, a Medical Power of Attorney or an Anticipatory Direction before July 1st 2014 (these documents are now considered to be advance care directives).
- If a person does not have an advance care directive, but there is a disagreement about health care and/or medical treatment. This includes disputes involving children under 16 years of age.

Mediation

The Office of the Public Advocate (OPA) has developed a mediation service that makes sure that the rights of the person are upheld. In mediation, everyone who is involved in the dispute is able to share their views and discuss the issues with the aim of coming to an agreement that will respect the person's wishes and views. Mediation focuses on a way forward, not on the past.

Mediation is a voluntary, cooperative process, where an experienced independent, mediator helps people in conflict to come together, talk about the issues that are in disagreement and reach solutions that are agreeable to all the people involved. The focus is on the ongoing wellbeing and benefit of the person about whom a decision must be made.

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Office of the Public Advocate

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The mediator does not have any authority to make the decisions, but can provide an environment where all participants:

- can be listened to
- can hear and appreciate the views of others involved
- can develop and consider options to resolve the dispute
- can reach an appropriate agreement.

The mediator will not:

- take sides
- decide who is right or wrong
- make a decision for you
- force you to reach an agreement

Mediation is Voluntary

Participation in mediation is voluntary with the participants choosing to take part because they are willing to meet together and want to find a solution to the issues in conflict. A participant is able to leave the mediation process at any time. If difficulties do arise the participant can speak with the mediator who may be able to suggest a way for them to stay involved and still have their views heard.

Mediation is Confidential

Mediation is a confidential process and the information given by the participants during the mediation process will not be able to be used in any other proceedings unless everyone involved in the mediation agrees.

An exception to maintaining confidentiality can be made if the mediator becomes aware of any threats or actual violence during the mediation process, or of abuse to the person. These issues must be reported to the appropriate authorities.

Who can apply for Mediation?

An application for mediation can be made by:

- the person who the decision is about
- a substitute decision maker appointed under an advance care directive
- If the matter relates to a child (under 16yrs) a parent or guardian of the child
- a relative of the person
- If the person is a patient with impaired decision making capacity in respect to a particular decision, a *person responsible* for the patient (see definitions over page)
- a health practitioner giving, or proposing to give health care to the person
- any other person who the Public Advocate considers has a proper interest in the life of the person and the dispute.

The Mediation Process

1. You can apply for mediation using the application form which is available from the OPA office or can be downloaded from the OPA website: www.opa.sa.gov.au. If the matter is urgent (e.g. the need for an urgent medical decision), an application can be taken by the OPA over the telephone.

2. When an application is received by the OPA Dispute Resolution Service, the mediator will review it to determine whether mediation is the most appropriate way to resolve the issue/s.
3. If the matter is suitable for mediation, the mediator will invite each of the people involved in the conflict to contact the OPA to make a time to speak with the mediator in a pre - mediation session. The discussion can take place in person or over the telephone. This gives the participants an opportunity to freely discuss their issues and any concerns that they may have. The conversation between the mediator and each of the participants is confidential and won't be passed on to anyone else without that person's permission.
4. It is very important that the person who the decision is about is involved as much as they are able to in decision-making about their life and this includes being involved in resolving disagreements. Before the mediation takes place the mediator will meet with the person, either at the OPA or at another place where the person feels comfortable. After speaking with the person and the other people involved in the dispute the mediator will decide the most appropriate and respectful way for the person to be included in the mediation process.
5. If after speaking with everyone, the mediator thinks that the mediation can go ahead, a time and date for this to occur will be made.
6. In most cases the mediation will take place at the Office of the Public Advocate, but arrangements may be able to be made for the mediation to take place at another location.
7. The OPA Dispute Resolution Service is designed to make sure that the person who the decision is about is involved in the mediation process in the best way possible. The mediator will speak with the person and all the other people concerned to decide the best way for this to happen.

Direct involvement If the person is able to come to the meeting the mediator will take special care to make sure that they are able to give their point of view and understand the discussions that are taking place. The person can be supported in the meetings by someone who is not involved in the conflict, such as a friend or a service provider.

Indirect involvement If the person is not directly involved in the mediation their substitute decision maker (if they have appointed one using an advance care directive) or an advocate can speak on her / his behalf and make sure that the person's thoughts, views, wishes and values are brought into the mediation process and fully considered in developing solutions to the dispute.

An advocate can be a private person or a professional advocate from an advocacy organisation.

8. During the mediation, the mediator will help the participants to speak about the concerns and issues that they have in a way that is respectful to each other and, most importantly, focuses on the person.
9. During the mediation, the mediator will assist the participants to look for options that will resolve the issues in dispute. Once an agreement is reached, the mediator will write it up and have it signed by all the participants. The mediator will make sure that each person who attended the mediation receives a copy of the agreement.

If, during the mediation, the participants are not able to come to an agreement about the issues in dispute, and the person does not have decision - making capacity in regard to the issues raised, the matter may be referred to the more formal process of the Tribunal.

What to bring to mediation

- a willingness to:
 - take part in a respectful process
 - share your concerns and to hear the concerns of others
 - focus on the wishes and needs of the person that the dispute is about
 - focus on the way ahead and not on the past
 - find a resolution to the issues in conflict
- any documents or reports that are relevant to the matter and that you are able to share with the other participants

Some Useful Terms

Advance Care Directive

An advance care directive is a legal document where a person (18 years and over) is able to write down his/her instructions, wishes and preferences for future health care, accommodation and personal matters and/or to appoint one or more substitute decision makers who can step in to make the person's decisions if the person's decision making capacity is impaired. An Enduring Power of Guardianship, a Medical Power of Attorney or an Anticipatory Directive made before July 1st 2014 is now called an advance care directive.

Decision-making Capacity

- Decision making capacity is assumed unless there is evidence to the contrary. A person will be taken to have impaired decision-making capacity in respect of a particular decision if the person is not capable of :understanding any information relevant to the decision (including information relating to the consequences of making a particular decision); or
- retaining such information; or
- using such information in the course of making the decision; or
- communicating his or her decision in any manner.

Substitute Decision Maker

A substitute decision maker is someone appointed by an advance care directive to make decisions for a person if he/she is unable to make a particular decision due to impaired decision making capacity. The substitute decision maker should 'stand in the shoes of the person' and, wherever possible, make decisions that they think the person would have made, taking into account the person's past and current wishes, values and beliefs.

Person Responsible

Person responsible includes a guardian, relative or adult friend with a close and continuing relationship to the person, or a person responsible for the ongoing day to day supervision care and wellbeing of a person – see section 14 of the Consent Act.