

OFFICE OF THE PUBLIC ADVOCATE OVERVIEW OF THE LAW - (English)

This fact sheet provides basic information about the law relating to people with mental incapacity and mental illness in South Australia. The two relevant laws are the *Guardianship and Administration Act 1993* and the *Mental Health Act 2009*. The Office of the Public Advocate can advise you further on any of the matters outlined below.

GUARDIANSHIP AND ADMINISTRATION ACT 1993

This Act is about the protection of people with a mental incapacity when they are unable to make personal decisions or manage their own affairs because of that incapacity. The causes of mental incapacity can include dementia, intellectual disability, brain damage, mental illness, or being unable to communicate wishes in any manner. When informal processes break down, the Guardianship Board can make legal orders appointing family members, friends or government representatives to make decisions for the person with the mental incapacity.

MENTAL HEALTH ACT 2009

This Act is about the treatment and protection of people who have a mental illness. A doctor (usually a psychiatrist) will decide whether the person has a mental illness and what treatment is required. Most people with a mental illness understand their health issues and follow recommended treatment plans. However, some will not be able to recognise the need for treatment when unwell and may need to be directed to enter hospital or to take medication. This Act allows for lawful detention and compulsory treatment as well as the protection of people's rights including appeal rights.

ADVANCE DIRECTIVES

Advance directives are legally binding documents that express a person's wishes or directions in advance. This means that people can choose who they want to make decisions for them if they lose mental capacity in the future. Advance directives can only be made by adults who have the capacity to understand the nature, effect and legal consequences of signing the forms. In South Australia there are four different advance directives:

- Enduring power of attorney (EPA) – financial, property and legal decisions;
- Enduring power of guardianship (EPG) – lifestyle and medical decisions;
- Medical power of attorney (MPA) – medical decisions only;
- Anticipatory direction (AD) – end of life medical treatment decisions.

People who have made the appropriate advance directive will not require applications to the Guardianship Board when mental capacity is lost unless there are problems such as the misuse of a Power of Attorney or where the person appointed is no longer willing or able to act. The Office of the Public Advocate provides information about advance directives, how to make them and how to challenge them.

Forms and kits for making advance directives are available in English and can be purchased from Service SA, Tel 13 23 24.

INFORMAL ARRANGEMENTS

The *Guardianship and Administration Act 1993* promotes the use of informal arrangements to assist people with mental incapacity. Informal arrangements are appropriate if a person is being adequately cared for, is coping in the community, and there are no problems or conflict. For example, relatives or friends can organise community support and welfare services, arrange for the person to be assessed and help move people from home or hospital into a support facility without being a legal guardian. There are also some informal arrangements that can be organised in the financial area, for example with banks and Centrelink, but these are more limited due to privacy considerations and legal issues. Legal orders made by the Guardianship Board may be necessary when the informal arrangements do not allow adequate protection or support of the person with the mental incapacity.

CONSENT TO MEDICAL AND DENTAL TREATMENT

If a person has a guardian, enduring guardian or medical agent responsible for health care decisions, this person must be approached for consent. In other situations, the *Guardianship and Administration Act 1993* allows for certain relatives to provide substitute consent for medical and dental treatment for people who cannot consent themselves due to their mental incapacity. Consent can be given by:

- A spouse or domestic partner;
- A parent;
- Someone who acts in loco parentis for a person under the age of 18 years.
- Someone who is charged with overseeing the ongoing day-to-day supervision, care and well-being of the person;
- A brother or sister of or over 18 years;
- A daughter or son of or over 18 years.

Where no one is available to provide substitute consent, or where there is conflict about the proposed treatment, an application can be made to the Guardianship Board to provide consent to medical or dental treatment.

There are certain 'prescribed' treatments, which may involve applications to the Guardianship Board for consent when people cannot consent for themselves. These treatments are sterilisation, termination of pregnancy, electroconvulsive therapy and neurosurgery for mental illness.

GUARDIANSHIP BOARD

The guardianship board is like a court but less formal in its processes. It has the power to make legal orders affecting the lives and property of people with a mental incapacity or mental illness. A person seeking the involvement of the board must make application, on the relevant application form, to request a hearing.

The two main orders that the guardianship board can make in relation to a person with a mental incapacity *guardianship and administration act 1993* are guardianship orders and administration orders.

Guardianship Orders:

The board may appoint a guardian to make lifestyle and health care decisions for a person with a mental incapacity. The guardian could be a family member or close friend. If there is nobody suitable to become guardian, the public advocate may be appointed as guardian of last resort. The board can also grant special powers of compulsion to a guardian or enduring guardian. These powers allow the guardian to direct that a person live in a particular place, authorise detention in that place and, if necessary, authorise the use of reasonable force to ensure the proper medical treatment, day to day care and wellbeing of a person with a mental incapacity.

Administration Orders:

The Board may appoint an administrator to manage the financial, property and legal affairs of a person with a mental incapacity. It can appoint a family member, a friend, solicitor or an organisation such as the Public Trustee or a private trustee company.

The two main orders that the Guardianship Board can make in relation to a person with a mental illness **under the *Mental Health Act 2009*** are Level 2 Community Treatment Orders and Level 3 Detention and Treatment Orders.

Community Treatment Orders

A Community Treatment Order allows a psychiatrist or authorised medical practitioner to authorise compulsory psychiatric treatment for a person who is living in the community. A level 1 Community Treatment Order can be commenced by medical practitioners or authorised health professionals for a period not exceeding 28 days. A level 2 Community Treatment Order can only be made by the Guardianship Board and is for a period up to 12 months (6 months for a child under 18 years of age)

Detention and Treatment Orders

A Detention and Treatment Order authorises the involuntary treatment of a person with a mental illness in an approved treatment centre. An approved treatment centre is a special facility that provides treatment for people with a mental illness. People subject to detention orders are required to stay in the approved treatment centre and receive psychiatric treatment, even if they don't want to. There are two levels of detention and treatment orders that can be made or confirmed by psychiatrists and authorised medical practitioners. Level 1 is for a maximum of 7 days and level 2 for a maximum of 42 days. A Level 3 detention and treatment order can be made by the Guardianship Board for up to twelve months (6 months for a child under 18 years of age). At the time of the application to the Guardianship Board, the person must be detained, either on a level 2 or level 3 detention and treatment order.

APPEALS HEARD BY THE GUARDIANSHIP BOARD

People subject to a level 1 OR level 2 detention and treatment order or a level 1 community treatment order made or confirmed by an authorised medical practitioner or a psychiatrist can appeal to the Appeals Division of the Guardianship Board. An appeal form must be filled

out and lodged at the Appeals Division of the Guardianship Board (tel 8368 5600, fax 8368 5699).

APPEALS AGAINST ORDERS AND DECISIONS OF THE GUARDANSHIP BOARD

Orders made by the Guardianship Board can be appealed to the Administrative and Disciplinary Division of the District Court. An appeal form must be lodged at the District Court (tel 8204 0285, fax 8204 0544).

RIGHTS AND PROTECTIONS

People who have a mental illness or incapacity and who are subject to orders under either the *Guardianship and Administration Act 1993* or the *Mental Health Act 2009* have particular rights to information and assistance. These rights should be explained by staff of services which are providing treatment or care. Guardians, parents of children, medical agents, relatives, carers and friends are also entitled to information and involvement with some limitations. The Office of the Public Advocate and other advocacy services can advise on these rights.

MORE INFORMATION

The Office of the Public Advocate (OPA) was set up to promote and protect the rights of people with mental incapacity in South Australia. The main responsibilities of the OPA are guardianship, advocacy, investigation, and education. The OPA has produced a range of information material in English, including the fact sheets and flowcharts. These provide more detail about the areas covered in this fact sheet.

The OPA Enquiry Service is available during office hours, 9am – 5pm, Monday to Friday. Should you want to discuss an issue in more detail; appointments can be made for a telephone or office interview. You are welcome to involve an interpreter.

WEB SITE: www.opa.sa.gov.au

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