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THE OFFICE OF THE PUBLIC ADVOCATE

Position Paper

GUARDIANSHIP AND ADMINISTRATION ACT AND MINORS

1. PURPOSE

The purpose of this paper is to outline an understanding of the circumstances under which the *Guardianship and Administration Act SA 1993* applies to minors.

2. DEFINITIONS

“Minor” is a term used to refer to individuals under the age of 18 years.

“Guardian” is a parent of a minor or someone appointed to the position of Guardian under the Children’s Protection Act or the Guardianship and Administration Act.

“In loco parentis” refers to a person acting in the place of a parent of a minor.

3. LEGISLATION

This document should be read in conjunction with the *Guardianship and Administration Act 1993, SA*; *Children’s Protection Act 1993, SA*; and the *Consent to Medical Treatment and Palliative Care act 1995, SA*.

4. INTERPRETATION

4.1 Background

The Guardianship Board received advice from the Crown Solicitor’s Office on 4 April 2005 to the effect that it had no jurisdiction over persons who were under the age of 18 years. This was contrary to the previous practice of the Board. There were subsequent exchanges with the Crown Solicitor’s Office which resulted in amended advice from them. It is to the following effect:

4.2 Guardianship and Administration

The *GAAct* does apply to minors in certain circumstances. Its application is subject to the rights of parents and other guardians (ie person acting in loco parentis) because of their common law and statutory rights. The effect of this

is that parents or guardians may object to the Board making an order or to the conditions attached to an order.

The Act may apply where the parent or other guardian of the child wishes to make application to the Board in respect of an older (as distinct from a young) child or when an order is made with the consent of the parent or guardian. The Act does not apply where the parent or guardian objects.

In circumstances where the Board can not make an appropriate order due to the objections of the parents or guardians, then the Board will not make an order and an order should then be sought under the *Children's Protection Act 1993, SA* in the Youth Court.

4.3 Consent to medical and dental procedures

Section 59 of the *GAAct* deals with consent to medical and dental treatment for those who can not give their own effective and informed consent due to mental incapacity. This section applies to minors, subject to the common law and statutory rights of parents and other guardians to give consent to such treatment on behalf of a minor.

According to section 6 of the *Consent to Medical Treatment and Palliative Care Act 1995, SA*, "a person of or over 16 years of age may make decisions about his or her own medical treatment as validly and effectively as an adult". Where a 16 or 17 year old is incapable of giving effective consent due to his or her mental incapacity, a parent or other relative of the minor may give consent to medical treatment in accordance with section 59(2)(b) of the *GAAct*.

If the *GAAct* did not apply to minors, there would be no legislative means for allowing parents to give consent to treatment for 16 and 17 year olds with a mental incapacity.

In respect of a child under 16 years of age, section 59(2)(b) would only apply in the unlikely event that the parents or other guardians of a mentally incapacitated minor were deceased or otherwise unable to give consent and no other guardian had been appointed.

Section 59(2)(a), indicates that consent can be provided by an appointed guardian, and would apply to a minor where a guardianship order had been made under the *GAAct* or a guardian had been appointed under the *Children's Protection Act*.

4.4 Prescribed Treatment

Section 61 of the *GAAct* provides that a medical practitioner must not give prescribed medical treatment (sterilisation, termination of pregnancy) to a person who cannot give effective consent due to mental incapacity (whether or not they are a protected person) unless the Board gives consent to the treatment.

This provision clearly applies in relation to treatment of a minor. In fact Section 61(5) of the *GAAct* recognises the need in appropriate circumstances to obtain the views of the person's parents in relation to the prescribed treatment.

John Harley
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